

Hon. François-Philippe Champagne, MP
Minister of Innovation, Science, and Industry
(By email: Francois-Philippe.Champagne@parl.gc.ca)

Hon. Steven Guilbeault, MP
Minister of Canadian Heritage
(By email: Steven.Guilbeault@parl.gc.ca)

cc: Hon. David Lametti, MP
Minister of Justice & Attorney General of Canada
(By email: David.Lametti@parl.gc.ca)

cc: copyright-consultation-droitdauteur@canada.ca

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

As a group of Canadian Intellectual Property Law scholars, we write regarding the Ministers' recently launched consultation on extending the term of copyright protection in order to meet Canada's CUSMA commitments. With this letter, which we jointly submit in response to the call for comments, we wish to express our shared concerns about both the proposed term extension and, more immediately, the inappropriately curtailed nature of this consultation process.

The duration of copyright is a matter of enormous importance to the Canadian public and the stakes are high indeed. By providing an unreasonably truncated time period for submissions (even with the last-minute extension to the initial deadline), the process has been skewed in favour of stakeholders who can readily invest time and money in crafting rapid responses (likely those with an economic interest in expanded copyright protection) while the citizens, educational, cultural, and public institutions who stand to bear the brunt of the costs imposed by copyright's expansion have little chance of participating. Such a short consultation period—particularly in the midst of a global pandemic that has overburdened many of us with increased workloads and childcare responsibilities—ensures that few people will have the opportunity to make meaningful submissions. On a matter of such seriousness, this is unfortunate, exclusionary, and frankly unacceptable.

As leading Canadian IP scholars with many decades of combined expertise and extensive knowledge in this field, we write to urge the Government not to proceed with a rushed extension of copyright term without first undertaking an appropriate and fulsome consultation, evidence-gathering, and careful consideration of every available option for mitigating the significant economic and cultural costs of extending the duration of copyright (including the option of requiring registration for the surplus CUSMA term, which the Consultation Paper has dismissed without good reason). As we explain, such an approach is not merely consistent with sound democratic and evidence-based policymaking but is also vital to ensure the compatibility with the *Canadian Charter of Rights and Freedoms*.

In what follows, we explain:

- The impact of copyright term extension on the users' freedom of expression, and therefore the need to ensure minimal impairment of free expression if term extension is to be consistent with Canada's constitution and international commitments;
- The impact of the copyright term extension on the public domain, and therefore the need to take appropriate ancillary measures to ensure that access to and reuse of protected works are not impeded beyond what is strictly necessary; and
- The options available for mitigating the significant economic and cultural costs of extending the duration of copyright, including a registration requirement for the CUSMA Supplementary Term (which we urge the Government to consider as a preferred option that is compatible with Canada's international and constitutional commitments).

I. The Impact of Term Extension on Freedom of Expression

A. The Harms of Extended Copyright Terms

Adding twenty more years to the already existing long term of protection will create two types of severe harms. The first type of harm includes the deadweight loss resulting from an extended period in which a copyright owner could charge a supra-competitive price for their work, the resulting transfer of wealth from Canadian users to mostly-foreign copyright holders, and an increase in the cost of follow-on creativity, resulting from a smaller public domain upon which creators could freely draw. The second type of harm results from extending the period in which copyright holders can legally prevent the use of their works, either because they choose to exercise this veto power and actively deny others permission to use their works or simply neglect to keep their works in circulation or take measures to prevent their works from becoming orphans. The losses resulting from the second type harms are mostly in the form of social opportunity costs: the follow-on creativity that could have been made if people could freely use those works; the discoveries that could have been inspired by those inaccessible works; the cultural losses resulting from locking-down enormous amounts of cultural materials, and a range of other forgone opportunities.

The concerns about these forgone opportunities are not merely theoretical. Indeed, a growing body of empirical evidence shows that those harms are real and substantial. Copyright keeps works disappeared;¹ it has resulted in black hole of cultural heritage.² The following two graphs, visualize some of these findings.

¹ Paul J Heald, "How Copyright Keeps Works Disappeared" (2014) 11:4 J Empir Leg Stud 829–866.

