

Recommendations on Implementing an Extended General Term of Copyright Protection

A submission to the federal consultation on how to implement an extended general term of copyright protection in Canada

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Purpose

This submission was prepared by Universities Canada on behalf of our 96 member institutions. Universities Canada applauds the government's initiative to consult stakeholders on measures to mitigate the impact of the life-plus-20-year general copyright term extension provided for in the Canada-United States-Mexico Agreement (CUSMA). We hope the Government of Canada continues to consult the postsecondary education sector as they move ahead with mitigation measures.

Universities Canada

Universities Canada is the voice of Canada's universities at home and abroad. As a membership organization, we represent 96 public and private not-for-profit Canadian universities from across Canada.

Universities have a unique understanding of copyright. They are home to copyright owners, creators, buyers, sellers and users. University academics and researchers are the creators of most of the content used on campus by students. Universities understand both sides of copyright – users' and creators'. As such, universities believe in a balanced approach to copyright.

The Copyright Term Extension

As part of the negotiation of the Canada-United States-Mexico Agreement (CUSMA) the Canadian federal government agreed to extend the general copyright term of life-plus-50 years by an additional 20 years. When implemented, this change will represent a substantial shift in the delicate balance between the rights of users and rights-holders.

The decision to move to life-plus-70 will have serious implications for Canada's universities, their librarians, archivists, researchers, professors and students. These include:

- Reducing access to important scientific, historic and cultural material;
- Limiting exposure to the full breadth and diversity of content for academic inquiry;
- Increasing costs borne by students and institutions through copyright compliance and in accessing copyrighted material;
- Increasing the legal risk for institutions from bad-faith copyright trolls; and
- Delaying important digitization, archival and historical work by at least 20 years.

Recommendations

Having consulted within our membership and following careful review of the federal discussion paper entitled, *A consultation on how to implement an extended general term of copyright protection in Canada*, Universities Canada presents the following three recommendations:

Recommendation 1

That the government consider a well-constructed registration system to effectively mitigate many of the concerns arising from the 20-year term extension.

Recommendation 2

That, in the event that a registration system is not pursued, the government implement a combination of Option 3 and Option 5, which together represent the best approach from the federal discussion paper.

Recommendation 3

That the federal government also consider a number of additional measures to strengthen the package presented to mitigate the potential consequences of the term extension.

Impacts:

The 20-year term extension if unmitigated or insufficiently mitigated, will have profound impacts across university campuses. In their own words, here are the responses we've received¹ from practitioners on what the term extension could mean for them:

“For my project, we use a lot of material in the public domain. As the research is collaborative, sharing it depends on sharing material. Establishing which documents are in the public domain has already been complicated – consider the complexity of translations and editions with several contributors. We may have to redo everything, and a good portion of the works may no longer be accessible.”

[Associate Professor, Department of French Literature](#)

“This will make publishing articles and books much more expensive and complicated for everyone in the academic community. The costs to have the rights to reproduce images are sometimes very high, and it may be possible for professors who have grants, but it can prevent a student from being published. This therefore slows down research and the dissemination of research.”

[Assistant Professor, Department of Art History and Film Studies](#)

“At the Rare Books and Special Collections Library, we are considering various projects to digitize our collections. Fifty percent of our documents date from the 20th century. The 20-year extension of copyright will therefore have a significant impact on what it will be possible for us to digitize (without prior permission) for dissemination to the community or to researchers. This is particularly true for special collections acquired after the 1950s. From now on, we will only be able to digitize those whose author's deaths occurred before 1950.”

[Chief Librarian, Rare Books and Special Collections Library](#)

“Our institution recently obtained a premier collection documenting the history of Western Canada. The world-class collection consisting of books, maps, photographs, textual records and films benefits scholars in a wide range of disciplines: local, regional and provincial history; social studies; cultural and social history; religious studies; geography; political science; and agriculture. In order to facilitate access to the wealth of cultural materials in this collection, our institution has been planning digitization projects of works that are in – or soon to be – in the public domain. Copyright term extension will have considerable impact on this project, particularly in terms of adding to the very popular Western Canadian photography collection, which is used by authors, filmmakers, media outlets, students, historians, others. The inability to add images to this collection for 20 years will limit access to these valuable materials.”

