



Canadian Federation of Library Associations
Fédération canadienne des associations de bibliothèques

POSITION STATEMENT EFFECTS OF THE CANADA, US, MEXICO AGREEMENT TERM EXTENSIONS

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ISSUE:

Extending the term of copyright negatively impacts the public domain. Changes to the *Copyright Act* are required to help mitigate this damage.

Under Article 20.H.7 of the Canada, US, Mexico Agreement (CUSMA), Canada would be obligated to add two decades to the basic term of copyright, (to “life plus 70” in most cases). As a result, users of creative works will be delayed access to a large body of works *that have no commercial value*. This is particularly problematic in cases where rights holders are inaccessible, unresponsive, or unknown (Works for which the rights holder is unknown are often referred to as “orphan works”). In addition, terms of protection for Canadian government works will be extended while US government works will continue to be unhindered by copyright and available for re-use.

BACKGROUND:

The rationale for extending the term of copyright under the CUSMA is that a longer time period for the commercial exploitation of copyright-protected works is a greater incentive for authors to create new works. Under current Canadian law, the copyright term already extends for generations after a creator’s death. Studies have produced no credible evidence that further extending the copyright term results in increased creation, and there is no empirical support for the original arguments used to initiate term extensions in the United States, despite the significant costs of additional copyright protection.¹

Libraries provide access to creative works in a number of ways. These include purchasing commercially available books, ebooks, and recordings, as well as reproducing and making available works that are either no longer protected by copyright or for which libraries have obtained related permissions.

Providing reliable, respectful, and trusted access to works that are no longer commercially available serves the public interest in Canada. The role of libraries in fulfilling this public interest is complicated by the requirement to trace

¹ See Hollander, Abraham, *Assessing Economic Impacts of Copyright Reform on Selected Users and Consumers*, 2005; Australian Government Productivity Commission. *Intellectual Property Arrangements*, 78. September 23, 2016; Posner & Landes. *The Economic Structure of Intellectual Property Law*. Harvard University Press, 2003; Buccafusco, C., & Heald, P. (2013) and “Do Bad Things Happen When Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension.” *Berkeley Technology Law Journal*, 28(1), 1-43, <http://www.jstor.org/stable/24120609>; Appendix A of *Eldred v. Ashcroft* (01-618) 537 U.S. 186 (2003) 239 F.3d 372 <https://www.law.cornell.edu/supct/html/01-618.ZD1.html>

inaccessible, unresponsive, or unknown rights holders, as well as by the increasingly unnecessary limitations related to the distribution of works that are no longer commercially available (s 30.1 (2), *Copyright Act*). This includes government works in Canada but not the US, as US federal government works enter the public domain by default.

Currently, the provisions of the *Act* related to the work of Libraries, Archives, and Museums prevent the reproduction of works protected by a technical protection measure and limit distribution to a narrow group of users. This often results in extremely limited access to works **pending the expiration of the term of copyright**, a date which triggers a work's availability for reproduction.

ANALYSIS:

Canadian copyright policy attempts to provide a balanced approach that ensures both fair compensation for rights holders and public access to works through a robust public domain. Historically, the expiration of rights holders' copyright interests helped ensure that creative works became part of the public domain before those works were lost to obsolescence, deterioration, or rarity. In a market where literary works are generally commercially viable for only a few years,² the existing delay is already much longer than warranted by rights related to economic exploitation. Further restricting access to these works would move Canada even further away from a balanced copyright system, unnecessarily delaying wide public access to digitized cultural heritage and further exacerbating difficulties associated with inaccessible, unresponsive, or unknown rights holders (which often includes government agencies). In short, term extensions provide economic rights holders with additional time to exercise their limited monopoly to commercially exploit that small number of works that has maintained its commercial value throughout the already generous copyright terms specified in the Berne Convention. This additional time is granted at the expense of the public interest in gaining access to all those other works that have no commercial value and yet to which the term extension will also apply. Furthermore, one of the key features recognized in copyright policy development is that new works build upon older works. Preventing the use and enjoyment of works thus will also adversely impact the development of new creative works by a wide range of creators, including historians and other scholars, writers, and researchers.

Balancing mechanisms must be implemented specifically to offset the effects of term extensions. This can be achieved in a number of ways. One mechanism

² See Australian Government, Productivity Commission. *Intellectual Property Arrangements, Productivity Commission Inquiry Report*, 78. September 23, 2016, page 129, <https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf>

that preserves the Berne life plus fifty rule is to extend copyright protection for the additional 20 years upon application. This has a twofold benefit: it honours the CUSMA term requirement and ameliorates issues related to orphan works. Another mechanism is to adopt forward-looking fair dealing criteria that could support applications including text transformation for accessibility, preservation, and researcher use such as text mining. In all cases, the *Copyright Act* must clarify that technological protection measures do not inhibit the use of statutory exceptions. In addition, and with regards to Canadian Crown Copyright, Canadian government works should enter the public domain by default.

RECOMMENDATION:

To offset the damaging effects of CUSMA term extensions on the public interest, CFLA-FCAB recommends that:

- registration be made a requirement for adding 20 years to copyright terms, and
- fair dealing provisions be expanded, and
- provisions related to the work of Libraries, Archives, and Museums be revised to insure that exploitation of works that no longer hold economic value, including their reproduction and open distribution to the public at large, is available regardless of technical protection measures, and
- Canadian Crown materials not be protected by copyright or that they be removed from related CUSMA provisions.