

Submission to the Consultation regarding Copyright Term Extension

These comments are being submitted on behalf of the University of Alberta Copyright Office as part of the consultation on implementation of the extended general term of copyright protection under CUSMA. While this submission focuses on recommending the adoption of Option 3 from the Consultation Paper¹ for the reasons outlined herein, it is also supportive of the recommendations of the joint response by the Canadian Federation of Library Associations (CFLA) and the Canadian Association of Research Libraries (CARL).

Copyright Term Extension - Impacts

The wording of Article 20.63 of CUSMA states that, where the term of copyright protection of a work is calculated on the basis of the life of a natural person, that term shall not be less than the life of the author plus 70 years. The implementation of this provision will result in a 20-year extension to the general term of copyright protection in Canada. The Supreme Court of Canada speaks of copyright protections “as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator” (para 30, *Théberge*)². This balance will certainly be disrupted by such a 20-year extension to the general term of copyright protection.

Presumably, the main benefit of such a term extension is that it will allow for those exceptional works that are still reaping commercial gains at the end of their current copyright term to have an additional 20 years of potential commercial gains. Unfortunately, given the wording through which this benefit is secured under CUSMA, this additional 20 years of protection will apply to ALL works that are covered by the general term of copyright protection.

Copyright protection applies to all literary and artistic works from the moment they are created. The vast majority of these works will never have any commercial value, and, for that very small percentage of works that do have commercial value, only a very small minority of those will have commercial value that endures for a length of time that even approaches the current term of copyright protection. Most books go out of print long before the copyright in the book has expired. Therefore, only a tiny percentage of works that receive copyright protection will realize any economic benefit from this term extension.

The most disruptive and costly outcome of this term extension is how it will impact all those other works, and, in turn, impact the public. The current consultation process is examining

¹ <http://www.ic.gc.ca/eic/site/693.nsf/eng/00188.html>

² *Théberge v. Galerie d'Art du Petit Champlain inc.* - <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1973/index.do>

options to mitigate some of these costs and to alleviate some of the disruption this general term extension will cause to Canada's copyright balance.

The Copyright Bargain and the Public Interest

The copyright balance is essentially a bargain. For works that are intended for broad distribution, the creators of such works have their economic interests protected, and, in exchange, the public is assured of access to those works. This access is limited by copyright during the term of protection, after which access becomes fully open as the work enters the public domain.

The copyright bargain is effectively an investment by the public in both present and future access to works. The extension of the copyright term delays part of the return on that public investment. There is a real public cost in having an additional 20-year delay for well-known works entering the public domain, but this is not the chief impact. The chief impact will involve increased challenges ensuring that lesser-known works are not lost but rather survive their copyright term so they are still accessible to the public when they ultimately do enter the public domain.

Preserving Canada's Heritage

The issues that relate to a small, discontinued, local newspaper can provide a useful illustration. The content of such a newspaper is protected by copyright, but these newspapers had limited publication runs, and their issues go out of print very quickly. If not preserved, they can easily be lost. Since in many cases these newspapers contain important parts of the local history, it is in the public interest to preserve their content to the extent practical. The rightsholder cannot be reasonably relied upon for preservation. The publisher is running a business and is not the steward of the public interest. Furthermore, mere preservation does not allow for access by researchers, historians, and other interested parties. Given paper originals that become increasingly fragile over time, digitization plays a key role both in preservation and in access.

At the University of Alberta, Peel's Prairie Provinces³ is a project that is very close to this problem. Peel is an online "resource dedicated to assisting scholars, students and researchers in their exploration of western Canadian history and culture of the Canadian prairies." It currently includes over 67 thousand newspaper issues, which contain almost 650 thousand pages and nearly 5 million articles. Peel plays an important role in preserving and maintaining access to Canada's heritage.

For a project like Peel, a copyright extension adds to the challenges around preservation, consolidation and providing access to such materials. An additional 20 years is troublesome when looking back in time to track the ownership of small local newspapers through various sales and mergers in order to gain permission to make available some copyright-protected content that was once commercialized, but now is simply part of our historical and cultural fabric.

