



# **A consultation on how to implement an extended general term of copyright protection in Canada**

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# 1. Introduction

Under the Canada-United States Mexico Agreement (CUSMA), which entered into force on July 1, 2020, Canada will extend its general term of copyright protection from 50 years after the life of the author to 70 years after the life of the author.<sup>1</sup> Canada has a 2.5-year transition period from the date of entry into force of the agreement to fully implement this change (i.e. until the end of 2022).<sup>2</sup>

While many Canadian stakeholders have conveyed their support for term extension, many others have expressed concern that term extension may have negative consequences, particularly in the form of reduced access to works. In particular, some stakeholders have expressed the concern that a longer term of protection will result in a 20-year gap before any copyright terms expire, resulting in no works entering the *public domain* (where they can be used freely by a wide range of users, including researchers and creators) during that 20-year period. Notably, libraries and archives, and some other stakeholders, have raised concerns over the implications of term extension for access to orphan works<sup>3</sup> and out-of-commerce works<sup>4</sup>.

This consultation aims to solicit views from stakeholders and the Canadian public on whether accompanying measures should be adopted to address concerns that have been raised over the potential implications of a longer general copyright term, and if so, what form such measures should take.

## 1.1 – Term of Protection

Canada's *Copyright Act* (the Act) currently provides a "general term" of protection for works of authorship that is calculated based on the life of a natural person: namely, the lifetime of the author, the remainder of the calendar year in which the author dies, and for 50 years following the end of that calendar year.<sup>5</sup> The range of works that are subject to the general term is broad and includes books, newspapers, musical compositions, movies and TV shows, paintings, photographs, and computer programs.<sup>6</sup>

## 1.2 – International Context

International copyright treaties<sup>7</sup> establish minimum standards that member states must adhere to,<sup>8</sup> including a minimum life-plus 50-year term of protection, as well as national treatment obligations. Approximately 80

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<sup>1</sup> "Canada-United States-Mexico Agreement (CUSMA)", online: Global Affairs Canada <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/toc-tdm.aspx?lang=eng>> [CUSMA].

<sup>2</sup> *Ibid.*, art. 20.89(4)(c).

<sup>3</sup> An **orphan work** may be defined as a work in relation to which the copyright owner is not known, or is known but not locatable. Orphan works will be discussed in more detail below.

<sup>4</sup> An **out-of-commerce work** may be defined as a work that is no longer available to the public through customary channels of commerce (e.g., a published book that goes out of print). Out-of-commerce works will be discussed in more detail below.

<sup>5</sup> *Copyright Act*, R.S.C., 1985, c. C-42, s. 6 [Copyright Act].

<sup>6</sup> Note that terms of protection other than the general term of life of the author plus 50 years apply in some cases. For example, special terms of protection apply to certain types of works (i.e. anonymous and pseudonymous works, posthumous works, works of joint authorship, non-dramatic cinematographic works, and Crown works) and to certain subject matter (i.e. performer's performances, sound recordings, and communication signals). (*Ibid.* at ss. 6.1-6.2, 7, 9, 11.1, 12 and 23). Note that the range of works that are subject to the general term also includes works that are protected as compilations, including compilations of data.

<sup>7</sup> *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, as revised at Paris, 24 July 1971, online: World Intellectual Property Organization <<https://www.wipo.int/treaties/en/ip/berne/>> [Berne]; Marrakesh Agreement establishing the World Trade Organization, Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, 1869 UNTS 299 (entered into force 1 January 1995); *World Intellectual Property Organization Copyright Treaty*, 20 December 1996, 2186 UNTS 121 (entered into force 6 March 2002).

<sup>8</sup> "Joining the International Copyright System: What's at Stake?" (2017) at 7, online: World Intellectual Property Organization <[https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_flyer\\_crsystem.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_flyer_crsystem.pdf)>

countries have moved to a term of life-plus 70 years or longer<sup>9</sup>, including key trading partners such as the United States (U.S.),<sup>10</sup> Mexico,<sup>11</sup> the European Union (EU),<sup>12</sup> the United Kingdom,<sup>13</sup> Australia,<sup>14</sup> Japan,<sup>15</sup> and South Korea.<sup>16</sup> Canada's implementation of its commitment to extend its general term of protection to life-plus 70 years will provide certainty that Canadian rights holders will benefit from this extended term in each of these countries<sup>17</sup>, contributing to a more level global playing field and providing new export opportunities for Canadian creative industries and Canadian-made content.

### 1.3 – Canada-United States-Mexico Agreement

CUSMA negotiations between Canada, the U.S. and Mexico began in August 2017, and the agreement was signed by all three countries in November 2018.<sup>18</sup> *The Canada-United States-Mexico Agreement Implementation Act (CUSMA Implementation Act)* received Royal Assent on March 13, 2020<sup>19</sup> and the treaty entered into force on July 1, 2020,<sup>20</sup> which followed from all three Parties' notification of the completion of their domestic procedures.