² "The missing decades: the 20th century black hole in Europeana", online: Eur Pro <<https://pro.europeana.eu/post/the-missing-decades-the-20th-century-black-hole-in-europeana>>.

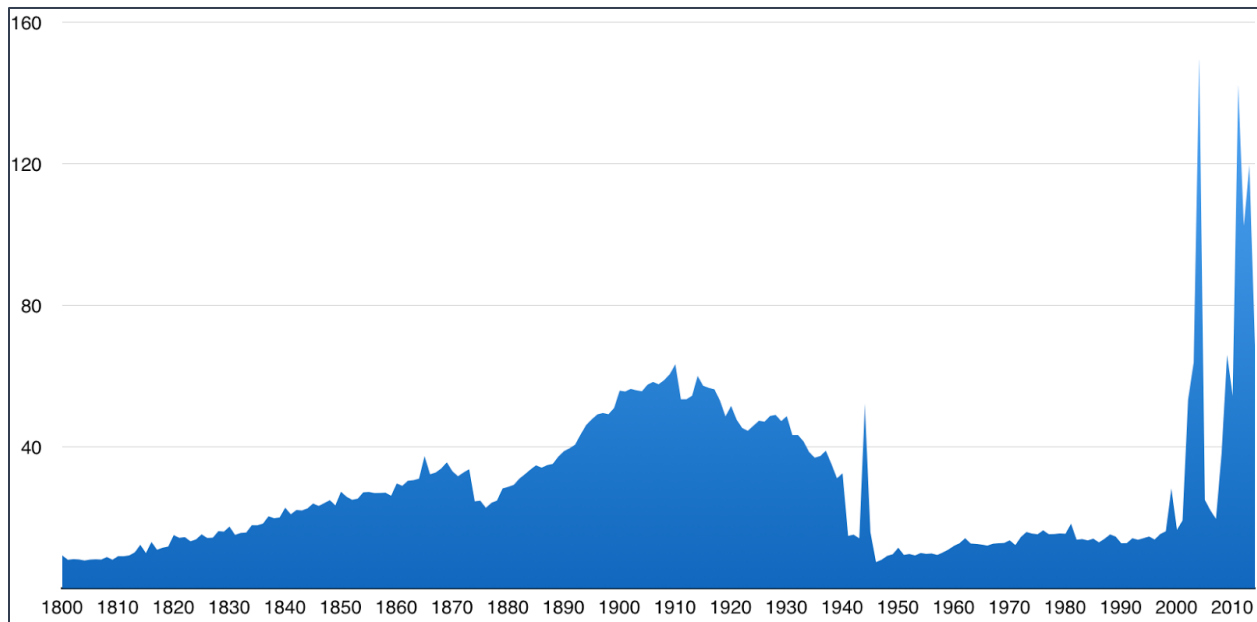


Figure 1: Chronological distribution of dcterms:issued values in Europeana dataset (1800-today), Europeana, CC-BY-SA

The first graph, prepared by Europeana,³ “represents an analysis of the 7,300,000 objects in Europeana's dataset of 45 million objects that contain the most reliable information about the date of creation of the work. The graph gives an approximate breakdown of the numbers of items represented digitally in Europeana that were created in each year since 1800.”⁴

The graph shows “that the amount of cultural heritage made available online increases steadily from the 1800s to the second half of the 20th century. From the 1950s onwards, the amount of material that is made available online falls dramatically. While the first half of the 20th century represents 35% of the sample, the second half is around only 11%. These findings reinforce [Europeana's] earlier research (from 2012) and illustrate once more that cultural heritage institutions are hampered in their ability to make collections from the 20th century available online”.⁵

³ Europeana is a web platform created by the European Union containing digitised collections of more than 3,000 cultural institutions across Europe.

⁴ Europeana, “The missing decades”, *supra* note 2.