³ <http://peel.library.ualberta.ca/index.html>

The Consultation Paper- Option 3

From the options presented in the Consultation Paper, the one that most clearly addresses some of the more significant concerns that arise due to the term extension is:

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

Operating under this option could be aided through some additional clarity and certainty, as follows:

- 1) It would be useful to have some clarity around the “uses” by non-profit LAMs for which reasonable remuneration can be presumed to be zero. Reproduction for preservation purposes is already addressed in s 30.1 of the *Copyright Act*, but, for example, providing online access to old issues of an in-copyright but orphan newspaper might be a good candidate for such treatment.
- 2) There is the suggestion that the copyright owner might come forward and either claim reasonable remuneration for past and future uses, or require that the use be ended, but require no remuneration for past use. It would be useful if there were clear upper limits on what such remuneration costs for past use might be, as such limits could assist risk assessments and decision-making regarding how orphan works might be made accessible to the public.
- 3) Regarding copyright owners coming forward under this option, it should also be noted that a copyright owner might formally endorse past and permit future use without remuneration, again as a way of alleviating concerns about possible future costs associated with ongoing activity in the public interest.
- 4) Regarding out-of-commerce works, it is important to make clear that for a work to be “in-commerce”, copies of the work must be available for purchase or access must be available via a licence. The availability of a licence that only covers the use of a work, for example, via a copyright collective, is not sufficient for a work to be in-commerce, as such a licence does not provide access to the content. The ongoing sale of, or licensing of access to, the content should be paramount in determinations of what is in-commerce.

To comment briefly on the other options presented in the consultation paper, exceptions that relate only to the final 20 years of the term or only to works that are over 100 years old, as in Options 4 and 5, do not address one of the main concerns for the public domain, which is ensuring works are not lost. These options also do nothing to alleviate the practical challenges non-profit LAMs already have in dealing with the current length of the copyright term. An option, like Option 3, that focuses specifically on out-of-commerce works, irrespective of how old they are or where they are in their copyright term, is a better approach not only to lessening the adverse impact of the term extension but also to addressing some current issues for the non-profit LAM sector.

Options that are based on augmenting the current orphan works regime, such as Options 1 and 2, still anticipate making a separate application for each work, which will be costly and time consuming both for the LAM making the request and for the Copyright Board or collective

reviewing the request. A more blanket approach, with safe-guards, such as Option 3, would be much more efficient.

One additional point that deserves mentioning is regarding “born digital” content. Given that this content enjoys the benefits of copyright protection, the public has an interest in ongoing access to and the preservation of that content as part of the copyright bargain. Online content can disappear without notice, so additional formal clarity around the permissible reproduction of such content for preservation purposes, and making such content accessible within reasonable limits, should also be considered.

Public Access to Published Works

Public access to published works is a key component of the copyright bargain. To the extent practical, works should remain accessible from the time they are published, regardless of their commercial success. It is not part of the copyright bargain that published works that benefit from copyright protection might later become inaccessible or disappear entirely. Such losses cause irreparable harm to the public domain.

When a work is out-of-commerce, new copies of the content are not available, so the only security the public has for ongoing access is in the copies that are already out in the world and publicly accessible, usually in libraries and archives. The public cannot rely on the rightsholders to ensure the preservation of their works. Such works can be lost unless steps are taken to ensure that works are preserved and access to the works is maintained. Copyright law should not be impeding this in any way.

Non-Profit LAMs and the Public Interest

Non-profit LAMs are acting in the public interest to ensure that the copyright bargain is maintained through ensuring out-of-commerce works remain accessible to the public, subject to the reasonable limits of ongoing copyright protection. An increase in the copyright term does not change this, but it does make it more difficult. We must now be even more vigilant in ensuring that copyright limitations and their repercussions do not contribute to the loss of our cultural heritage.



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