



Submission to the Consultation on How to Implement the
Extended General Term of Copyright in Canada

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Summary of University of Guelph recommendations

The University of Guelph (UofG) supports the recommendations made by the Canadian Association of Research Libraries (CARL) and the Canadian Federation of Library Associations (CFLA) in their joint submission to the Consultation on the Implementation of an Extended General Term of Copyright in Canada. In particular, the UofG wishes to emphasize the importance of the following recommendations:

1. Adoption of accompanying measures as outlined in Option 3 in the Consultation paper, with suggested adjustments.
2. Amending the *Copyright Act* in the following ways, in order to mitigate the harmful effects of the extended copyright term:
 - a. Make the list of fair dealing purposes in Section 29 an illustrative rather than exhaustive one.
 - b. Include limits on liability for users of works impacted by the term extension.
 - c. Remove part b) from the definition of “commercial availability”.

Impact of additional 20 years of copyright protection

The extension of Canada’s general term of copyright protection to life plus 70 years represents a significant loss for scholars, learners, and members of the public whose access to Canadian historical and cultural content will become more difficult. With no new works entering the public domain for the next 20 years, the body of works available to be freely copied, built upon, performed, translated or adapted has been significantly reduced. Institutions and individuals alike will now be required to track down copyright owners, seek permission, and pay copyright fees to use materials that would have entered the public domain under the current (life plus 50) copyright term. Libraries, archives, and museums (LAMs) will be impeded in their ability to collect, preserve, and provide public access to works, the majority of which no longer have any commercial value.

For these reasons, the extended general term of copyright must be implemented with accompanying measures that will help to offset the loss of public access to works which would have otherwise entered the public domain.

Possible Accompanying Measures to the Term Extension

Options outlined in Consultation paper

It is important that any measures enacted to accompany the term extension do not place unreasonable burdens on users of orphan and out-of-copyright works, given those works were either not created for commercial purposes in the first place, or no longer have any commercial value. Accompanying measures that involve seeking licenses from the Copyright Board or a collective are impractical, labour-intensive and time consuming, particularly for LAMs. Purchasing licenses to use works that have no commercial value is unreasonable given most of the license fees would never be claimed by copyright owners. Academic libraries need to be able to provide timely access to materials needed by scholars and researchers; university archives are often digitizing large collections containing thousands of works. The additional workload and expense imposed on institutions in Options 1 and 2 make these unworkable measures and will unnecessarily restrict the use of orphan and out-of-commerce works.

Of the five options outlined in the Consultation paper, the UofG favours Option 3 but with the inclusion of additional legislative changes as outlined in the sections below. By eliminating the need to

apply for licenses, Option 3 ensures timely and fair access to orphan works and out-of-commerce works without imposing unjustifiable expense and effort on the users of such works. At the same time, it preserves the ability of copyright owners to claim their works and to receive compensation if they so choose.

However, it is important that Option 3 not be limited to use only by LAMs. Other non-profit organizations, educational institutions, filmmakers, media outlets, researchers, authors, and others should be able to easily access and use orphan and out-of-commerce works, even for commercial purposes, subject to the safeguards described in this option.

Additional legislative amendments

In addition to the implementation of the measures outlined in Option 3, Canada's *Copyright Act* requires the following amendments in order to mitigate the effects of the extended term of protection.

Expanded fair dealing exception

As the Consultation paper notes, in the United States, the copyright term of life plus 70 years is offset by a robust fair use exception that preserves the interests of the public. As Canada brings its general copyright term in line with the U.S., it should also adopt the more flexible U.S. approach to fair dealing. This can be accomplished by amending Section 29 of the *Act* to make the list of fair dealing purposes an illustrative rather than an exhaustive one, as recommended by the INDU committee in the Parliamentary Review of the Copyright Act.¹ This amendment would enable additional uses of works, still subject to a fairness assessment, for purposes other than those currently enumerated in Section 29. It would also help to restore the balance between the rights of copyright owners and the users of copyright-protected works, which will be negatively impacted by the term extension.

Limiting liability

Limiting users' liability when using orphan and out-of-commerce works is essential to ensuring that such works will be accessed and used. Fear of litigation involving works for which copyright owners are unlocatable or unresponsive will inhibit LAMs and other potential users from making use of those works. The *Copyright Act* must include clear limits on the liability of users who have conducted good faith searches for copyright owners and/or commercially available works, such that they are not liable for past uses of such works should a copyright owner come forward with allegations of infringement.

Revise Definition of Commercial Availability

The current definition of "commercial availability" in Section 2 of the *Copyright Act* is applicable to several exceptions, including those that enable LAMs to carry out activities such as preservation, management and maintenance of collections. As such, the inclusion of part b) of the definition, which requires that users obtain a license from a collective if one is available, is an unnecessary and unworkable restriction. Obtaining a license is not equivalent to purchasing a commercially available version of a work (as defined in part a) of the definition) and requiring that users obtain one will hamper the use of orphan and out-of-commerce works, for which no license should be required unless a copyright owner comes forward. Part b) of the definition of "commercial availability" should be removed, requiring only that users conduct a search to determine if a work is commercially available on

¹ See Recommendation 18, from the INDU Review of the Copyright Act <https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/report-16/page-150#36>.

the Canadian market and can be obtained for a reasonable price, within a reasonable time frame, and using a reasonable amount of effort.

The University of Guelph

The University of Guelph is one of Canada's top comprehensive universities: both learner-centred and research intensive. Across our three campuses, we have more than 30,000 undergraduate and graduate students, with 94 per cent of our graduates finding employment within two years of graduation. The University of Guelph's McLaughlin Library, through its 130 full-time staff, stewards more than 65,000 electronic journals, more than 280 electronic databases, 9500 linear feet of archival collections and more than 2 million print volumes. Our research-centered services include world-renowned archival collections in Canadian theatre, culinary history, landscape architecture, agricultural history and rural heritage, and Scottish studies.



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