[Copyright Officer, University Library](#)

¹ Comments received in French have been translated into English and comments have been edited for clarity.

Recommendation 1 – Pursue a Registration System

One solution to the 20-year term extension is the proposal to introduce a requirement for rights-holders to register their copyright to receive the additional benefits of the 20-year term. This was the proposal favoured by the House of Commons Standing Committee on Industry, Science and Technology (INDU), who in their 2019 review of the *Copyright Act*, and in response to the changes necessitated by CUSMA wrote:

“The Committee believes that requiring rights-holders to register their copyright to enjoy its benefits after a period equal to the life of the author plus 50 years would mitigate some of the disadvantages of term extension, promote copyright registration, and thus increase the overall transparency of the copyright system.”²

Registration is viewed as an ideal solution, as it has the potential to strike the right balance between allowing rights-holders the opportunity to continue benefiting from commercially successful works while simultaneously allowing the vast majority of works to enter the public domain after the standard life-plus-50.

Universities Canada supports a registration system which, if implemented properly, could effectively mitigate many concerns around the 20-year term extension. However, the details of how such a system would be constructed are equally important.

A poorly implemented registration system could incentivize large rights-holders to immediately register all their works by default, even if there is little likelihood that the works would remain commercially viable into the additional 20-year term. This would have many of the same effect of implementing the 20-year term without mitigation measures. In addition, consideration should be given to small and independent creators who may be disproportionately burdened by the costs and effort required to register their works for the additional period of protection.

If a registration scheme is implemented, the option to register works should only be available in a narrow window before the expiration of the initial life-plus-50-year term of protection. This may serve to effectively limit speculative registration that would – in the case of most works – offer minimal commercial reward to rightsholders and no significant benefit to the public.

²<https://www.ourcommons.ca/Content/Committee/421/INDU/Reports/RP10537003/indurp16/indurp16-e.pdf>

Recommendation 2 – A Combination of Option 3 and Option 5

After examining all the options presented in the federal discussion paper, we have concluded that a combination of Option 3 and Option 5 presents the best alternative path forward for mitigating the harms of the 20-year term extension. Conversely, Options 1 and 2 would provide the least remedy.

Option 3 – Permit the use of orphan works and/or out-of-commerce works, subject to claims for equitable remuneration

Option 3 is the single strongest proposal in the discussion paper. It provides the greatest support for university libraries, archives and museums (LAMs) to acquire and make available orphan and out-of-commerce works. It does so by:

- a) Simplifying the clearance process and reducing legal risk for LAMs while avoiding additional costs (except where a copyright owner seeks reasonable remuneration);
- b) Not burdening LAMs with the time delays and costs associated with obtaining licenses from third parties such as the Copyright Board and collective societies; and
- c) Being scalable to uses both large and small and applicable “on demand.”

As with any policy, the specific approach to implementation will be important. The discussion paper notes several potential conditions for Option 3, among them, *a search in good faith for each work*. What constitutes good faith should accommodate practical concerns in an increasingly digital copyright environment. For instance, increasingly LAMs are undertaking mass digitization projects, many of which are only feasible once works enter the public domain. For these public interest projects to continue, they will need explicit consideration in the development of this option and should allow for the use of automated and digital copyright clearance tools (e.g. Durantionator).

Similarly, consideration should be given to changing the definition of “commercial availability” in relation to out of commerce works. This is further expanded upon in Recommendation 3.

Option 5 – Exception for use of works 100 years after their creation

Option 5 would be an advisable way of bolstering Option 3 but is not preferred as a stand-alone option. The primary appeal of this approach is the simplicity of treating all works, including Crown copyright, in the same manner. Relying on the date of creation also simplifies due diligence over using date of death.