In addition to the outcome on extending the general term of protection, and consistent with the entry into force of the agreement and the *CUSMA Implementation Act*, Canada now provides extended terms of protection associated with certain types of works (i.e. anonymous and pseudonymous works and non-dramatic cinematographic works) and certain subject matter (i.e. performer's performances and sound recordings).<sup>21</sup>

### 1.4 – Parliamentary Review of the Copyright Act

Stakeholders participating in the recent Parliamentary review of the Act had diverse views on term extension and its potential implications. The review was launched in February 2018 under the leadership of the Standing Committee on Industry, Science and Technology (the INDU Committee).<sup>22</sup> To support the review, the Standing Committee on Canadian Heritage (the CHPC Committee) conducted a study on remuneration models for artists and creative industries.<sup>23</sup> The committees heard from an extensive list of witnesses on the topic of term extension. Rights holder stakeholders – including collectives and associations representing

<sup>9</sup> "List of countries' copyright lengths", online: Wikipedia [https://en.wikipedia.org/wiki/List\\_of\\_countries%27\\_copyright\\_lengths](https://en.wikipedia.org/wiki/List_of_countries%27_copyright_lengths).

<sup>10</sup> U.S. Copyright Act of 1976, 17. U.S.C. at § 302 [U.S. Copyright Act].

<sup>11</sup> Federal Law on Copyright, Mexico 2020, Art. 29(I).

<sup>12</sup> Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the Term of Protection of Copyright and Certain Related Rights, Art. 1(1).

<sup>13</sup> Copyright, Designs and Patents Act 1988, United Kingdom, 1988 c. 48, s. 12(2).

<sup>14</sup> Copyright Act 1968, Australia, no. 63, 1968, s. 33(2).

<sup>15</sup> Copyright Act, Japan, Act no. 48 of May 6, 1970, Art. 51(2).

<sup>16</sup> Copyright Act, Republic of Korea, Act no. 432 of January 28, 1957, Art. 39(1).

<sup>17</sup> International copyright treaties generally provide that member states are not required to apply a longer general term to foreign works that originate from countries that provide a shorter general term of protection. See, for instance, Berne, *supra* note 7, art. 7(8). Known as the 'rule of the shorter term', this exception from national treatment is reflected in a number of key international copyright treaties.

<sup>18</sup> "A new Canada-United States-Mexico Agreement", online: Global Affairs Canada [https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/index.aspx?lang=eng&\\_ga=2.131280079.1949629756.1596467911-1641399134.1578597318](https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/index.aspx?lang=eng&_ga=2.131280079.1949629756.1596467911-1641399134.1578597318) [A New CUSMA].

<sup>19</sup> An Act to implement the Agreement between Canada, the United States of America and the United Mexican States, SC 2020, c 1 [CUSMA Implementation Act].

<sup>20</sup> A new CUSMA, *supra* note 18.

<sup>21</sup> For example, Canada was required to extend the term of protection from 70 to 75 years from the date of publication for published sound recordings and performances fixed therein, and from 50 to 70 years after fixation for unpublished sound recordings and performances fixed therein. (CUSMA, *supra* note 1 at art 20.62(b)(i) and (ii)). CUSMA Implementation Act, *supra* note 19 at ss. 24, 26 and 29.

<sup>22</sup> Canada, Parliament, House of Commons, *Statutory Review of the Copyright Act: Report of the Standing Committee on Industry, Science and Technology*, 42<sup>nd</sup> Parl, 1<sup>st</sup> Sess, No 16 (June 2019) (Chair: Dan Ruimy) at 11 [INDU Report].

<sup>23</sup> Canada, Parliament, House of Commons, *Shifting Paradigms: Report of the Standing Committee on Canadian Heritage*, 42<sup>nd</sup> Parl, 1<sup>st</sup> Sess, No 19 (May 2019) (Chair: Julie Dabrusin) at 5 [CHPC Report].

musicians, the film and television industry, and the publishing sector<sup>24</sup> – generally expressed support. At the same time, user stakeholders – including schools, libraries, consumer groups, open Internet advocates, and a limited number of rights holders – generally expressed concern.

For its part, the INDU Committee indicated that it would be supportive of term extension – but only if CUSMA was ratified.<sup>25</sup> As such, it recommended that, “in the event that the term of copyright is extended, the Government of Canada consider amending the *Copyright Act* to ensure that copyright in a work cannot be enforced beyond the current term unless the alleged infringement occurred after the registration of the work.”<sup>26</sup> Separately, the CHPC Committee recommended that, “the Government of Canada pursue its commitment to implement the extension of copyright from 50 to 70 years after the author’s death.”<sup>27</sup> The Committee was silent on the question of accompanying measures.

