

**Consultation on how to implement Canada's CUSMA commitment
to extend the general term of copyright protection
March 2021**

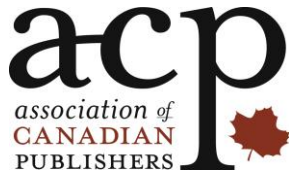
Introduction

The Association of Canadian Publishers (ACP) represents 115 independent English-language book publishing firms. Our members are Canadian-owned and operate in communities across Canada. Along with our francophone counterparts, we publish 80% of the new books published by Canadian writers each year. These books cross all genres in both print and digital formats. Copyright is essential to the work that we do and is a key pillar of the creative economy. Copyright supports the continued creation and publication of written works in all genres and for a variety of markets.

ACP recognizes that the Government of Canada must extend the general term of copyright protection by 20 years, to life-plus 70, before the end of 2022, in order to meet its obligations under the Canada-United States-Mexico Agreement (CUSMA). ACP also understands that the government is consulting on whether term extension should be accompanied by the establishment of a new out-of-commerce works and orphan works regime. ACP does not view these issues as being linked. Issues around out-of-commerce works and orphan works are complex and may warrant further study after the *Copyright Act* is amended; however, in the absence of this link, ACP recommends extending the general term of copyright without any accompanying measures.

Canadians had the opportunity to study issues related to copyright in great detail during the 2018-19 Parliamentary Review of the *Copyright Act*. As noted in the term extension consultation paper, neither the Standing Committee on Industry, Science and Technology nor the Standing Committee on Canadian Heritage identified a need to introduce an out-of-commerce works or orphan works regime in conjunction with term extension. The committees did, however, identify a range of other policy areas that require attention, including Canada's educational fair dealing exception and its negative impact on Canadian publishers and creators.

In addition to meeting its international treaty obligations by implementing term extension, ACP believes that the government should prioritize amendments to the *Copyright Act* based on the recommendations made during the 2018-19 Parliamentary Review. Otherwise, an extended term of copyright protection will bring limited value to Canadian rightsholders who continue to operate in a broken marketplace.



Current orphan works regime

Canada's current orphan works regime is administered by the Copyright Board of Canada, which has agreements with Access Copyright and Copibec to help administer the licensing of published works in cases where the copyright holder cannot be located. When cases are referred to Access Copyright or Copibec, the organizations are responsible for conducting additional research to verify whether or not the copyright owner can be located.

We understand from Access Copyright that the demand for the use of orphan works remains low; only nine requests regarding orphan works have been made by the Copyright Board to Access Copyright in the past five years. Of that number, only three were, in fact, orphan works. Though the user community has raised concern that term extension will be accompanied by challenges surrounding the use of orphan works, we expect that the number of orphan works may be much lower than users believe. We note that in cases where their use is sought, a process is already in place to support the licensing of this content through the Copyright Board. The creation of a new orphan works regime appears to be a solution in search of a problem.

Future considerations regarding out-of-commerce works and orphan works

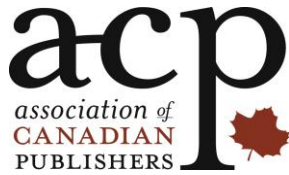
Though we do not believe that a new regime for out-of-commerce or orphan works needs to accompany copyright term extension, if further consultation on this topic is pursued after the necessary amendments are passed, we recommend the government study the actual need for such a regime, including an evaluation of the effectiveness of the current regime that is administered by the Copyright Board.

Separate from the issue of term extension, lessons could be learned from the international community regarding out-of-commerce and orphan works regimes. The European *Directive on copyright and related rights in the Digital Single Market* (DSM) includes detailed rules for the implementation of out-of-commerce works regimes, which are currently being implemented by member states. The European Commission is also in the process of reviewing the European Union's existing orphan works regime.

ACP refers the government to a [helpful guide](#) published by the International Federation of Reproduction Rights Organizations (IFRRO), which is informed by the implementation of the *Digital Single Market* directive. The guide addresses the digitization and making available of out-of-commerce works for the text and image-based sectors within Europe. IFRRO's guide identifies the complex factors that must be evaluated and addressed when implementing an out-of-commerce works regime, and also includes case studies of regimes that have been successfully implemented in France, Germany, the Czech Republic, and Norway. These experiences are valuable and could inform a similar discussion in Canada, on a longer timeline than this consultation permits.

