Canadian Association of University Teachers
Association canadienne des professeures et professeurs d'université

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

Restore Balance

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Introduction

The Canadian Association of University Teachers (CAUT) represents 72,000 professors, librarians, and professional staff at over 120 colleges and universities across Canada. Our members write tens of thousands of articles, books and other works every year, making CAUT one of the country's largest creator groups and a strong proponent of authors' rights. Our members are also teachers, researchers, and librarians, whose success depends on making information available to others. The creation and sharing of knowledge are core purposes of the post-secondary education sector and we are therefore uniquely positioned to speak to the importance of balance within the *Copyright Act.*

The extension of the term of copyright protection in Canada from 50 years after the death of the creator to 70 years drastically tips the balance in the *Copyright Act* towards corporate content owners. It means that works that would have been freely available to all to be copied, shared, altered, and republished will be locked down for another twenty years, inhibiting students, teachers, researchers, and ordinary Canadians in their pursuit of creativity, free expression and learning opportunities. It will also increase the number of orphan works.

Term extension constitutes classic "ladder pulling" behaviour, wherein large corporations that freely benefited from the public domain to enhance their own position have now diminished the same opportunity for a new generation of creators. Term extension shrinks the public domain, restricts expressive activity and the ability of authors and artists to incorporate and reflect the world around them into new creative works.

To ameliorate this imbalance, actions must be taken to mitigate to the extent possible the impact of term extension, including the granting of new rights to students, teachers, researchers, and the general public.

Points of Process

- The House of Commons Standing Committee on Industry, Science and Technology (INDU), following extensive consultations, recommended mitigation of term extension through the creation of a registration system to receive the additional 20 years of copyright protection, and through changes to Section 29. The absence of both these recommendations in the consultation paper is disappointing.
- The exclusive focus on Libraries, Archives and Museums within the consultation paper ignores the rights of users more broadly, well established through various Supreme Court decisions, and notably the education sector as a "public interest" user.
- Given the importance of the issue, the government should have established a longer consultation period from the outset. The snap consultation curtailed internal consultation processes. The eleventh-hour two-week extension, while welcome, was unnecessarily short notice.

Recommendations

1. Enhance and facilitate the exercise of user rights

Fair dealing provides a limited right to copy creative works in a way that is fair for both owners and users of the material. With copyright term extension undermining the availability of content in the public domain, it is important that fair dealing be protected, enhanced, and facilitated.

As the Canada-United States-Mexico Trade Agreement (CUSMA) is importing into Canada one of the worst aspects of U.S. copyright law which favours content owners, in the interest of maintaining a semblance of balance, Canada should simultaneously adopt copyright policies in the interest of the general public.

Specifically, this means expanding fair dealing in the direction of the American equivalent of "fair use", a broader and more expansive right. This would create a more flexible approach, facilitating knowledge sharing and innovation. This could be accomplished by amending Section 29 of the Canadian *Copyright Act* to include "such as", so that the list of allowable purposes for fair dealing is transformed into an illustrative list of purposes. This is in line with the American approach to user rights and would put Canadian users—including students, educators, creators and more—on a more equal playing field with their American counterparts when accessing, using and innovating upon content.

1.1 In step with this, the current blanket prohibition on breaking technological protection measures (TPM) for any reason must be reined in so as not to trample on user rights and legitimate reasons for circumventing TPM including fair dealing, preservation, and research.

2. Develop a registration system for the additional 20 years

A registration system, as noted by House of Commons INDU Committee would "increase the overall transparency of the copyright system." To argue, as did the consultation paper, that this would be redundant because of existing collectives is a surprising and false claim, as collectives obscure what is in the public domain. A registration system would improve the quality and availability of ownership information, give rights holders that want it an extra 20 years of protection, while allowing works that no longer have commercial value, out-of-commerce, and orphan works to enter the public domain. The registration system would also greatly decrease, if not eliminate, the number of orphan works during the 20-year extension.

3. Include limits on liability for users of works impacted by term extension

Limiting liability would support user rights by attenuating the chilling effects of term extension. It is imperative the government support educators' ability to teach, promote learning, develop, and disseminate knowledge. The chilling effect among regular users resulting from the fear of liabilities is a net loss to the Canadian ecosystem of content and knowledge dissemination.

