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The Extension of Canada's General Term of Copyright under CUSMA (USMCA)

by Caroline Winter | 12 November 2021 | English, Observations, Observations and Responses | 0 comments



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At a glance:

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CUSMA and Canada's Extension of the General Term of Copyright

Under the Canada–United States–Mexico Agreement (CUSMA) (also called the US–Mexico–Canada Agreement or USMCA in the US and Tratado entre México, Estado Unidos y Canadá or T-MEC in Mexico), a trade agreement that includes a chapter on intellectual property, Canada has committed to extending its general term of copyright by 20 years, from the life of the author plus 50 years to the life of the author

plus 70 years. This copyright extension applies generally to all works (literary, dramatic, musical, and artistic), such as “books, newspapers, musical compositions, movies and TV shows, paintings, photographs, and computer programs” (Government of Canada 2021 p. 3).

Although life plus 50 years is the required minimum term for copyright under the [Berne Convention for the Protection of Literary and Artistic Works \(1979\)](#), this measure brings Canadian copyright terms in line with those of more than 80 other countries with life plus 70 years or longer, including its treaty partners—the US and Mexico—and many of Canada’s other trade partners, including Australia, the EU, Japan, the UK, and South Korea (Government of Canada 2021).

CUSMA was signed in November 2018 and came into force on July 1, 2020. The Government of Canada is required to implement the term extension by the end of 2022, allowing time to manage this transition and consider the possibility of implementing additional measures to mitigate the effects of the extension.

Consultation on Mitigation Measures

In recognition that this copyright term extension affects various stakeholder groups, particularly regarding orphan works (those for which the copyright owner is unknown or unlocatable) and out-of-commerce works (those that are under copyright but not accessible commercially, e.g., a book that has gone out of print), the Government of Canada held a consultation about the implementation of the copyright term extension.

Between February and March, 2021, it called for input about whether any measures should be taken to mitigate the potential implications of the extension. The [Consultation Paper on How to Implement an Extended General Term of Copyright Protection in Canada](#) provides background information about the extension and its potential implications and proposes five options for consideration:

- “Option 1 – Expand Canada’s current orphan licensing regime / extend regime to out-of-commerce works” (p. 9)
- “Option 2 – Collective licensing regime(s) to facilitate use of orphan works and/or out-of-commerce works” (p. 10)
- “Option 3 – Permit the use of orphan works and/or out-of-commerce works, subject to claims for equitable remuneration” (p. 11)
- “Option 4 – Exception for use of works during the final 20 years of protection” (p. 11)
- “Option 5 – Exception for use of works 100 years after their creation” (p. 12)

The INDU Report

The consultation will also take into consideration a parliamentary review of the *Copyright Act* from 2019, summarized in a [Report by the Standing Committee on Industry, Science and Technology \(INDU\)](#).

The INDU report acknowledges opposition to the copyright term extension, and recommends (Recommendation 6) “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” (38). However, the consultation paper stated that a registration requirement for foreign works may violate Canada’s obligations under various treaties, including Berne (Government of Canada 2021, p. 9).

The Overall Response to CUSMA’s Term Extension

The signing of CUSMA was widely covered in the press, including by [CBC News](#), with some opposition voiced to its copyright extension provision. For instance, [singer Bryan Adams has argued](#) that it benefits record labels and other corporate copyright holders rather than creators. An article in the [Financial Post](#) predicts that the copyright extension will negatively affect the technology sector as well as the cultural sector, since it applies to databases and may lead to calls for stronger intellectual property rights in data.

The response from stakeholders to this copyright extension has been divided. Copyright holders and some content creators have tended to support it, whereas user groups including libraries, archives, educators, and other users of content – including certain content creators – tend to oppose it.

Supporters argue that because extending the general term of copyright increases opportunities for monetizing copyrighted content, it will increase the content's value and encourage increased investment in content creation (Ruimy 2019). Supporters also argue that the measure levels the playing field for exporting content on the international market.

Opponents argue that it will significantly reduce access to content, particularly since it will lead to a 20-year period in which no works enter the public domain. They also note that the extension will particularly affect orphan and out-of-commerce works, many of which have significant value for researchers and the public but little, or no, commercial value.

Response to CUSMA and the Consultation from the INKE Partnership Community

The copyright term extension has generated numerous responses from the academic community, including from the [Canadian Association of Research Libraries \(CARL-ABRC\)](#), an INKE partner.

CARL and the [Canadian Federation of Library Associations \(CFLA-FCAB\)](#) released a [joint response to the Consultation Paper](#) in March 2021, endorsed by the Canadian Urban Libraries Council (CULC) and the [Canadian Association of Law Libraries \(CALL\)](#). This response states that the Canadian library community stands opposed to the copyright term, citing two key issues:

- “the diminishment of the public domain resulting from a two-decade freeze on many works entering it, and;
- The related problems regarding use of (or access to) orphan and out-of-commerce works, which create additional burdens on libraries, archives, and museums (LAMs).” (p. 3)

It includes an appendix listing examples of how the copyright extension will affect the library and education communities (Appendix 1).

