

## **INTRODUCTION**

The Copyright for Creativity ([C4C](http://copyright4creativity.eu)) Coalition – more details below – welcomes the [consultation](#) by the Canadian Government on the Copyright Term Extension Proposal (hereafter ‘the Extension’). For further questions on our submission, please do not hesitate to contact Caroline De Cock, C4C’s Coordinator, at [secretariat@copyright4creativity.eu](mailto:secretariat@copyright4creativity.eu).

## **ABOUT C4C**

C4C is a broad-based coalition that seeks an informed debate on how copyright can more effectively promote innovation, access, and creativity. C4C brings together libraries, scientific and research institutions, digital rights groups, technology businesses, and educational and cultural heritage institutions that share a common view on copyright. See our members here: <http://copyright4creativity.eu/about-us/>.

## **PREAMBLE**

As an organisation that has its core of activities and members based in the European Union, we have had ample opportunity to assess the effects of a 70 year copyright protection term. There is clear evidence that a 70 years protection term is disproportionate compared to the average commercial life of copyright protected works. Indeed, in the EU, copyrighted material remains protected up to 70 years after the death of the author for artistic works, and up to 70 years after the death of the last surviving major contributor (e.g., director, composer, screenwriter) for audiovisual content. These terms do not reflect sound economic and legal considerations of the actual duration required for creators to recoup their investment in their works and their creativity.

## **OUR RECOMMENDATIONS**

At a principle level, we believe there should be no extension of the term of protection of copyright beyond 50 years, because:

- 1) The lack of sound legal and economic arguments for a term extension; and,
- 2) The current protection terms are already too long.

However, as it is our understanding that due to ill thought commitments in a trade agreement, the Canadian government may not be in a situation where it can avoid such an extension, then we consider that:

- 1) At a minimum, such an extension should not be retro-active; and,
- 2) An active act of registration by a rightholder to benefit from such an extension after 50 years (or for that matter even earlier) should be required.

Please find more details on our argumentation below.

## **OUR ARGUMENTATION**

At a principle level, we believe there should be no extension of the term of protection of copyright beyond 50 years for a variety of reasons, some of which we have set out below.

### **1) The lack of sound legal and economic arguments for a term extension**

The academic community, and other stakeholders, have voiced their concerns at numerous occasions, during previous debates on this subject, regarding the lack of sound legal and economic arguments that justify extending the current protection terms. The length of the current protection terms do not rest either on an evidence-based policy-making process that properly analysed the actual duration required to recoup investments and encourage creativity. The economist Rufus Pollock demonstrated in a 2009 paper titled 'Forever Minus a Day? Calculating Optimal Copyright Term,'<sup>1</sup> that the optimal copyright term is actually only 15 years.

In the EU, academia, ranging from copyright law scholars to economists, clearly argued that "there appear no sound legal and economic arguments for extending the term of protection for related right[s],"<sup>2</sup> in the debates on extending the related rights of performers and producers in the music sector. Legislators however pushed through an extension from 50 years to 70 years for the music industry, notwithstanding the absence of evidence to justify this. It is regrettable that due to ill thought commitments in a trade agreement, such a flawed process is now likely to be mirrored in Canada.

### **2) The current protection terms are already too long: the perspective of cultural heritage institutions**

Evidence shows that the current protection terms are already too long: they do not reflect sound economic and legal considerations of the actual duration required to recoup investments and or creative efforts, as demonstrated above.

Lengthy protection terms prevent cultural heritage institutions from digitising and making available in-copyright works, hence hindering them in fulfilling their public mission. The 2006 Gowers review remarks in this regard that: "In a system where all works receive protection for the maximum term, the vast majority of works remain in copyright despite not being economically viable for the rights holder."<sup>3</sup>

One of the outcomes of this vicious circle is the existence of the so called '20th century black hole' when it comes to online availability of copyrighted works. This black hole notably means that there are significantly fewer works from the mid to late 20th century available on europeana.eu than works from the centuries before (many of which are clearly in the public domain) or from the 21st century (many of which are still available commercially and whose rightholders can generally be contacted quite easily).

Through our own members, we are strongly aware of the risk that any extension to rights will have on the orphan works problem, given that it increases the chances that not all rightholders in a given work will be identifiable. As such, an extension of rights is likely simply to lock away works for longer, without bringing any particular benefits to rightholders.

Therefore, instead of extending protection terms, these need to be shortened to enhance access to knowledge and culture much more quickly.