⁵ *Id.*

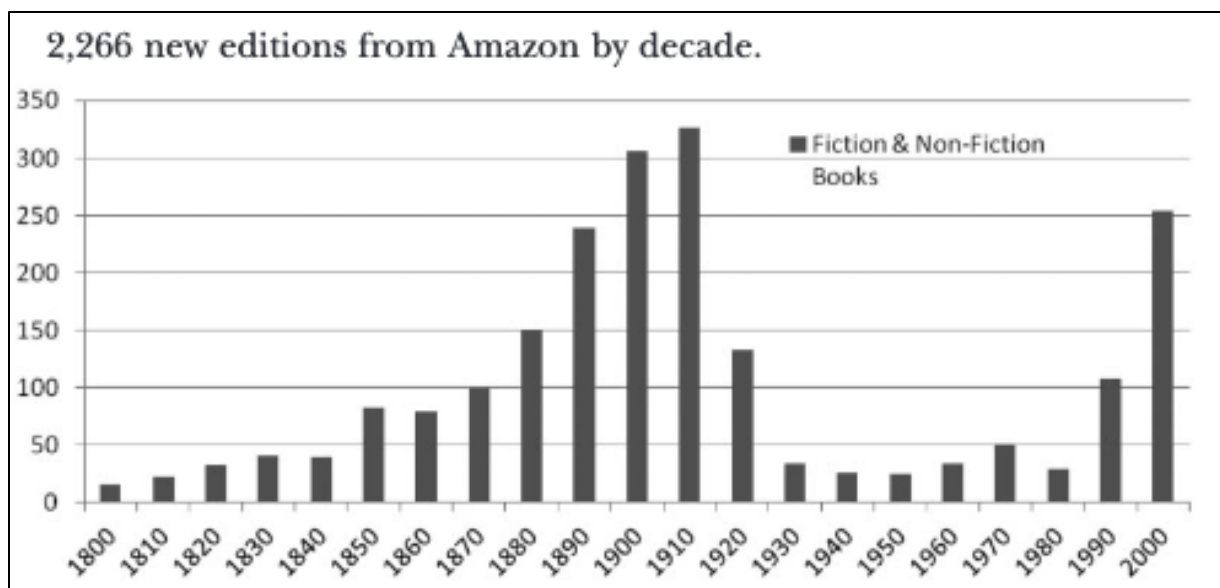


Figure 2: New Editions from Amazon by Original Decade of a Title’s Publication, 1800-2000. Source: Heald, supra note 1, at 839.

The second graph, from one of Paul Heald’s studies, shows a random sample of more than 2,300 new books for sale by Amazon in 2012. The graph shows the availability of books grouped by the decade in which they were first published. The shape of the graph is similar to that of Europeana’s. As expected, it shows the availability of a large number of recently published books. It also shows how the very low availability of most of the twentieth century literature (from the 1930s to the 1950s), and a surprisingly large number of books from decades prior to 1920 that are currently in print. “Why are there so many more editions of books from the 1880s and 1890s in print than from the 1980s and 1990s? The answer is fairly simple: copyright law.”⁶

A recent study that the Department of Canadian Heritage commissioned from Paul Heald reveals the same pattern in Canada. According to Heald:

In Canada, as in the United States and U.K., when a book falls into the public domain, it is significantly more likely to be in print. If we sort out the Canadian books into just two groups, public domain books versus copyrighted books, in 2019, the in- print rate is 65% for the public domain sub-set and only 31% for the copyrighted subset.

If Canada extends its copyright term from life-plus-fifty to life-plus-seventy, then the public domain will be frozen for 20 years, and the suppression of publication rates for copyrighted titles shown above will be exacerbated. Term extension would significantly deepen the problem of the “disappeared” books from the twentieth century to the detriment of Canadian readers and Canadian heritage.⁷

⁶ Paul J Heald, *Copy This Book!: What Data Tells Us about Copyright and the Public Good* (Stanford, CA: Stanford University Press, 2020) at 2.

⁷ Paul J Heald, “The Impact of Implementing a 25-Year Reversion/Termination Right in Canada” (2021) 28:1 J Intellect Prop Law 63 at 74, available at: <https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1464&context=jipl>. See also Paul J. Heald,

The Government's purpose in extending the terms of copyright may not be to place substantial amounts of 20th-century cultural heritage beyond reach for most Canadians for even longer periods. However, *this will be the effect* of extending copyright terms.

