CANADIAN COPYRIGHT INSTITUTE
Established to promote a better understanding of copyright and to encourage its use in the public interest

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The Canadian Copyright Institute's Response to the Consultation paper on how to implement an extended general term of copyright protection in Canada

We welcome the opportunity to respond to the Government's Consultation paper on extending the general term of copyright protection in the *Copyright Act* from 50 to 70 years following the end of the calendar year of the author's death. The creators, publishers and distributors who participate in the work of the Canadian Copyright Institute support implementation of the 20-year extension required by the Canada – United States – Mexico *Agreement* without accompanying measures.

Any accompanying measures would complicate and further delay this required amendment to extend the copyright term based on the life of an author. Delay will further hurt rightsholders, already badly hurt by the 2012 amendments to the *Act*, and unnecessarily hurt, most of all, the owners of copyrights that expire during the current 2.5-year period of grace provided by *CUSMA* to implement this extension, as expired copyrights will not be revived and extended.

Until Canada does implement term extension in an acceptable manner, other countries that protect copyright for 70 years following the year of an author's death may continue to retaliate by not giving Canadian authors the benefit of the last 20 years of protection in those countries, i.e., invoking the "rule of the shorter term" in the *Berne Convention for the Protection of Literary and Artistic Works*, which is tracked into other international treaties with copyright obligations ("*Berne*").

Immediate implementation of the required extension of the term of copyright would respect both the moral and economic interests of those who bring literary and artistic works into the world. We are surprised and disappointed that the Consultation paper does not rule out linking enforcement of copyright during the extended period to registration prior to the infringement (recommended by the Standing Committee on Industry, Science and Technology), as there would in effect be no copyright in a work after expiry of the current 50 years unless and until "restored" by a subsequent registration. This would clearly breach *Berne* (which also specifically prohibits "formalities", such as registration, as a requirement of copyright). However, neither a registration requirement, nor implementation of any of the accompanying measures in any of the Options presented to "mitigate" what some predict will be the result of longer copyright protection, necessitates delaying the legislation actually needed to implement the extension required by *CUSMA.*

With all of this in mind and recognizing that the Government is not presenting any of its proposed options as necessary to implement the extension and not ruling out other possible accompanying measures, we turn to commenting on the Options. Despite seeing issues with all of them, we welcome some positive elements included, particularly with respect to expanding collective licensing to provide easier access to copyright works.

Option 1. Canadians can be proud that Canada was one of the first countries to implement a regime specifically to license orphan works, although a separate regime will have been unnecessary in Nordic countries with "extended collective licensing". However, we do not support amending the *Act* to expand the current licensing regime for orphan works (on a non-exclusive basis) to include out-of-commerce works when copyright owners are locatable, even if licences are subject to conditions, e.g., duration of commercial non-availability, and even if only available to non-profit libraries, archives and museums ("LAMs"). These would be compulsory licences – distinctly limiting the exclusivity of the author's rights, disrespectful of the author or other rightsholder and very difficult to justify for a work that is not an orphan.

Previous "compulsory licences" (compelled access with remuneration) and statutory licences (subject to royalties specified in the *Act* or prescribed in regulations) were repealed in 1997 as serious limitations on the author's exclusive rights – viewed as a breach of *Berne* by the 1957 Royal Commission's *Report on Copyright* (cited in the Consultation paper) and also raised by the 1977 Keyes-Brunet report (*Copyright in Canada, Proposals for a Revision of the Law*) as grounds for international retaliation by application of the *Berne* rule of the shorter term.

An overworked Copyright Board might routinely license out-of-commerce works, particularly if a notice requirement gives the copyright owner an opportunity to opt out. For a less watchful, knowledgeable or financially well-off copyright owner, this sort of licence would in effect amount to an exception. It is possible that the copyright owner might be unaware of the licence or even unaware of owning the rights and not claim the royalties or other payment provided in the licence issued by the Board, and likely that minimal royalties would have been proposed by the applicant licensee and approved by the Board. Another suggestion in this Option 1 of the Consultation paper, to shorten the period during which the owner could collect or claim the payment to 3 years from the current 5 years following expiry of the Board-issued licence, would increase the resulting unfairness.