## 2. Potential Implications of Term Extension

Stakeholders have raised arguments in favour of and against extending the copyright term of protection. Those in support have highlighted that a longer term would increase opportunities to monetize copyrighted content, and thereby increase the value of copyright holdings and encourage investment in the creation, acquisition, and commercialization of copyrighted content. They have also pointed out that term extension would further harmonize Canada’s general term of copyright protection with that of our major trading partners, enabling Canadian rights holders to compete internationally on a levelled playing field.

In addition to expressing opposition to longer terms in principle, user stakeholders have raised concerns over potential implications in relation to access to works. This includes concerns that no new works will become freely accessible as public domain works for a 20-year period (given that copyrights that were due to expire during this period will be extended), but also that going forward it will take 20 years longer for works to enter the public domain. Of particular concern to some user stakeholders, including libraries and archives, are the potential implications of longer terms for accessing orphan works and out-of-commerce works. These institutional users want to reduce barriers to accessing such works in order to, for instance, facilitate research activities and foster greater access to such works in their collections through digitization initiatives.

### 2.1 – Orphan Works

Orphan works are works that are still under copyright protection, but in relation to which the copyright owner is not known or cannot be located. This might be because the rights holder died without assigning the right, or because the work was created informally, distributed without documentation or abandoned.<sup>28</sup> Absent special legislative dispositions, orphan works lead to undesirable outcomes: they cannot by definition provide remuneration to their owners, and they cannot be reproduced or communicated to the public since there is no one to authorize such uses.

The current Act provides a regime for dealing with orphan works.<sup>29</sup> Under this regime, persons wishing to use a work or other subject matter in which copyright subsists, but for which the copyright owner cannot be located, can apply to the Copyright Board of Canada (the Board) for a non-exclusive licence.<sup>30</sup> The Board

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<sup>24</sup> A limited number of rights holders in the publishing sector who publish works built on the public domain (e.g. Broadview Press) expressed concern with term extension. (INDU Report, *supra* note 22 at 35).

<sup>25</sup> INDU Report, *supra* note 22 at 38.

<sup>26</sup> *Ibid* at 38. Copyright registration is voluntary in Canada, and may be undertaken through the Canadian Intellectual Property Office. Copyright registration is explained in more detail below.

<sup>27</sup> CHPC Report, *supra* note 23 at 22.

<sup>28</sup> Giuseppina D’Agostino and Margaret Hagan, “IP Osgoode orphan works hackathon: Final report (abridged version)”, online: Government of Canada <<https://www.canada.ca/en/canadian-heritage/services/copyright-policy-publications/orphan-works-hackathon.html>>.

<sup>29</sup> Copyright Act, *supra* note 5 at s. 77.

<sup>30</sup> *Ibid* at s. 77(1)-(2).

may grant a licence for non-commercial or commercial use, if it is satisfied that the applicant has made reasonable efforts to locate the copyright owner, and that the owner cannot be located.<sup>31</sup> The copyright owner has five years from the expiry of the licence to come forward to collect the royalties fixed therein.<sup>32</sup>

The current regime was established in 1988, but has since shown that it may not be robust enough to deal with an increase in the demand for licences to use orphan works that might result from term extension.<sup>33</sup> The expected higher volume of orphan works indeed draws attention to existing limitations in the regime, including in terms of access to works in the digital environment. For example, due to the fact that the regime applies only to 'published' works as defined in the Act,<sup>34</sup> the Board has denied licence applications for orphan works that have only been made available online (e.g., YouTube videos),<sup>35</sup> and users that want to digitize unpublished orphan works (e.g. libraries, archives and museums, or "LAMs") are unable to obtain a licence to do so. Some commentators have also noted in the past that Canada's current orphan works regime places an administrative burden on the Board, which is responsible for reviewing applications, and the process often involves lengthy delays.<sup>36</sup>

## 2.2 – Out-of-Commerce Works

Another potential implication of extending the general term of copyright protection that has been raised by some stakeholders relates to out-of-commerce works. Out-of-commerce works are generally understood to be works that are still under copyright protection, but are no longer available to the public through customary channels of commerce.<sup>37</sup> A typical example of an out-of-commerce work is a published book that has been out of print for many years and is no longer available for purchase. Some stakeholders complain that such works are consequently "locked" in the sense that they remain under copyright protection, but with consumers, researchers, and creators hindered in their ability to access these works. The situation can be particularly acute for LAMs, which maintain large collections of works of cultural importance that may no longer have commercial value. These institutions do not always have the resources to identify and obtain permission from all rights holders, and as a result the out-of-commerce works in their collection often remain unavailable to the public.