One of the principal drawbacks of this option is that some works (e.g. those produced late in an author's life) would be available sooner under life-plus-70. As such, we view it as an option that would complement a more comprehensive approach (i.e. Option 3).

Recommendation 3 – Additional Measures

In addition to the options discussed above, there are a number of additional measures that should be considered in parallel to mitigate the term extension. The impacts of the term extension are far reaching; therefore, these additional measures are merited. These recommended measures are as follows:

a) Expanding the scope of mitigating measures beyond just non-profit LAMs to include *educational institutions*

The language of the discussion paper is narrow in its focus of potential remedies to non-profit LAMs. That language is potentially problematic for universities, as university centres, research teams, students and individual faculty members across many disciplines use orphan and out-of-commerce works for education, research and scholarship.

For non-commercial uses at universities, copyright owners would be unlikely to suffer measurable harm from an expansion of the institutions receiving the additional benefits of the proposed mitigation measures. As proposed under Option 3, the use of works would remain subject to claims of equitable remuneration.

Per the *Copyright Act*, “educational institution” is defined as follows:

Educational institution means

- (a) a non-profit institution licensed or recognized by or under an Act of Parliament or the legislature of a province to provide pre-school, elementary, secondary or post-secondary education,*
- (b) a non-profit institution that is directed or controlled by a board of education regulated by or under an Act of the legislature of a province and that provides continuing, professional or vocational education or training,*
- (c) a department or agency of any order of government, or any non-profit body, that controls or supervises education or training referred to in paragraph (a) or (b), or (d) any other non-profit institution prescribed by regulation;*

It is therefore recommended that the government expand the proposed scope of the measures to include educational institutions and cover both the students and employees of those institutions. This would ensure the mitigation measures cover the widest possible range of public interest copyright uses at Canadian universities.

b) Carefully defining “commercial use” and “out-of-commerce”

Part (b) of the definition of “commercially available” in Section 2 of the *Copyright Act* holds that a work is commercially available if a license to reproduce it is available from a collective society. Not only does the opportunity to purchase a reproduction-only license not equate to true commercial availability in the customary sense, the rights held by collective societies often do not permit the full reproduction of a work, but instead only a “short excerpt” thereof. To the extent it would apply to any amendment to the orphan and out-of-commerce works regime, part (b) should be deleted.

Additionally, even when a license to use a work in full is available, it may be for personal use only and thus be non-applicable to universities. As the work is nevertheless “commercially available” within the definition provided in the Act, universities and their LAMs are prevented from using certain available educational exceptions. An example is the exception for display contained in subsection 29.4(1), which requires that a work not be commercially available. The COVID-19 pandemic has highlighted this issue with many works being unavailable for purchase (e.g., no copies or library licenses are available on the Canadian market) yet also unusable under an educational exception.

As regards to out-of-commerce works, publishers may keep digital works “in print” long after commercial appeal has ceased by offering copies for a nominal fee, even \$0.01. Such copies, may however be sold for personal use only. Universities and their LAMs would therefore be excluded from using these works for the full term of life-plus-70-years.

As expanded below (in the section entitled “Support for rights reversion”), amending the definition of “commercially available” in regards to published works to include an objective standard (e.g., one based on sales) would help prevent such “embargoes” and provide support for authors.

c) Support for rights reversion

Universities are home to many creators who are unlikely to benefit from term extension as the academic publishing market is dominated by a handful of international publishers. In fact, copyright extension will harm these creators through delayed access to new public domain materials. As noted in the INDU committee’s report in

fulfilment of the statutory review of the *Copyright Act*³ and in Paul Heald’s recent report for Canadian Heritage⁴, rights reversion is another option to mitigate the harms of term extension.