Even if a considerable number of countries adopt a regime for out-of-commerce works that are not orphan works, some other countries will remain entitled to retaliate against Canada by invoking the *Berne* rule of the shorter term and to deny protection within their territories to works by Canadian authors for any period while works may be licensed in Canada under any such regime without the copyright owner's authorization.

It is currently our strong view that any expansion of the regime for orphan works to include out-of-commerce works would require careful study and assessment from Canada's economic perspective and must take into account the copyright owner's own opportunities for future exploitation of out-of-commerce works, whether directly or by licensing others. We also think too much may be expected from an expanded regime that is now only for orphan works. Contrary to the implication of footnote 31 of the Consulting paper, no one should anticipate that it would be generally considered acceptable for such a regime to license works of anonymous and pseudonymous authors (usually licensed by their publisher or agent) or appropriate to license a work of a copyright owner that ignores or overlooks a licence request or "insists on terms that are unacceptable" to the would-be licensee.

We do support the expansion of the existing licensing regime for orphan works to cover some unpublished works. The outdated definition of "publication" in section 2.2 of the *Act* does not include "the communication to the public by telecommunication, of a literary, dramatic, musical or artistic work…." Electronic books, often not published in print as well as digital form, and some other digital works that their authors clearly intend to make generally available to the public, are "published" in the

ordinary sense of "publication" and should be treated as published works under the licensing regime for orphan works. (As the definition of "publication" in the *Act* mirrors language in *Berne* and apparently cannot easily be amended, an amendment might "deem" some works to be "published" and consequently eligible for licensing by the Copyright Board or, as we suggest below, by an authorized collective society.)

Option 2. We agree that collective licensing could facilitate the use of orphan and out-of-commerce works although we query the legitimacy of licensing out-of-commerce works without the authorization of their copyright owners. The Copyright Board has already enlisted the assistance of collective societies to review applications to it for licences for orphan works. We also note that a collective society established only to license non-profit libraries, archives and museums (LAMs) is unlikely to be economically self-sustaining, and that licensing LAMs is more likely to be viable if by an existing collective society with extensive records of rightsholders and repertoire and with experience filing proposed tariffs with the Board.

The participation of collectives in licensing orphan works and, if eventually considered acceptable, some out-of-commerce works could be formalized by an amendment to the *Act* or by a Copyright Board regulation, so would-be licensees including LAMs could make direct applications for licences to authorized collective societies, thus removing this licensing responsibility and burden from the Copyright Board (except for possible appeals).

We suggest – a variation on Option 2 that is not included in the Consultation paper – that the Government give consideration to amending the *Copyright Act* to recast the functioning of collective societies as "extended collective licensing" (following the Nordic model) for the purpose of licensing orphan works and possibly some out-of-commerce works. This would substantially shorten time needed for response to applications for licences from all applicants including LAMs and expedite potential opting out by rightsholders.

Option 3. This option allowing non-profit LAMs to use orphan works and out-of-commerce works (which could be subject to conditions) without first obtaining a licence from the Copyright Board, but subject to rightsholders' claiming equitable remuneration or opting out later, is unfair to authors and other copyright owners. It would be necessary, or at least prudent, for a copyright owner to regularly monitor virtual and physical environments to look for unauthorized uses by LAMs, which would not be infringing yet would interfere with a copyright owner's own future commercialization or other use of a work. It could also result, failing agreement on compensation for a use, in arbitration by the Board that would be costly to the parties, unaffordable by most authors and small publishers and consequently likely to result in the equivalent of an exception for LAMs.

Because a LAM's purpose, "to achieve aims related to their public interest missions", could include activity that goes well beyond reproduction that is a "special" case "that does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author" under the *Berne* 3-step test for possible exceptions, a collective licensing regime under Option 2 that provides royalties or other payment is more appropriate than Option 3. For uses such as maintenance and management of a LAM'S permanent collection, the *Act* already has exceptions that could be revisited and reviewed separately from implementation of term extension. In short, we prefer a collective licensing regime to deal with the special needs of LAMs as more transparent and with more predictable outcomes for all involved.