The Act does not currently include specific measures in relation to out-of-commerce works.<sup>38</sup> In the past, the Act attached conditions to the final years of copyright protection and included provisions for out-of-commerce works. For example, in the Act of 1921, compulsory licences were available for the commercial reproduction of published works during the last 25 years of the life-plus 50 term of protection, and for published out-of-commerce works following the death of the author.<sup>39</sup> A 1957 Royal Commission was of the view that these provisions were inconsistent with the Berne Convention requirement to provide exclusive

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<sup>31</sup> *Ibid.* In their 2009 study of Canada's orphan works regime, Jeremy de Beer and Mario Bouchard explain that there may be circumstances where a copyright owner may be unknown and yet be locatable, or where a copyright owner could be located but is unresponsive to a request for a licence, or insists on terms that are unacceptable to a licensee. In such circumstances, the current orphan works regime does not apply. See Jeremy de Beer and Mario Bouchard, "Canada's 'Orphan Works' Regime: Unlocatable Copyright Owners and the Copyright Board", online: Copyright Board of Canada <https://www.cb-cda.gc.ca/sites/default/files/2019-04/2010-11-19-newstudy.pdf> at 16-17.

<sup>32</sup> *Copyright Act*, *supra* note 5 at s. 77(3). For more information on the process for obtaining a licence under Canada's current orphan works regime see <<https://cb-cda.gc.ca/en/unlocatable-owners/general-information>>.

<sup>33</sup> D'Agostino and Hagan, *supra* note 28.

<sup>34</sup> *Copyright Act*, *supra* note 5 at s. 2.2(1) and s. 77(1).

<sup>35</sup> Hany Ouichou, Laval, Quebec, for the reproduction of 3 videos posted on YouTube (11 May 2017), online: Copyright Board of Canada <<https://decisions.cb-cda.gc.ca/cb-cda/refusees-other-autre/en/item/366786/index.do>> [Ouichou].

<sup>36</sup> de Beer and Bouchard, *supra* note 31 at 7, citing Registrar of Copyrights, *Report on Orphan Works* (Washington: United States Copyright Office, 2006) at 83; Hugenholtz, Bernt, et. al. *The Recasting of Copyright & Related Rights for the Knowledge Economy* (Amsterdam: Institute for Information Law, 2006) at 187.

<sup>37</sup> There may be a variety of reasons why a given work is out of commerce. For instance, in some cases there may not be a sufficient return on investment associated with the further commercialization of the work.

<sup>38</sup> Note that provisions introduced to address out-of-commerce works would not impact moral rights.

<sup>39</sup> *Copyright Act*, SC 1921, c 24 at ss. 5 and 12.

rights for a term of life-plus 50 years.<sup>40</sup> These provisions have since been repealed.

## 3. Measures in Other Jurisdictions

### 3.1 – The United States

When extending its general term of copyright protection from life plus 50 years to life plus 70 years, the United States adopted measures to mitigate potential implications of a longer general copyright term – specifically measures that apply to works that are not being exploited commercially during the final 20 years of protection, including orphan works and out-of-commerce works. The U.S. introduced an exception that permits libraries and archives to reproduce, distribute, display, or perform in facsimile or digital form, copies or sound recordings of published works, or portions thereof, for purposes of preservation, scholarship, or research, during the final 20 years of copyright protection, as part of the *Sonny Bono Copyright Term Extension Act* (1998).<sup>41</sup> In order to benefit from this exception, libraries and archives must determine, on the basis of a reasonable investigation, that: (a) the work is not subject to normal commercial exploitation; (b) a copy or sound recording of the work cannot be obtained at a reasonable price; and (c) the copyright owner has not provided notice<sup>42</sup> that either (a) or (b) applies.

Additionally, in the U.S., statutory damages may only be awarded in relation to infringement of copyright in a work upon timely registration (or, where applicable, preregistration) with the Copyright Office.<sup>43</sup> This limitation applies equally to U.S. works and foreign works.<sup>44</sup>

### 3.2 – The European Union

The EU has regimes for both orphan works and out-of-commerce works. The use of orphan works is governed by the *Directive on certain permitted uses of orphan works* (the “EU Orphan Works Directive”), which seeks to further the work of public-oriented institutions in preserving European culture.<sup>45</sup> The EU Orphan Works Directive applies to specific EU public institutions (i.e. libraries, educational establishments, museums, archives, film or audio heritage institutions, and public service broadcasting organizations). These institutions can only benefit from the exception for the purpose of achieving goals related to their public interest missions, particularly preserving, restoring and providing cultural and educational access to works and sound recordings in their collections.<sup>46</sup> Permitted uses are limited to making the orphan work available to the public; and reproduction for the purposes of digitization, making available, indexing, cataloguing, preservation, or restoration.<sup>47</sup> Rights holders must be able to come forward to rescind a work or other subject matter's orphan status,<sup>48</sup> in which case they are entitled to “fair compensation” for use that has occurred.<sup>49</sup>

Rules concerning out-of-commerce works were recently adopted as part of the *Directive on copyright and*

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<sup>40</sup> Canada, Royal Commission on Patents, Copyright, Trade Marks and Industrial Designs, *Report on Copyright* (Ottawa: Queen's Printer and Controller of Stationary, 1957) at 14.