B. The Illusive Benefits of Term Extension for Canada and Canadians

But what is the goal of the contemplated amendment? At its outset, the Consultation Paper states that "Under the Canada-United States Mexico Agreement (CUSMA) ..., Canada will extend its general term of copyright protection from 50 years after the life of the author to 70 years after the life of the author." It does not ask whether Canada should extend the term, but begins with the premise that the extension is a *fait accompli*. The Paper then does not state any benefit that the Government believes would accrue from such term extension--a surprising omission given Canada's consistent and ongoing position that extending the terms of copyright will not benefit Canada as a whole. Instead, the Paper mentions only three benefits attributed to unidentified stakeholders who support term extension. It suggests that a longer term would (a) increase opportunities to monetize copyrighted content, and thereby increase the value of copyright holdings; (b) encourage investment in the creation, acquisition, and commercialization of copyrighted content; and (c) that term extension would further harmonize Canada's general term of copyright protection with that of our major trading partners, enabling Canadian rights holders to compete internationally on a levelled playing field.

Given the substantial harms of longer copyright terms, these suggested benefits could hardly justify the extension. While it is true that a longer term could increase opportunities to monetize copyrighted content and thereby increase the value of copyright holdings (for the copyright holders who own and exploit that content), on its own, this is merely a trivial statement that giving certain copyright holders an expanded opportunity to earn additional rents will be beneficial to those copyright holders. In other words, it concludes that conferring a private benefit on some persons will be beneficial to those persons. This tautology says nothing about whether bestowing such private benefits would also benefit other stakeholders and the public, whose interest is to be (pre)served by copyright law and policy.⁸

The claim that extended terms will increase the value of copyright holdings does not disclose any public benefit. There are two main reasons why an extended term could increase the value of copyright holdings: it could, in the case of a small number of works for which there

Property Rights and the Efficient Exploitation of Copyrighted Works: An Empirical Analysis of Public Domain and Copyrighted Fiction Best Sellers, (2012) Minnesota Law Review https://www.minnesotalawreview.org/wp-content/uploads/2012/01/Heald_FinalPDF.pdf; Christopher Buccafusco and Paul Heald, "Do Bad Things Happen When Works Fall into the Public Domain?: Empirical Tests of Copyright Term Extension", 28 Berkeley Technology Law Journal (2013) 1-43; Jacob Flynn and Rebecca Giblin and Francois Petitjean, "What Happens When Books Enter the Public Domain? Testing Copyright's Underuse Hypothesis Across Australia, New Zealand, the United States and Canada" (June 10, 2019). University of New South Wales Law Journal, Vol. 42, No. 4, 2019, U of Melbourne Legal Studies Research Paper No. 878, Available at SSRN: <https://ssrn.com/abstract=3401684>.

⁸ *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336, 2002 SCC 34 [30].

remains substantial market demand, mean that the holders of the copyright in those works could extract economic rents from their exploitation for a longer period; or, it could mean that the holders of copyright in some existing works, especially holders of large portfolios of works, could strategically manage their portfolios by suppressing the availability of older works that could compete with newer ones. In either case, the value of copyright holding may increase, but this is no more a justification for longer copyright terms than is the claim that highly restrictive zoning laws, which prevent an increase of supply of housing, are justified because the resulting high prices of homes increases the value of home owning by existing home-owners. And it is no more compelling an argument than the argument of a monopolist who lobbies the government to maintain its monopoly position and outlaw competition on the grounds that doing so would increase the value of its shareholders' stock.

The argument that longer terms could encourage investment in the creation of content also does not survive close scrutiny. The famous amicus brief written by seventeen leading economists from across the ideological spectrum and submitted to the US Supreme Court in the famous *Eldred v Ashcroft* case, sums up the economic consensus on the futility of the argument. As they explained (with respect to the creation of new works):

[Extending the term from life+50 to life+70] for new works provides some increase in anticipated compensation for an author. Because the additional compensation occurs many decades in the future, its present value is small, very likely an improvement of less than 1% compared to the [life+50] term. This compensation offers at most a very small additional incentive for an economically minded author of a new work.⁹

With respect to existing works,

term extension ... makes no significant contribution to an author's economic incentive to create, since in this case the additional compensation was granted after the relevant investment had already been made.¹⁰