Options 4 and 5 are both exceptions proposed for non-profit LAMs to make use of out-of-commerce works without authorization from the copyright owner to "achieve their public interest missions" or for related aims (similar to their purposes in Option 3) – specifically during a work's final 20 years of protection in Option 4 and arbitrarily 100 years after a work's creation in Option 5. In effect, both exceptions put Canada in breach of subparagraph (a) of Article 20.62(a) of *CUSMA* since they would shorten the exclusivity of the author's rights to a work following death to less than 70 years in Option 4 and potentially in Option 5. As also under Options 1 and 3, some other countries may invoke the *Berne* rule of the shorter term with respect to works by Canadian authors in their territories.

There is no obvious or necessary reason, because of copyright extension, to legislate the possible exceptions proposed for LAMs in Options 4 or 5 or in the quasi-exception in Option 3. Underlying the decision that has already been made to extend the copyright term by 20 years is the assumption that copyright owners will have the exclusive right to continue to control their works throughout the full term of copyright. If they are not locatable, there is a licensing regime for orphan works managed by the Copyright Board or, we have suggested, a collective society under Board oversight – if expanded, also for some out-of-commerce works. Even if LAMs were required to carry out a reasonable search in good faith before making any use of a work that is apparently an orphan or out of commerce, there can be no guarantee that their search has been adequate. On the other hand, collective societies, with access to robust databases and experience in rights management, would be well placed to manage or support such a regime and be motivated to find the rightsholder and license the LAM, or connect it directly with the rightsholder.

In response to observations in Option 5 that the proposed exception for LAMs to use a copyright work 100 years after its creation could apply to Crown material as well as other copyright works and that clarity on use of unpublished Crown works would benefit LAMs, we agree that an amendment is desirable to cure problematic wording in Section 12 of the *Act* that apparently provides perpetual copyright in unpublished Crown works. A specific term of protection for unpublished Crown works would be generally beneficial, not just for LAMs. However, protection for 100 years may be excessive, and the term of protection should be studied. This section, currently protecting Crown works for 50 years from the end of the year of publication, should in any case be reviewed in light of subparagraph (b) of Article 20.62 of *CUSMA*, which requires at least 75 years of protection from the end of the calendar year of publication of a work that is not protected on the basis of the life of a natural person.

CONCLUSION

The Options in the Consulting paper, like the INDU Committee's recommendation on registration, are intended to "mitigate" what some see as unfortunate effects of term extension. All of these measures contemplate limitations or exceptions to the exclusive rights of copyright owners. Canada's general approach copyright to copyright over the past decade has been seen through the lens of limitations and exceptions, which too often creates the unfortunate and illusory impression that they are the only tools available to improve Canadians' access to copyright works and to create more opportunities related to copyright. Exceptions are justified in special cases, and by their nature they involve extinguishing rights of copyright owners to some extent. On the other hand, legislation that would expand and bring some certainty to the applicability of collective licensing (in tandem with clarifying the parameters of fair dealing) would re-balance the recent tilt to increased claims of fair dealing by educators and other users of copyright material as well as eliminate enormous expense incurred by both rightsholders and users on litigation. This would allow concentration on important copyright issues where rightsholders and users share compatible goals, most significantly, easy access to copyright works, and exploration of

some of the suggestions put forward in this Consultation paper. Ideas in Options 1 and 2 that might encourage expansion of collective licensing would be a good start.

While the Consultation paper raises some important questions to consider, e.g., whether remuneration for compulsory licensing of out-of-commerce works will become viewed internationally as a measure that adequately respects and compensates rightsholders for some uses of their out-of-commerce works, none of the options in the Consultation paper directly affect the substance or structure of the 20-year extension of the general term of copyright required by *CUSMA*, nor affect wording of the necessary amendments to Sections 6 and 6.2 of the *Copyright Act* that simply requires the substitution of 70 years for the current 50 years of copyright protection measured from the end of the calendar year in which the author of a work dies.

We call on the Government to proceed immediately and expeditiously with copyright term implementation. Fairness to rightsholders demands this.

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