<sup>41</sup> U.S. Copyright Act, *supra* note 10 at § 108(h).

<sup>42</sup> *Ibid.* Pursuant to regulations promulgated by the Register of Copyrights. In a report published in 2017, the U.S. Copyright Office stated that “[a]s of the date of this report, no rightsholder has ever filed such a notice with the Copyright Office and, thus, such option would appear extraneous to the two current “market check” options.” (See “Section 108 of Title 17: A Discussion Document of the Register of Copyrights”, online: U.S. Copyright Office <<https://www.copyright.gov/policy/section108/discussion-document.pdf>>).

<sup>43</sup> U.S. Copyright Act, *supra* note 10 at § 412.

<sup>44</sup> Eric J. Schwartz, *United States* § 5[3][a], in *International Copyright Law and Practice* (Lionel Bently ed. Lexis Nexis 2019).

<sup>45</sup> *Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works*.

<sup>46</sup> *Ibid.*, Art. 1(1) and 6(2).

<sup>47</sup> *Ibid.*, Art. 6(1).

<sup>48</sup> *Ibid.*, Art. 5.

<sup>49</sup> *Ibid.*, Art. 6(5).

related rights in the Digital Single Market.<sup>50</sup> Under this Directive, member states must provide that collective societies may conclude non-exclusive licences for non-commercial purposes with cultural heritage institutions for the reproduction, distribution, communication to the public, or making available to the public out-of-commerce works or other subject matter that are permanently in their collections, subject to certain conditions.<sup>51</sup> Where no collective is able to provide such a licence, member states must provide for an exception or limitation allowing cultural heritage institutions to make available, for non-commercial purposes, out-of-commerce works or other subject matter on non-commercial websites.<sup>52</sup> For any such licensing mechanism, exception, or limitation, certain notice obligations apply,<sup>53</sup> and rights holders must be able to exclude their works or other subject matter at any time.<sup>54</sup>

## 4. Consultation

This consultation seeks the views of stakeholders and the public on whether accompanying measures should be adopted to mitigate some of the potential implications of term extension, and if so, what form these measures should take. Such measures would aim to address concerns identified by some stakeholders regarding the relationship between the term extension and access to works.

### *Term Extension Without Accompanying Measures*

Canada could extend the general term of protection by 20 years, to life-plus 70 years, without any accompanying measures. Groups representing rights holders during hearings that preceded the ratification of CUSMA advocated for such an approach.<sup>55</sup> Implementing term extension in this manner would not close the door to the possibility of future reforms to address the concerns raised by some stakeholders in relation to access to orphan works and out-of-commerce works.

### *INDU Committee Recommendation*

The INDU Committee recommended that the Government “consider amending the *Copyright Act* to ensure that copyright in a work cannot be enforced beyond the current term unless the alleged infringement occurred after the registration of the work.”<sup>56</sup> Canada currently provides an optional copyright registration system via the Canadian Intellectual Property Office (CIPO). Registration is not required in order to obtain copyright protection in Canada, or generally internationally, but doing so provides the registrant in Canada with certain enforcement benefits. For instance, a certificate of registration of copyright is evidence that the copyright subsists and that the person registered is the owner of the copyright.<sup>57</sup> Registration requires the payment of a fee (\$50 to register a work or other subject matter online, or \$65 if not done online).<sup>58</sup> CIPO

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<sup>50</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market, Art. 8 [EU Directive on Copyright in the Digital Single Market].

<sup>51</sup> *Ibid*, Art. 8(1). The conditions are that: collectives must be sufficiently representative of right holders in the relevant type of works or other subject matter and of the rights that are the subject of the licence; and that right holders are guaranteed equal treatment in relation to the terms of any such licence. Para. 31 of the preamble provides that “Member States should have legal mechanisms in place allowing licences issued by relevant and sufficiently representative collective management organisations to cultural heritage institutions...to also apply to the rights of right holders that have not mandated a representative collective management organisation in that regard.”

<sup>52</sup> *Ibid*, Art. 8(2) and 8(3). The name of the author or any other identifiable right holder must be indicated, unless this turns out to be impossible.

<sup>53</sup> *Ibid*, Art. 10.