By returning rights to authors once a work is no longer commercially exploited based on sales (measured in units or dollar value), rights reversion helps creators and provides them with the ability to reassign their rights – if they so choose – in favour of public licenses. It would also assist in preventing the “embargoes” referenced in our previous point. A recent EU directive also recommended rights reversion, both as a standard for contracts and as a legislative requirement when works are out of commerce.⁵

d) Maintaining limited liability for non-commercial uses

The *Copyright Act* caps non-commercial infringement at \$5,000 to protect copyright users from disproportionate penalties for infringements that cause no measurable harm to copyright owners. However, copyright trolls nevertheless pursue university users and seek large sums for non-commercial, often inadvertent uses of work, such as the inclusion of a copyrighted image on a university webpage promoting a research initiative. Even if such claims never make it to the courts, universities may expend thousands in legal fees to defend their actions.

It is essential that the mitigation measures do not provide further opportunity for abusive trolling. Limiting the liability for the use of orphan and out-of-commerce works, for example as contemplated in Option 3, would also assist in protecting universities from unreasonable abuses by copyright owners or their assignees.

³ See

<https://www.ourcommons.ca/Content/Committee/421/INDU/Reports/RP10537003/indurp16/indurp16-e.pdf>, pp. 32-38.

⁴ See

<https://files.webservices.illinois.edu/9076/ssrnversionofstudyontheimpactofimplementinga25-yearreversionrightincanada.pdf>.

⁵ See <https://eur-lex.europa.eu/eli/dir/2019/790/oj>.

Further Considerations – A Review of Options 1, 2 and 4

Option 1 – Expand Canada’s current orphan works licensing regime / extend regime to out-of-commerce works

Option 1 expands a rarely used process⁶ with little added benefit to universities. Licenses would remain only applicable to in-Canada exploitation and be subject to expiration. For university LAMs to make their orphan and out-of-commerce works available in a cost- and time-efficient manner, mass digitization projects for long-term use and preservation are often the only practical solution. Given the fees and timelines associated with acquiring Board-issued licenses, Option 1 offers no practical assistance to these projects, especially as any licenses obtained would be subject to expiration. Additionally, the license process contemplated in Option 1 for out-of-commerce works would be available only to non-profit LAMs and not other university personnel, such as faculty engaged in teaching and research.

Option 2 – Collective licensing regime(s) to facilitate use of orphan works and/or out-of-commerce works

Option 2 in the discussion paper proposes that orphan and/or out-of-commerce works be licensed through collective societies. The idea of licensing orphan works – that is of a collective society receiving commercial benefit from a unlocatable copyright owner – is problematic in principle. While this currently exists in the orphan works system⁷, the government should seek neither to expand nor further entrench this practice.

Another obstacle to this option is the persistence of the problematic definition of *out-of-commerce* as noted above. Pursuing this option would mean the overall impact for universities in terms of mitigating adverse impacts of the term extension would be less significant than the other options presented in the paper (i.e. Option 3).

Additionally, significant elements⁸ of the collective licensing regime in Canada will soon be heard by the Supreme Court of Canada⁹. Therefore, it is not advisable to structure mitigation for the term extension around fluid aspects of the copyright system pending the Court’s decision.

⁶ For example, in 2020 only 10 applications were made under the unlocatable copyright owners system. See https://decisions.cb-cda.gc.ca/cb-cda/refusees-other-autre/en/2020/nav_date.do

⁷ For example: <https://decisions.cb-cda.gc.ca/cb-cda/refusees-other-autre/en/item/484286/index.do>

⁸ i.e. the mandatory nature of tariffs

⁹ *York University v. The Canadian Copyright Licensing Agency (Access Copyright)*

Option 4 – Exception for use of works during the final 20 years of protection

Option 4 is an acceptable alternative to Option 3. If it is pursued, we would recommend it also be combined with Option 5 in order to increase the breadth of works covered and the efficacy of the mitigation.

As presented elsewhere in this paper, Option 4 would also substantially benefit from an expansion of LAMs to include *educational institutions*, as well as amending the definition *commercially exploited* in the *Copyright Act*. Further consideration would also need to be given to designing appropriate adjoining requirements such as record-keeping obligations and information concerning “reasonable searches.” The requirements should be constructed such that they do not effectively preclude many of the potential university, library, archive and academics uses, in particular digitization.