While the benefit of term extension, in terms of greater incentive to create, ranges from insignificant to none, the harms resulting from such terms are substantial. They include the deadweight loss resulting from an extended period in which a copyright owner could charge a supra-competitive price for their work and an increase in the cost of follow-on creativity, resulting from a smaller public domain upon which creators could freely draw.¹¹

Similarly unconvincing is the argument that further harmonizing Canada's general term of copyright protection with that of our major trading partners will enable Canadian rights holders to compete internationally on a levelled playing field. In fact, this argument is misleading. The US, Canada's largest trading partner and the major export destination for Canadian content, does not follow the "rule of the shortest term" and grants all creators the same term of copyright of life+70 (for most works). Therefore, harmonizing the term with

⁹ Brief of George A. Akerlof et al. as Amici Curiae In Support Of Petitioners, in *Eldred v. Ashcroft* 537 U.S. 186 (2003), at p. 2. Available at:

<https://cyber.harvard.edu/openlaw/eldredvashcroft/supct/amici/economists.pdf>.

¹⁰ *Id.*

¹¹ *Id.*

that of the US will not gain Canadian creators anything beyond what they already get in the US. At the same time, extending the term will result in greater expenditure by Canadian users of domestic and foreign content. Since Canada is a net importer of creative content, in the Canada-US context, an extended term provides a net loss for Canada overall. As far as export countries who follow the “rule of the shortest term” and have a life+70 term, extending the term in Canada would seem to allow Canadian creators to enjoy an extended term in those countries as well. However, to the extent that extending the term would require Canadians to pay more for content from those countries, so long as Canada remains a net importer of creative content, the net benefit to Canada from an extended term will be negative.

Moreover, even in countries who follow the “rule of the shorter term”, such as most EU countries, Canadian creators can already enjoy an extended term in those countries if they so wish. They can, for example, first publish their work in a country with a longer term (e.g., the US), and wait thirty days before they also publish it in Canada. In such a case, the country of origin of the work would be considered the US, and the work should enjoy a term of life+70 in any EU country. And in the case of the UK, under UK law, if a Canadian creator publishes the work simultaneously in the UK (i.e., within thirty days) and Canada, the work will be considered a work of UK origin and entitled to a protection term of life+70 years in the UK.¹²

Furthermore, copyright duration will remain not-harmonized even if Canada extends the term, because many countries provide different terms for different types of works. In the UK, for example, computer programs are protected for a term of 50 years from the making of the work rather than under the life plus model, as is currently the case in Canada.¹³

It is regrettable that the Consultation Paper simply asserts overbroad claims about the supposed benefits of harmonization. The lack of any acknowledgment of the complexity of the matter, and the willingness to simply repeat general and misleading claims about supposed benefits, provides further indication of the inadequacy of this consultation.

C. The Relevance and Primacy of Canada’s Constitution

Article 20.5 of CUSMA notes that “Each Party shall be free to determine the appropriate method of implementing the provisions of this Chapter within its own legal system and practice.” One of the foundational elements of Canada’s legal system is the Canadian *Charter of Rights and Freedoms (Charter)*. The *Charter* is part of the Constitution of Canada. As noted in s. 52(1) of the *Constitution Act, 1982*, “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.” The *Charter*, being part of the supreme law of Canada, limits the range of options available to the Government in seeking to implement copyright term extension. Whatever method is chosen must be consistent with the *Charter*. The supremacy of the Constitution implies that, in principle, if there is no way to implement a CUSMA obligation in a way that is consistent with the *Charter*, then Parliament will be constitutionally incapable of implementing that obligation.

¹² UK *Copyright, Designs and Patents Act* 1988, ss 12(6) & 15A(4)(a).

¹³ *Id.*, at s 12(7).