<sup>54</sup> *Ibid*, Art. 8(4).

<sup>55</sup> See Canada, Parliament, House of Commons, Standing Committee on International Trade, *Minutes of Proceedings and Evidence*, 43<sup>rd</sup> Parl, 1<sup>st</sup> Sess, No. 9. (25 February 2020) and No. 12 (26 February 2020).

<sup>56</sup> INDU Report, *supra* note 22 at 38.

<sup>57</sup> *Copyright Act*, *supra* note 5 at s. 53(2). Registration provides similar benefits to assignees and exclusive licensees (see s. 53(2.1) and 53(2.2)). Note, as well, the protection for assignees and exclusive licensees against subsequent assignees and exclusive licensees where the initial assignment or exclusive licence has been registered (see s. 57(3)).

<sup>58</sup> Schedule to *Copyright Regulations*, SOR/97-457. The registration fee for assignments and exclusive licences is \$65.

issues fewer than 10,000 copyright registrations annually in Canada.<sup>59</sup> The INDU Committee noted that their proposed approach would “mitigate some of the disadvantages of term extension, promote copyright registration, and thus increase the overall transparency of the copyright system.”<sup>60</sup>

The approach recommended by INDU raises serious questions in the context of Canada's international obligations, as well as the costs that would be borne by copyright owners and the duplication of administrative efforts that might result. Numerous international treaties to which Canada is a party (e.g., Berne) prohibit the imposition of any ‘formalities’ that would need to be satisfied for foreign works to benefit from copyright protection in Canada. While limitations on enforcement of copyright linked to registration are not unprecedented,<sup>61</sup> they do not appear to be the norm internationally. In addition, with new pressure on copyright owners to register their works, such an approach would likely result in increased costs in the form of registration fees and associated administrative and legal costs, particularly for owners of copyright in multiple works. Finally, consideration would need to be given to the resulting duplication of efforts between the governmental registration system and the records maintained by Canada's numerous collective societies.<sup>62</sup>

While the Government will give due consideration to any views expressed in relation to extending term without accompanying measures and in relation to the implementation approach recommended by the INDU Committee, it is specifically inviting comments on a number of possible measures that could accompany term extension (outlined below). These measures represent a range of possible approaches to facilitating access to orphan works and out-of-commerce works. The measures can be categorized as either remuneration models (i.e., permitting use without the need to seek authorization from the copyright owner, but subject to the payment of royalties) or exceptions (i.e., permitting use without the need to seek authorization from the copyright owner or the need to pay royalties). The Government's consultation on these options should not be approached as a *take-it-or-leave-it* proposition, but rather an opportunity to invite targeted feedback on the types of accompanying measures that could be considered and on their various characteristics and safeguards. This is not an exhaustive list of options, and the Government would welcome submissions on measures other than those outlined in the paper. (Note that, for the options outlined below, some of the specific considerations that are identified in one option, such as considerations unique to the treatment of out-of-commerce works, may have relevance for other options, but are not repeated for the sake of brevity).

## **4.1 – Enable use of works not currently being commercialized in exchange for remuneration**

### ***Option 1 – Expand Canada's current orphan works licensing regime / extend regime to out-of-commerce works***

One option could be to expand the current orphan works licensing regime so that it includes *unpublished* orphan works and/or published out-of-commerce works for the entire term of protection, to facilitate broader access to such works following term extension. For example, if Canada's orphan works regime was not limited to works that have been ‘published,’ it could apply to orphan works that are publicly communicated in other

<sup>59</sup> “Copyright statistics: 2018 to 2019”, online: Canadian Intellectual Property Office <<http://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr04724.html>>.

<sup>60</sup> INDU Report, *supra* note 22 at 38.

<sup>61</sup> For example, see above under 3.1 – *the United States*.

<sup>62</sup> Examples include the following: “CMRRA Direct: Repertoire Search”, online: Canadian Musical Reproduction Rights Agency (CMRRA) <<https://cmrradirect.cmr.ca/WorkRegistration/ViewRepertoireList.aspx>> and “Public Repertoire”, online: The Society of Composers, Authors and Music Publishers of Canada (SOCAN) <<https://www.socan.com/controller?modulePageName=repertoirePage&subPage=pubRepertoireSearch&searchOption=b&language=en&session=skip>>.

ways, such as being made publicly available online,<sup>63</sup> or that are not amenable to publication, such as sculptures in public spaces<sup>64</sup>, and the Board could grant licences for uses of such works, in the public interest.