The response supports Option 3 in the Consultation Paper and recommends policy measures to make it effective at meeting the needs of LAMs and rights holders. It also broadly supports Option 5 in combination with Option 3. It notes, however, that both measures are complex and require further study and consultation. It also supports INDU's proposal for a registration system, in which rights holders must register their works in order for the 20-year copyright extension to apply, but notes that there are many possible registration systems and that these should be investigated fully before a decision is reached.

CARL and CFLA's response also lists some additional recommendations that are echoed in responses from other members of the academic community.

Response from the Broader Academic Community

All [stakeholder responses to the Consultation Paper](#) are available online. Responses from the scholarly community across Canada (libraries, library associations, and university associations) emphasize the potential negative effects of the copyright term extension on their public service mission, specifically their ability to make resources and materials available to users, particularly through digitization.

Several of these responses voice support for the CARL and CFLA response, which was submitted on behalf of their members. Most of these responses echo that response's support of Option 3 in the Consultation Paper with certain amendments to make it better represent the needs of LAMs and research and educational institutions. Some also support Option 3 in combination with Option 5.

Many responses examined here offered additional recommendations beyond the options presented in

the Consultation Paper.

Most call for the education community—educational institutions, researchers, instructors, and other users—to be considered as well as LAMs. The Universities Canada (2021) response, for instance, calls upon the government to “expand the proposed scope of the measures to include educational institutions and cover both the students and employees of those institutions.”

The Canadian Association of University Teachers (CAUT) and the CARL and CLFA responses note that Canadian copyright legislation—including the general term of copyright—must respect and address Indigenous Knowledges. The Canadian Council of Archives (CCA) points out that “the copyright system represented in the Act is based on the idea that copyright is owned by an author, and that the duration of copyright is based on that author’s life. This system does not reflect an Indigenous approach based on community ownership of stories, songs, dances, names, and other creations, and the principle that such ownership is perpetual” (2021, p. 16).

Many note that, since CUSMA extends ownership of copyright by 20 years, other aspects of Canadian copyright must be revised in order to maintain a balance between creator rights and user rights, a balance called for by the Supreme Court in multiple copyright decisions. This includes ensuring limited liability for LAMs for the use of orphan and out-of-commerce works. This would ensure that, if a copyright holder asserted their rights over an item, the organization would not be liable for the past use of it. This would encourage LAMs to make these works available since, without it, they are at risk of expensive settlements even if they have searched for the copyright holder in good faith. As the CARL and CFLA (2021) response notes, “An orphan works / out-of-commerce works provision without limitations on liability is nothing more than a risk management exercise, rather than true protection against liability” (p. 12–13).

In addition, several responses call for greater clarity around definitions of key terms including “commercially available” and “out-of-commerce.” The Copyright Act currently defines works as “commercially available” if they can be located on the Canadian market with reasonable effort and if they can be licensed through a collective society, but several respondents argue the definition should be amended to remove the ability to license the work through a collective society.

A few respondents, including CAUT and the University of Winnipeg, voice support for a rights reversion strategy, in which the rights to a work would revert to its creator after 25 years, in line with US copyright law, to prevent works that are of value to the public from “languishing” with rights holders who are no longer benefitting from the copyright (BCLA 2021).

To offset the effects of term extension and to align Canadian and US copyright exceptions, many responses also call for an expansion of Canada’s fair dealing provisions to bring them in line with the US fair use provisions. They suggest revising the list of fair dealing purposes listed in Section 29 of the *Copyright Act* to be illustrative rather than definitive. As CAUT (2021) states, this amendment 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” (p. 2).

Many respondents wrote in support of the registration system described in the INDU report or something similar. Universities Canada (2021) notes that this registration would need to be designed carefully and through consultation with stakeholders to prevent “speculative registration” by “bad-faith copyright trolls.” CARL and CFLA (2021) point out that the system that INDU describes is only one possible model, and that more research and consultation is needed to determine the best option.

The need for careful design of infrastructure and administrative processes was another common theme. Several responses emphasize the need for reasonable standards for efforts to locate rights holders and the associated record keeping. The British Columbia Library Association (BCLA) notes that these standards should be established by the LAM community. The CCA points out that archives hold huge

numbers of orphan works, many of which are unpublished—a single collection can contain thousands of individual items. Reasonable standards and record-keeping requirements are necessary to prevent the administrative burden from limiting access to materials.

Several responses also call for any amendments to the *Copyright Act* to be done as a piece of standalone legislation, rather than as part of an omnibus bill, so they receive the necessary attention and debate.

Extension of the General Term of Copyright and Open Scholarship

Extending the length of copyright protection will limit the types of material that LAMs and the educational community can make available to the wider community. Several of the responses offer examples of how this policy will affect research, teaching, and other scholarly activities. Term extension will specifically impact efforts to digitize older community heritage materials and make them available online. For example, digitization of community newspapers, photographs, community organization publications, and other important heritage items will be paused and not made available to the wider communities who would benefit from being able to access these materials.

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