In particular, the Government must be alert to the implications of copyright term extension in respect of the fundamental right of free expression. A court could conclude that adding an additional 20 years of copyright protection prima facie infringes freedom of expression as protected under s 2(b) of the *Charter*. Ariel Katz and Liran Kandinov have written that: “Adding 20 more years of exclusivity will restrict both our right to convey meaning through our own expression, as well as our right to obtain information and use the expression of others. The Canadian Charter of Rights and Freedoms protects both, and thus places on the government the burden to justify the limitations.”¹⁴ Should a court conclude that the amendment prima facie infringes the *Charter* right to freedom of expression (either by limiting the ability to impart or to receive expression), the burden would then shift to the Government to justify the infringement under s. 1 of the *Constitution Act, 1982*. In order to do so, the Government would have to show that the amendment advances “a pressing and substantial goal” while satisfying the proportionality test (that is to say that “it is rationally connected to the goal, limits the right as little as reasonably necessary, and is proportionate in its effects”, including weighing “the salutary and deleterious effects of the law.”¹⁵

This suggests that, prior to deciding on any one approach, the Government should engage in an appropriate and fulsome consultation, complete with careful consideration of all available options for mitigating the costs of extending the duration of copyright. We note with great concern that during a stakeholders' conference call on February 25, the Departments, in response to a question, indicated that the Government had not conducted any assessment of the costs and impacts of extending copyright terms, the suggested benefits, or the costs and benefits of any of the measures suggested in the Consultation Paper. The explanation given was that no assessment of the costs and benefits of extending the term of copyright was necessary because Canada had already committed to extending the term, which renders the question of whether Canada *should* implement this obligation moot. To the extent that this explanation implies that the Departments believe that once the Government has signed and ratified a treaty it is relieved from the need to consider whether implementing a treaty obligation is consistent with the Constitutional guarantees of fundamental rights and freedoms, and Canada's existing obligations to protect freedom of expression under international human rights instruments, such a view may represent a serious hurdle should the Constitutional validity of the implementation measures be challenged.

While, superficially, complying with a treaty obligation (and avoiding the consequences of non-compliance) might seem like a “pressing and substantial goal,” it is doubtful that such a goal could justify enacting a law that would not otherwise survive constitutional scrutiny. If that were possible, then the “Government...need only agree with a foreign nation to enact [] legislation [and] Parliament would be forthwith clothed with authority” to enact legislation that it would otherwise be constitutionally incapable of enacting.¹⁶ Moreover, since “the

¹⁴ Ariel Katz & Liran Kandinov, “TPP Trades Away Our Constitutional Rights”, The Toronto Star (28 Oct 2015), available at: <https://www.thestar.com/opinion/commentary/2015/10/28/tpp-trades-away-our-constitutional-rights.html>.

¹⁵ *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, paras 47 & 103.

¹⁶ *AG Canada v AG Ontario (Labour Conventions)*, [1937] AC 326 (PC). While Parliament's legislative incapacity in that case was with respect to division of legislative power between Canada and the Provinces, it stands to

government can almost always claim that its subjective purpose was to address some real or purported social need, not to restrict expression,...the government's purpose must be assessed from the standpoint of the guarantee in question."¹⁷ Accordingly, the relevant question is what purpose does the government seek to achieve by limiting free expression. "To comply with CUSMA" is not an answer responsive to this question.

D. A Broader Sense of Canada's International Commitments

Even if Canada's treaty obligations were paramount to the *Charter*, in deciding how to implement the CUSMA term extension, the Government should have a view to Canada's international commitments not only under international trade agreements but also under international human rights treaties, which are as binding as CUSMA. These include article 19 of the *International Covenant on Civil and Political Rights* (ICCPR); and article 15 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

Article 19 of the ICCPR provides that:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 15 of the ICESCR provides that:

1. The States Parties to the present Covenant recognize the right of everyone:
 - (a) To take part in cultural life;
 - (b) To enjoy the benefits of scientific progress and its applications; and
 - (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

reason that the same principle applies to legislation that Parliament could not enact because it contradicts the *Charter*.

¹⁷ *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 973.