Canada's orphan works regime could also be extended to out-of-commerce works. Since the copyright owner of an out-of-commerce work is locatable, such an approach would require consideration of separate conditions. For instance, the scope of what constitutes an out-of-commerce work would need to be determined, which may not be a simple proposition in an era of publish-on-demand options or small-print alternatives. Moreover, the ability to apply for a licence to use out-of-commerce works could be limited to non-profit LAMs. LAMs play a critical role in society in terms of ensuring access to knowledge and preserving our cultural heritage, and typically operate on a non-profit basis. Within their collections are large numbers of works that were once commercialized by the copyright owner, but are now no longer available commercially, such as out-of-print books. Consideration might also need to be given to whether the regime should only apply during a specific time period during the out-of-commerce work's term of copyright protection (e.g., only after the work has no longer been available to the public through customary channels of commerce for a specified period of time). Further conditions might include that: (i) uses be limited to achieving aims related to these institutions' public-interest missions; (ii) institutional users be required to undertake a reasonable search in good faith for each work to determine if it is being commercially exploited; and, (iii) institutional users be barred from engaging in uses with a motive of gain.<sup>65</sup> While there are circumstances where allowing for commercial uses of out-of-commerce works might be desirable from a policy standpoint, it would be important to ensure that the interests of the copyright owner, who is known and locatable in such circumstances, are appropriately safeguarded. Copyright owners could also be provided with an opt-out mechanism. For example, licence applications could be made subject to a notification period (e.g., 90 days) that would need to expire before the Board could grant a licence, providing an opportunity for the copyright owner to opt out.

Expanding the orphan works regime to include orphan works that were not 'published' would require consideration of the extent to which the regime should apply to works that were never made available to the public at all (e.g., personal letters).

Finally, while not directly related to addressing potential implications of term extension, under an extended orphan works regime that applies to unpublished orphan works and/or published out-of-commerce works, the limitation period for the copyright owner to come forward to claim remuneration could be reduced to three years after the expiration of the licence. This would align with the general limitation period in the Act, thereby improving consistency within this piece of legislation.<sup>66</sup>

## ***Option 2 – Collective licensing regime(s) to facilitate use of orphan works and/or out-of-commerce works***

Another option could be to develop a collective licensing regime inspired in part by the EU orphan works and out-of-commerce works directives to facilitate uses of orphan works and/or out-of-commerce works by non-profit LAMs for purposes related to achieving their public-interest missions. Under this approach, uses could be permitted by default under an exception (i.e., no requirement to seek authorization or pay

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<sup>63</sup> Ouichou, *supra* note 35.

<sup>64</sup> Royal Canadian Mint for the reproduction of the image of the Angel of Victory sculpture created by Cœur de Lion McCarthy (17 January 2018), online: Copyright Board of Canada <<https://decisions.cb-cda.gc.ca/cb-cda/refusees-other-autre/en/item/366773/index.do>>.

<sup>65</sup> See, for instance, a similar limitation under s. 29.3 of the Act that applies to certain exceptions for libraries, archives and museums and educational institutions. Section 29.3(2) clarifies that an educational institution, library, archive or museum does not have a motive of gain where it recovers no more than the costs, including overhead costs, associated with doing the permitted act (*Copyright Act*, *supra* note 5 at s. 29.3).

<sup>66</sup> Under the current orphan works regime, the copyright owner can come forward to collect the royalties fixed in the licence up to five years after the expiration of the licence (*Copyright Act*, *supra* note 5 at s. 77(3)). This current period does not align with the general limitation period in the Act for proceedings in relation to acts or omissions giving rise to a remedy (see *Copyright Act*, *supra* note 5 at s. 43.1).

remuneration), unless authorized under a tariff approved by the Board. As such, the entry into force of such a measure could be delayed to allow for the creation or designation of one or more collective societies to administer the tariffs. If a collective licence existed for a certain use, copyright owners could be permitted to opt out, in which case the collective(s) could be required to provide notice to users under the tariff.

Other conditions could be required under this type of collective licensing regime as well. For example, institutional users could be required to carry out a reasonable search in good faith for each work, in order to determine: (i) whether the copyright owner could be located (for orphan works); or, (ii) whether the work is being exploited commercially (for out-of-commerce works). Further, record-keeping obligations could be placed on institutional users, including information concerning "reasonable searches" and the uses made of orphan works and/or out-of-commerce works. Institutional users could also be barred from engaging in uses with a motive of gain.

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

Another option could be to permit non-profit LAMs to use orphan and/or out-of-commerce works by default, without being required to first obtain a licence from the Copyright Board, in order to achieve aims related to their public interest missions. Copyright owners could be permitted to claim equitable remuneration or opt out at a later date. Such an approach would share certain characteristics with the EU orphan works and out-of-commerce works directives, and with a measure proposed recently by Australia to facilitate the use of orphan works.<sup>67</sup>

As with the other options outlined above, such a measure could be subject to conditions, such as requiring institutional users to carry out a reasonable search in good faith for each work, in order to determine: (i) whether the copyright owner could be located (for orphan works), and, (ii) whether the work was being exploited commercially (for out-of-commerce works). Other conditions could include placing record-keeping obligations on institutional users, including information concerning "reasonable searches" and uses made of eligible works, as well as requiring institutional users to provide a public notice of their use of a work (e.g., via their website). Institutional users could also be barred from engaging in uses with a motive of gain.