## **CONCLUDING REMARKS: NO TERM EXTENSION PREFERABLE BUT AT THE VERY LEAST DAMAGE CONTROL MEASURES REQUIRED**

Should the Canadian Government move forward with proposing an extension of the protection term, then we consider that:

### **1) At a minimum, any type of extension should not be retro-active**

The Canadian Government must ensure that such an extension does not alter the protection term retrospectively, in order to avoid 'a widespread resuscitation of expired copyrights.'<sup>4</sup>

The 'logic' of copyright rests on the fact that a monopoly right is granted for a limited time in order to encourage and reward creativity. This monopoly restricts competition and imposes restrictions on the access and use by consumers of the copyrighted works. In this context, the 2006 Gowers Review rightfully argued that extending this monopoly would be unfair.<sup>5</sup>

"Copyright is a contract between creators and society; once the work has been created, altering the length of term of protection changes the terms of that contract. This is not fair for consumers, as they would be forced to pay monopoly prices for longer than they had implicitly accepted. The same logic applies to all forms of IP rights."

Refraining from retro-actively extending protection terms also ensures that the current status-quo of the public domain is safeguarded, whilst recognising its function as a stimulus for creativity. The public domain it is not merely a 'graveyard' for old content, but also "an essential source of inspiration to subsequent creators, innovators and distributors."<sup>6</sup>

From a user/creator perspective, public domain works are a key foundation on which both old and new forms of expression (such as remix) can flourish thanks to the lack of copyright restrictions. The longer the copyright term, the less public domain works are available for distribution, use and re-use.

### **2) Any extension should be linked to a registration requirement**

It is disappointing to see that the consultation document does not reflect the recommendations issued in 2019 during the copyright review process led by the Canadian Industry Committee.<sup>7</sup> Indeed, the latter considered that if an extension was unavoidable, the harm it could induce should be limited to a maximum. This 'damage control' included the establishment of a registration requirement for the additional twenty years:

"The Committee believes that requiring rights-holders to register their copyright to enjoy its benefits after a period equal to the life of the author plus 50 years would mitigate some of the disadvantages of term extension, promote copyright registration, and thus increase the overall transparency of the copyright system" (see p. 38 of the Recommendations)

## C4C's comments on the consultation on how to implement an extended general term of copyright protection in Canada



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- <sup>1</sup> Pollock, R. (2009, 19 July). Forever Minus a Day? Calculating Optimal Copyright Term. *Review of Economic Research on Copyright Issues*, 6(1), 35-60. Retrieved from: <https://ssrn.com/abstract=1436186>.
- <sup>2</sup> van Gompel, S. (2008, March). *Extending the term of protection for related rights endangers a valuable public domain*. Paper presented at Communia Workshop, Vilnius, Lithuania. Retrieved from: [https://comunia-project.eu/comuniafiles/Stef van Gompel Position paper term extension CC.pdf](https://comunia-project.eu/comuniafiles/Stef%20van%20Gompel%20Position%20paper%20term%20extension%20CC.pdf).
- See also Hugenholtz, B. (2011, April 6). O No, Not Again: Term Extension [Web blog post]. Retrieved from: <http://copyrightblog.kluweriplaw.com/2011/04/06/o-no-not-again-term-extension/>.
- See also the '2008 Bournemouth Statement': Kretschmer, M. (2008). Creativity Stifled? A Joined Academic Statement on the Proposed Copyright Term Extension for Sound Recordings. *European Intellectual Property Review (EIPR)*, 2008(9), 341-347. Retrieved from: <https://ssrn.com/abstract=2063813>.
- See here for an overview of academic opposition against the previous EU term extension: [https://nexa.polito.it/sites/nexa.polito.it/files/Studies and Signatories.pdf](https://nexa.polito.it/sites/nexa.polito.it/files/Studies_and_Signatories.pdf).
- <sup>3</sup> See p. 52. Gowers, A. (2006). *Gowers Review of Intellectual Property*. Retrieved from The Stationery Office website: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/228849/0118404830.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228849/0118404830.pdf).
- <sup>4</sup> Angelopoulos, C. (2012). Determining the Term of Protection for Films: When Does a Film Fall into the Public Domain in Europe? In S. Nikoltchev (Ed.), *The Lifespan for Copyright of Audiovisual Works* (pp. 7-22). Strasbourg, Luxembourg: European Audiovisual Observatory. Retrieved from the European Audiovisual Observatory website: <https://rm.coe.int/1680783bd3>.
- <sup>5</sup> See p. 56. Gowers, A. (2006). *Ibid*.
- <sup>6</sup> Helberger, N., Dufft, N., van Gompel, S., & Hugenholtz, B. (2008). Never Forever: Why Extending the Term of Protection for Sound Recordings is a Bad Idea. *European Intellectual Property Review*, 2008(5), 174-181. Retrieved from: [https://www.ivir.nl/publicaties/download/EIPR\\_2008\\_5.pdf](https://www.ivir.nl/publicaties/download/EIPR_2008_5.pdf).
- <sup>7</sup> House of Commons Canada. (2019, June). *Statutory Review Of The Copyright Act - Report of the Standing Committee on Industry, Science and Technology*. 42nd Parliament, 1st Session. Retrieved from: <https://www.ourcommons.ca/Content/Committee/421/INDU/Reports/RP10537003/indurp16/indurp16-e.pdf>.