This phenomenon is well understood and resulted in important reforms in the 2012 *Copyright Modernization Act* which limited excessive mandatory penalties (statutory damages) for non-commercial copyright infringement. With over a million students, teachers, researchers and librarians exchanging content every day, caps on statutory damages have allowed the education sector to utilize the various exceptions and user rights in the Act without fear of financial devastation for minor and inadvertent acts of infringement. For orphan works in particular, there must be clear limits on the liability of users who have conducted good faith searches for copyright owners and/or commercial availability, such as no retroactive damages for use prior to the identification of a rights holder.

4. Adopt and adapt options 3 and 5 for all users

Of the five options presented in the consultation paper, option 3 (permit the use of orphan works and/or out-of-commerce works, subject to claims for equitable remuneration); and option 5 (exception for use of works 100 years after their creation) should be adapted and adopted.

Challenges in tracing ownership can leave students, teachers, researchers, creators, librarians, and archivists in the difficult situation of being unable to use, anthologize, share, quote, re-print, research, discuss, preserve and digitize needed works because the owner cannot be located, and the necessary permission secured.

In Canada, the Copyright Board process regarding orphan works is a cumbersome clearance system. In almost all cases, royalties may be assessed, and may be payable to a collective society with no relationship to the owner. Ensuring timely and fair access to orphan works and out-of-commerce works is essential without imposing unjustifiable expense and effort on the users of such works. Option 3 is the best and most equitable way to address the issue of orphaned and out-of-commerce works, but a rights holder must not be eligible for remuneration for prior use.

The blanket exemption for public interest uses of orphaned and out-of-commerce works after 100 years of creation could also assist mitigating the impact of term extension.

Both of these options, however, must be extended for educators, researchers and other users. Neither of these options are as strong or as clear as improved fair dealing and limiting liability.

5. Allow rights reversion during the life of the creator

There is a crisis in scholarly communications resulting from the increasing concentration of academic journal ownership in the hands of a small group of highly profitable private sector corporations—none of which are Canadian owned. Standard contracts with publishers can be excessively lengthy, and do not always have reversion rights for authors if a work goes out of print.

A rights reversion provision would further align Canada with the United States, which reverts rights for certain classes of creators after 25 years. This would allow a direct economic benefit to the creator when rights revert, rather than remaining with a rights-holding organization that may see no further value in the work; or, as is increasingly occurring with academic works, the creator may opt for their work to enter the public domain early through open access and open educational resources to the broader benefit of society.

6. Limit Crown Copyright

Although briefly mentioned in the consultation paper but deemed out of scope, Canada's *Copyright Act* currently delays Canadian government works from entering the public domain for 50 years. This outdated system has diminished the ability of Canadians to use works produced by the government. Interpretations of existing Crown Copyright terms of use are inconsistent and confusing, inhibiting public access to government works and leading to the delay or cancellation of library projects meant to preserve and disseminate archival material. In contrast, works produced by the U.S. government directly enter the public domain.

Though likely not the intention of CUSMA negotiators, it appears that the text is written in such a way as requiring the government to extend this term to "not less than 75 years." As copyright term extension diminishes the size of the public domain, it is important to mitigate this in all possible ways, including strict limits on the use of Crown copyright with strict requirements to demonstrate necessity due to its detrimental impacts on the public.

7. Address Indigenous rights

Term extension only exacerbates the conflict between copyright law, based on Western notions of property ownership, and Indigenous understandings on the use, sharing, and community ownership and control of culture and knowledge. Tragically, this has resulted in many Indigenous creators and communities losing control over their heritage. The federal government must ensure First Nations, Inuit and Métis peoples can develop and exercise their own rules on how the results of their creativity are shared, ensuring that custodianship, dissemination and compensation occur according to their own traditions.

Conclusion

With term extension now required due to CUSMA, the careful balance that has been developed in Canadian copyright law has been diminished to the detriment of the public domain which underpins Canada's entire creative ecosystem. To correct this, all options to mitigate the impact of term extension must be adopted to preserve and expand user rights. As Canada has aligned term to be consistent with U.S. law, it should also adopt U.S. counterbalancing measures, specifically broader fair dealing provisions, enhanced rights reversion, and the elimination of Crown copyright. In addition, a registration system for the additional 20 years of copyright would improve transparency and access to content, and provision of default access to orphan and out-of-commerce works with strict limits on liability will help restore balance.