



Consultation on How to Implement an Extended General Term of Copyright Protection in Canada

Submission from The Writers' Union of Canada

March 12, 2021

Recommendation

The Writers' Union of Canada (TWUC) recommends that Canada implement copyright term extension to Life + 70 without any accompanying measures. As term extension is part of a signed trade agreement with obvious positive economic implications for Canada's cultural creators, it would be inappropriate to further delay or in any way weaken implementation.

The Writers' Union of Canada

Founded in 1973, TWUC is the national organization representing and advocating for professionally published writers. It is dedicated to enhancing writers' working conditions; advocating for their rights; providing professional development tools and opportunities; promoting authors and their writing; and enabling writers to network and share information with their colleagues. Union membership has steadily expanded with the growth of the Canadian writing and publishing sector. Beginning with just 43 members, TWUC now represents 2,300 cultural professionals. Since 2014, TWUC has chaired the International Authors Forum (IAF), representing over 750,000 authors worldwide.

TWUC has engaged multiple times in government inquiry affecting copyright law. It took part in the consultative process preceding amendment of the Copyright Act in 1988. That amendment authorized the collective licensing of copyright works in Canada by collectives like Access Copyright. TWUC was also an active advocate on behalf of writers prior to the 1997 amendment of the Copyright Act. It has previously made representations to the federal government on issues of copyright reform, intervened in and supported many court cases related to the protection of creator rights, and appeared before parliamentary committees struck to review amendments to the Copyright Act, including submission prior to the 2012 amendments and recent presentations to the Statutory Review of the Copyright Act¹. In its role with the IAF, TWUC monitors meetings of the Standing Committee on Copyright and Related Rights (SCCRR) at the World Intellectual Property Organization (WIPO) in Geneva.

Orphan Works

TWUC does not believe Orphan Works (OW) represent significant problems under Canadian copyright. The issue of OW was not the subject of lengthy consideration or research during the most recent Statutory Review of the Copyright Act, and reasonable measures are already in place in Canadian copyright practice.

As noted in the consultation paper, instances of OW in Canada are processed by the Copyright Board of Canada, and non-exclusive licences are made available to users when a true orphan is found and desired for use. This regime also provides for compensation back to an OW's actual rightsholder if they come forward after the licence is issued. According to Canada's copyright

licensing agency, which assists the Copyright Board in searches for rightsholders, requests to the Copyright Board for orphan licences are quite rare, and when they do occur often the rightsholder is identified through a diligent search by experts.

Several years ago, at the request of the federal government, TWUC participated in days of facilitated strategic brainstorming on the subject of updating Canada's existing orphan works regime for the digital ageⁱⁱ. Many workable digital solutions were suggested and tested, and a full report delivered to government. Throughout all that work on copyright orphans, the idea of legislative change or specific user-focused measures within copyright law was shown to be completely unnecessary.

Before any consideration of accompanying measures in the instance of copyright term extension, the government should invest in the elegant and affordable digital solutions already presented through their existing orphan works final report.

Out of Commerce Works

As with OW, TWUC does not believe that Canada has a significant Out of Commerce Works (OOCW) problem, nor will we have one after copyright term extension. From the author's perspective, an out of commerce work is simply a work that is potentially back in commerce. The point of having an active copyright term is to provide for the opportunity for continued or renewed interest in a work in order to bring it back into the market. In the digital age, when new and exciting business models for cultural content arrive with regularity, it is more and more possible for works that have slipped from the market to return to it in some other form, to the benefit of both users and rightsholders.

In the consultation paper, there are two assertions about OOCWs with which we take issue:

- *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 rhetorical description of work “locked” by copyright is inaccurate and unhelpful. Authors, as a rule, are passionate about providing access to their work and finding as large an audience as possible. Locking work away from users is the antithesis of authorial motivation; and that includes secondary users such as researchers and adaptors. Given existing and uncontroversial provisions within the Copyright Act, there is nothing about a term of copyright that acts as a hindrance to access.

- *These institutions [LAMs] 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.*

TWUC challenges the idea that in-copyright status makes a work in a library, archive or museum inaccessible or unavailable. Copyright protected literary works are accessed in and lent from public and research libraries every day in Canada. Many of those works are out of commerce, and yet still remain active in library collections.

It is our view that most complaints about both OW and OOCW are not about the difficulty of identifying the rightsholder of an individual title, but actually come from commercial entities engaged in mass digitization projects. It is clear from the examples of the Google Books project, the HathiTrust collection, and the Internet Archive's so-called "Open Library," that requesting and/or paying for permission from rightsholders is not generally part of the calculation when budgeting for mass digitization. It is unclear why that should be the case, considering the resources of the technology firms engaged in such work, and the clarity of copyright's purpose in giving an exclusive right to creators.

TWUC agrees that libraries, archives and museums should not suffer from limited resources in their drive to provide public access to their collections. We live in a digital age in which there has never been greater or speedier access to copyright ownership data, and as we move forward it is impossible to imagine a time when a simple search will not provide reliable contact information for any query. Properly funded institutions should be able to take advantage of these resources and tools, and it is unfair and unrealistic to expect copyright rightsholders to subsidize this work through interruption or suppression of their rights. We urge government to prioritize funding for LAMs adequate to the task.

Copyright Registration

TWUC forcefully objects to the suggestion that a registration requirement be attached to the final twenty years of a Life + 70 copyright term. Copyright registration is not a requirement in Canada, nor is it in the legal regimes of many of our strongest trading partners. We believe such a requirement attached to term extension would be contrary to Canada's responsibilities under the Berne Convention, would run against international norms, and would impose undue work and expense on rightsholders. The shifting of responsibility from those seeking permission to those trying to make the most of a limited term of protection is entirely unfair and counter to copyright's role in motivating cultural creation.

TWUC believes that responsible and professional secondary creators plan and budget for copyright clearance and/or licensing. There is no need to drill a registration loophole through the term of copyright.

Conclusion

The Writers' Union of Canada (TWUC) recommends that Canada implement copyright term extension to Life + 70 without any accompanying measures, and that it do so without any further delay.

Finally, TWUC is concerned that this consultation, around a question that is effectively settled by Canada's signing of the CUSMA, distracts from far more pressing issues pertaining to Canada's

Copyright Act. Since 2012, because of ill-defined provisions inserted into the Act, Canada's writing and publishing sector has suffered a loss of earned income in the hundreds of millions of dollars. This problem, of large-scale, unpermitted educational copying was recognized by both Standing Committees engaged with the recent Statutory Review of the Copyright Act. There are recommendations before Parliament for immediate repair.

The ongoing educational copying problem undermines any benefit Canada's authors gain through term extension. Twenty extra years of not being able to set a fair price for our work, of having no enforceable tariffs or licences, of seeing our work taken for free without permission, is hardly a gain. We once again urge government to act immediately on recommendations 18, 19, 20 and 21 from the CHPC Shifting Paradigms reportⁱⁱⁱ, and to restore a working educational market for Canadian cultural work.

ⁱ TWUC briefs to the [CHPC](#) and [INDU](#) Committees

ⁱⁱ [IP Osgoode Orphan Works Hack-a-Thon Final Report](#)

ⁱⁱⁱ [Shifting Paradigms](#), May 2019