

March 12, 2021

Innovation, Science and Economic Development Canada
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Submitted via email: copyright-consultation-droitdauteur@canada.ca

Re: Copyright Term Extension Consultation

The following is the submission from Western University Libraries with respect to the call for input regarding the Consultation Paper on the Implementation of an Extended General Term of Copyright in Canada.

Western University Libraries supports the recommendations that have been jointly put forward by both the Canadian Federation of Library Associations (CFLA) and the Canadian Association of Research Libraries (CARL).

We agree with CFLA and CARL that of the options outlined in the Consultation Paper, Option #3 (Permitting the use of orphan works and/or out-of-commerce works, subject to claims for equitable remuneration) is the most palatable. Properly framed, it would bring about some needed clarity around the use of orphan and out-of-commerce works which for many Libraries, Archives, and Museums currently exist in a state of limbo. While it would go some way to mitigating the deleterious effects of the term extension, we feel that the adoption of additional measures are necessary to fully balance these effects.

While it is recognized that the extension of the term of copyright protection from 50 to 70 years is a necessary function of obligations tied to the adoption of the Canada-United States-Mexico Agreement (CUSMA), the de facto moratorium on material entering the public domain for twenty years is regressive from a public policy perspective. There are ways in which the government could balance the damage to our copyright system in Canada, but left on its own without mitigating the extension itself sends the wrong message to the many Canadians who utilize public domain material for scholarship, arts, and so much more. The public domain as a concept and construct is a critically important part of cultural heritage.

From the perspective of Libraries, Archives, and Museums this stifling of public domain materials will have the effect of creating extra burden in terms of facilitating access to materials that - for the most part - have negligible commercial value. While this would be

true at any point in time, the challenges posed by the COVID-19 pandemic have sharpened these considerations. Post-secondary institutions and their libraries have had to adapt to remote education and safety protocols that have restricted access to on-site materials, which have in turn presented enormously challenging circumstances around access to educational material and library materials that would otherwise be available via print. While they have risen to this challenge, every barrier to materials places an additional burden and could reasonably restrict or prohibit access to materials to users who would otherwise be able to access them.

Proposed legislative changes

Operating under the assumption that the CUSMA amendments are a done deal and that the adoption of the 70 year term of copyright is an inevitability, then there are additional ways (beyond the proposed changes contained in Option #3) in which the government could mitigate this impact by bringing needed clarity and relief via additional amendments to the *Copyright Act*.

We feel that the following amendments should be prioritized:

1. Clarity around Fair Dealing

The Canadian fair dealing doctrine has come a long way in the past decade, with the courts and the 2012 *Copyright Modernization Act* bringing a needed expansion and clarification around fair dealing. It has still not been enough. Even though fair dealing is intended to be exhaustive (in turn making decisions around what can or cannot be used clear-cut), it has clearly not worked. Enormous time and resources have been spent parsing semantic distinctions and attempting to read meaning into the listed exceptions. There are a number of cases before the courts that highlight the inherent ambiguity, not least the Access Copyright and York litigation currently before the Supreme Court. The fair use doctrine in the United States is instructive and open-ended by design, rather than the exhaustive framework of the Canadian fair dealing, which allows for a greater degree of flexibility in interpretation.

Legislative clarity around the use of materials would allow all relevant parties to move forward with a greater degree of clarity and purpose. The current legislative environment is a chilling one. At the best of times, this would be problematic. The pandemic has compounded the problem, and it has arguably created a stunted environment for instructors and students who have been unable to access materials that they may have otherwise been able to utilize in research and instruction.

2. Clarity around commercial availability

There is ambiguity around the rights of the copyright holder and what constitutes commercial availability and thresholds for contacting the rightsholder. This

ambiguity is problematic and relevant in a number of areas, including the provision of accessible materials and preservation.

The existing language is excessively vague and weighted towards rights holders. Particularly with respect to the provision of accessible materials, this is unacceptable. One of the many ways in which the Marrakesh Treaty is remarkable is the fact that it is the first World Intellectual Property Organization (WIPO) treaty that is focused on the rights of the end user.

The ambiguity of the language around commercial availability means that entities who are providing accessible material for users with perceptual disabilities are, in many cases, doing so under the very real risk that rights holders could take issue with such usage. While it is true that this is something that has not yet come to pass, the fact remains that accessible material provision remains an exercise in risk tolerance, and adds unnecessary delays to material conversion that in turn places a burden on the experience of users with print disabilities.

The spirit of accessibility legislation such as the *Accessibility for Ontarians with Disabilities Act* (AODA) and the Federal *Accessible Canada Act* is to ensure that Canadians with disabilities have the same user experience as those without. By leaving ambiguous language around what constitutes “commercial availability” and reasonable timelines for inquiries and procurement of such material, this flies in the face of the spirit and substance of accessibility pledges in Canada.

This also applies to institutions who are working with material that may be in copyright but at risk of being lost for myriad reasons such as poor physical condition or format obsolescence. Libraries, museums, and archives are where these materials would logically be preserved. However, for much the same reason as accessible material provision, the ambiguity around the rights of the copyright holder and what constitutes commercial availability and thresholds for contacting the rightsholder is a real barrier to preservation efforts. For the sake of the cultural record, and ensuring that these materials are preserved for posterity, additional clarity would provide an enormous benefit.

3. Removing Open Retroactive Liability

Following on point #2, it is important to consider limitations on liability.

Currently, when institutions undertake reasonable, good faith efforts to contact commercial rights holders, before proceeding to use works for non-commercial purposes they must still weigh their risk tolerance and potential exposure to liability. Under the current framework rights holders can still seek retroactive liability. While there are reasonable, limited damages under the current legislation, litigation itself is expensive and time-consuming.

The effect of this is to create a justified culture of risk aversion. Amending the *Copyright Act* to provide specific guidance on what constitutes appropriate due diligence with respect to seeking permissions from rights holders, along with a corresponding removal of retroactive liability would protect LAMs and facilitate more robust use of materials that are otherwise unused.

While the stated or implied aims of a specific framework or policy may be to perpetuate the cultural record and provide access to researchers, students, and users with special needs, if there risk that is deemed to be excessive due to concerns around potential exposure to liability, it is often deemed easier to not proceed. This results in a diminished experience for end users. In the educational sphere, this is undeniably poor policy and benefits nobody.

As stated above, we recognize that there are obligations around the extension of the copyright term and that its implementation is now inevitable. The silver lining to this is that it provides an opportunity to have a robust and honest discussion around the current copyright regime in Canada, and to hopefully improve and clarify use of copyrighted materials in higher education and research for all.

We recommend that the term extension be introduced in its own Bill to allow for this discussion to transpire. It would be regrettable if it were to be implemented via an omnibus bill, which would have the *de facto* impact of no debate, no discussion. Canadian copyright would suffer as a result. It is hoped that this will not be the case.

Sincerely,

A handwritten signature in black ink, appearing to read "Catherine Steeves". The signature is fluid and cursive, with a long horizontal line extending from the end.

Catherine Steeves
Vice-Provost and Chief Librarian
Western Libraries
Western University