We join colleague Canadian rightsholder associations in recommending that the following principles inform any future study of potential models for Canadian orphan works and out-of-commerce works regimes. These are informed by IFRRO's guide:

- 1) Any out-of-commerce or orphan works regime must be carefully designed with effective safeguards to ensure it does not negatively impact current and future markets for rightsholders.
- 2) The most effective way to balance legal access to orphan works and out-of-commerce works, while safeguarding against potential impacts on current and future markets for these works, is to establish a remunerated regime, supported by a licensing scheme. The most efficient and fair system would be collective licensing with extended effect.
- 3) Customary channels of commerce must be comprehensively defined. Rightsholders, copyright management organizations (CMOs) and libraries, archives, and museums (LAMs) should all be consulted in the process of defining when a work is out-of-commerce.
- 4) Territorial scope must be considered and defined.
- 5) Orphan works and out-of-commerce works must be carefully defined to take into account new and emerging business models for authorship and publishing.
- 6) An out-of-commerce/orphan works regime should incorporate centralized infrastructure to ensure there is an effective opt out and publicity mechanism.
- 7) The regime should only apply to LAMs for works in their permanent collections.
- 8) The government should ensure that a Canadian orphan works and out-of-commerce works regime is designed to be in compliance with international treaty obligations.
- 9) Given the considerable overlap between orphan and out-of-commerce works, the government should consider the efficiency and value of implementing one comprehensive regime, as was done in Norway, as part of any eventual study.
- 10) The onus should *not* be placed on the rightsholder to determine if their works have been digitized. Rightsholders currently have significant enforcement challenges and this would add additional administrative and enforcement burdens. Responsibility should lie with the user making use of the work. A well-designed regime supported by collective licensing with extended effect would reduce the burden on both users and rightsholders.
- 11) Out-of-commerce and orphan works regimes will disproportionately affect rightsholders of text-based and visual works. These rightsholders must be consulted and be active partners in implementing any new regime to ensure that current and future markets for these works are not undermined.



Other recommendations

The consultation paper highlights increased opportunity to monetize copyright-protected content, increased value of copyright holdings, and increased new investment in the creation, acquisition, and commercialization of copyright-protected content as being among the potential benefits of term extension. For the Canadian publishing sector, ACP stresses that these benefits will only accrue if the Government of Canada takes action to correct the damage that has resulted from the 2012 *Copyright Modernization Act's* overly broad fair dealing exception for education.

Over the last decade we have presented factual evidence and made the case that changes to the *Copyright Act* in 2012 have resulted in significant economic damage to our sector. During this time, Canadian creators and publishers have lost more than \$150M in direct licensing revenue alone, along with an unknown amount in primary book sales. This damage has resulted under the current life-plus 50 term of copyright. Extending that term an additional 20 years will do nothing to repair Canada's broken marketplace. Sufficient remedies to enforce copyrights and ensure fair remuneration for use of published works are required to ensure Canadian rightsholders can benefit from opportunities that may emerge from term extension.

ACP calls on the Government of Canada to restore fair compensation to creators and publishers for the educational use of their works. We join colleagues across our sector in urging the government to implement measures that are consistent with recommendations 18, 21, and 21 from the Standing Committee on Canadian Heritage's *Shifting Paradigms* report:

- 1) Fair dealing for education must only apply to educational institutions where a work is not commercially available under licence by the owner or a collective.
- 2) Tariffs set by the Copyright Board must be enforceable.
- 3) Statutory damages must be available to all collectives.

Conclusion

In summary, ACP recommends that the Government of Canada extend the general term of copyright to life-plus 70 without any accompanying measures. Should a regime for out-of-commerce and orphan works remain an issue for consideration, we recommend an evaluation of Canada's current tools that support the use of these works. The experience in other countries should also be considered, specifically collective licensing regimes that ensure rightsholders are compensated for their use as is appropriate. Finally, the Government of Canada must ensure a functioning marketplace for all rightsholders, regardless of sector, as described in the three measures specified in the previous paragraph.

For more information:

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