While Article 15(1)(c) is sometimes thought to require intellectual property rights to protect the moral and material interests of an author, nothing in the language demands that the “benefit” be conferred through such rights of exclusion (indeed, in other UN human rights instruments such as the Nagoya Protocol, we see inclusive models of access and benefit sharing, e.g.). In context, Article 15 may be better conceived of as right that recognizes the liberty and expressive freedoms of authors and others and “confers on everyone...a claim...to be able to *participate* in contributing to the information and creative commons as a personal right rather than a *proprietary* claim to the products of that creative contribution once made[.]”¹⁸ While “vesting an author, for a limited period of time, with the exclusive right to exploit his scientific, literary or artistic production” can be one way to comply with Article 15(1)(c), it is clear that it “need not extend over the entire lifespan of an author”,¹⁹ let alone for an extended period beyond the life of the author.

Articles 19 and 27 of the 1948 *UN Declaration of Human Rights*, moreover, similarly endorse the fundamental rights of freedom of expression and cultural participation, respectively, as well as the protection of moral and material interests of authors in cultural and scientific production. Taken together, it is clear that Canada’s international obligations--like its Constitution--require an appropriate and careful balancing of freedom of expression with the restrictions upon this freedom that are necessary for the protection of authors’ rights. A fulsome consultation is necessary for the identification of those options that are consistent with both our obligations under international intellectual property treaties and our obligations under international human rights treaties. Both sets of obligations are relevant, and both must be honoured.

E. *Evaluating Copyright Term Extension from a Canadian Perspective*

It may be objected, at this point, that the protection of copyright for life plus seventy years is now common amongst our major human rights-respecting trading partners and that this, in itself, suggests there is no conflict with internationally recognized human rights including the right to freedom of expression. We caution against leaping to such a conclusion.

First, Canada’s concern is with its own Constitution, which establishes the necessary conditions for statutorily limiting freedom of expression. Different constitutions demand different approaches to the necessary balancing of rights and their limits. (Indeed, under Article 36 of the *Berne Convention*, a country party to the Convention “undertakes to adopt, *in accordance with its constitution*, the measures necessary to ensure the application of this

¹⁸ Bita Amani, *State Agency and the Patenting of Life in International Law: Merchants and Missionaries in a Global Society*, (Aldershot: Ashgate Publishing Company, 2009), pp 195-201, at 197. The United States has not ratified the ICESCR and so does not share the obligations pursuant to it with Canada. US copyright law does not have the moral rights protections that Canada has, which subsist for the same term as copyright.

¹⁹ UN Economic and Social Council, General Comment No. 17 (2005)

The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant), E/C.12/GC/17, para 16. See also N Economic and Social Council, General comment No. 25 (2020) on science and economic, social and cultural rights (article 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights).

Convention” (emphasis added).) In Canada, if the implementation of Art. 20.62 of CUSMA (extending protection beyond the *Berne* term of life plus fifty years) is to survive constitutional scrutiny, it must meet the well-established demands of section 1 of the *Charter*.

Second, the essential tension between copyright and free expression is widely acknowledged and frankly undeniable: copyright is liberty-intruding and places limits on expressive freedom in relation to protected works. It is “a monopoly restraining the public from doing that which, apart from the monopoly, it would be perfectly lawful for them to do.”²⁰ It does so in order to encourage the creation and dissemination of original works of the arts and intellect and thereby foster a vibrant public domain.²¹ Copyright laws may therefore be consistent with the values of free expression—but *only if they do not limit expression more than is reasonably necessary to achieve their (rationally connected) objectives*.²² In the United States copyright has been hailed as an “engine of free expression.”²³ The U.S. Supreme Court has held, in a case examining the constitutionality of copyright term extension, that “copyright’s limited monopolies are compatible with free speech principles.”²⁴ This conclusion, it should be noted, was based on certain historical arguments and idiosyncratic features of the US Constitutions that are irrelevant to the interpretation of the Canadian *Charter*.

Moreover, the “built-in First Amendment accommodations” within the U.S. copyright system have been essential to these rulings. Notably, these First Amendment safeguards include the US “fair use” defence and the “considerable latitude it affords.”²⁵ Canada’s fair dealing doctrine, with its limited enumerated purposes, does not afford the same latitude. This underscores that the necessary balance of owner rights and user rights requires a jurisdictionally specific assessment that contemplates the full measure of the law, including limits on protectable subject matter and available speech-protecting mechanisms internal to copyright law. It further confirms, of course, that the constitutionality of copyright term extension depends on ensuring appropriate limits to copyright owner rights.