Under such a measure, a copyright owner could be entitled to come forward and either: (i) claim equitable remuneration from the institutional user at a rate the parties agree to or, in the absence of an agreement, at a rate determined by the Board; or, (ii) opt out of the measure (in which case the use by the institution must cease, but no remuneration would be required for use that had already occurred under the measure.)

## **4.2 – Exceptions**

### ***Option 4 – Exception for use of works during the final 20 years of protection***

Using measures adopted by the U.S. as part of the *Sonny Bono Copyright Term Extension Act* (1998) as a reference point (described above), non-profit LAMs could be permitted to use works during the additional 20 years of protection in order to achieve aims related to their public interest missions. For the exception to apply, the institution could be required to first undertake a reasonable search in good faith for each work to determine if it is being exploited commercially. Institutional users could also be required to comply with

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<sup>67</sup> "Copyright access reforms", online: Australian Government, Department of Infrastructure, Transport, Regional Development and Communications <<https://www.communications.gov.au/departamental-news/copyright-access-reforms>>. The proposed limited liability scheme for orphan works would allow "the use of copyright material where: a reasonably diligent search has been undertaken, but the copyright owner cannot be identified or located...and as far as reasonably possible, the work has been clearly attributed to the author...If the copyright owner later comes forward, the user will not be liable for past use of the orphan work, and will be permitted to continue to use the work upon reasonable terms as agreed with the copyright owner (or, failing agreement, as fixed by the Copyright Tribunal). If reasonable terms are not met, the copyright owner would be able to seek an injunction against future use of the orphan work."

record-keeping obligations, including information concerning “reasonable searches” and the uses made of works, and could be barred from engaging in uses with a motive of gain.

### ***Option 5 – Exception for use of works 100 years after their creation***

Alternatively, a made-in-Canada approach sharing certain characteristics with the U.S. accompanying measure could be adopted. For example, an exception could be introduced permitting non-profit LAMs to use a work 100 years after its creation, in order to achieve aims related to their public interest missions. 100 years after creation aligns with the 100-year maximum term of protection that applies to other types of copyright content in Canada – namely, performances, sound recordings, non-dramatic films, and anonymous and pseudonymous works. Certain conditions could apply to such an exception. For example, user institutions could be required to undertake a reasonable search in good faith for each work, to determine whether it is being exploited commercially. User institutions could also be required to comply with record-keeping obligations, including information concerning “reasonable searches” and the uses made of works. Moreover, institutional users could be barred from engaging in uses with a motive of gain.

Though not directly related to addressing potential implications of term extension, a noteworthy aspect of this option is that it could equally apply to Crown copyright material (copyright in the control of the Crown). This option would improve access to works by federal, provincial and territorial governments and their agencies, particularly when such works are unpublished. While published Crown works are subject to a 50-year copyright term<sup>68</sup>, clarity concerning the use of unpublished Crown works would be beneficial to LAMs. While a full exploration of the topic of Crown copyright is beyond the scope of this consultation, an overall exception for use of works after 100 years may address some stakeholder concerns in relation to use of such works.

## **5. Conclusion**

Canada's term of copyright protection could be extended without accompanying measures, with one or a combination of the measures presented in this document, or possibly with alternative measures raised by stakeholders. All comments regarding how a general term of copyright protection of life of the author plus 70 years should be implemented in Canada are welcome. Since the overview of possible approaches covered above is non-exhaustive, additional ideas, comments, legal analysis, and supporting evidence and data from stakeholders and the public are also welcome. Finally, the Government welcomes views on whether any accompanying measures should apply to a broader range of users (e.g., educational institutions). Following the conclusion of this consultation, the Government will develop a plan for implementing term extension, taking full account of the views expressed through this process.

All comments should be sent to [copyright-consultation-droitdauteur@canada.ca](mailto:copyright-consultation-droitdauteur@canada.ca) by March 12, 2021. Comments received will be made public following the close of the consultation.

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<sup>68</sup> *Copyright Act*, *supra* note 5 at s. 12. Note that the extension of Canada's general term of protection would apply to works with a term that is calculated on the basis of the life of a natural person (CUSMA, *supra* note 1, art. 20.62(a)). For this reason, the term of protection in the Act that applies to Crown works is not implicated by the extension of Canada's general term of protection to life of the author, plus 70 years.