Third, the constitutionality of copyright term extension in Canada should be assessed with a view to *the recognized objectives of Canada’s copyright system*. The Supreme Court of Canada

²⁰ *Hanfstaengl v. Empire Palace* [1894] 3 Ch. 109 (CA) 128 (Eng.), *aff’d*, *Franz Hanfstaengl v. H. R. Baines & Co.* (1895) AC 20 (HL).

²¹ *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 [23].

²² David Fewer, “Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada” (1997) 55 U.T. Fac. L. Rev. 175; Jane Bailey, “Deflating the Michelin Man Michelin: Protecting Users’ Rights in the Canadian Copyright Reform Process (2005). Jane Bailey, “Deflating the Michelin Man: Protecting Users’ Rights in the Canadian Copyright Reform Process”, in Michael Geist (ed) *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law Book, 2005); Carys J Craig, “Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright Law” (2006) 56 *University of Toronto Law Journal* 75-114; Bitu Amani, “Copyright and Freedom of Expression: Fair Dealing Between Work and Play” in Rosemary Coombe et. al., (eds.), *Dynamic Fair Dealing: Creating Canadian Culture Online* (Toronto: University of Toronto Press, 2014) 43-55; Graham J. Reynolds, “Reconsidering Copyright’s Constitutionality.” *Osgoode Hall Law Journal* 53.3 (2016): 898-947.

²³ *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) at 588.

²⁴ *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

²⁵ *Id* at 220.

has opined that the proper balance between competing policy objectives in Canada's copyright law "lies not only in recognizing the creator's rights but in giving due weight to their limited nature." Granting "excessive control" to copyright holders—which surely includes by extending such control for an excessive period of time—"may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to property utilization."²⁶ Extending copyright beyond its current term risks upsetting the essential balance between protection and access within the copyright scheme;²⁷ it also casts doubt over the constitutionality of any implementing legislation, which may not be rationally connected to the objectives of copyright, and which may impair the right of freedom of expression more than is necessary to achieve them.

In short, it is essential that the Government explores the least freedom-intrusive means by which to implement term extension if the implementing legislation is to survive constitutional scrutiny. As we argue next, this approach is also just good copyright policy.

II. Mitigating the Impact of Term Extension on Free Expression and the Public Domain

Extending the duration of copyright will not only impact freedom of expression, as explained above, but it will unavoidably deplete the public domain: works that would normally be free for reuse fifty years after the death of the author are kept from the public domain for an extra period of twenty years. There will effectively be a twenty-year freeze on works entering the Canadian public domain. This measure will reduce society's access to culture and knowledge. As well, it will have a chilling effect on creativity and innovation by putting obstacles on the reuse of existing works.

The public domain is not properly conceived of in the negative—simply as what is left unowned and therefore always available and vulnerable to encroachment by ever-expanding IP protections.²⁸ Rather, the public domain is a shared and inclusive commons that all are entitled to access and enjoy.²⁹ As the Supreme Court has emphasized, the public domain is a

²⁶ *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336, 2002 SCC 34 [32].

²⁷ *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326 [11].

²⁸ See Carys J. Craig, *The Canadian Public Domain: What, Where, and to What End?* (January 1, 2010). *Canadian Journal of Law & Technology*, Vol. 7, p. 221, 2010, Available at SSRN: <https://ssrn.com/abstract=1567711>; Teresa Scassa, "Table Scraps or a Full Course Meal? The Public Domain in Canadian Copyright Law", in *Intellectual Property at the Edge: New Approaches to IP in a Transsystemic World*, Proceedings of the Meredith Lectures, Editions Yvon Blais, 2007, pp. 347-376.

²⁹ See Severine Dusollier, *The commons as a reverse intellectual property - from exclusivity to inclusivity* in J. Griffiths & H. Howe, *Concepts of Property in Intellectual Property Law* (Cambridge Intellectual Property and Information Law, pp. 258-281). See generally, James Boyle, *The Public Domain: Enclosing the Commons of the Mind*, available at: <https://thepublicdomain.org/thepublicdomain1.pdf>; David L. Lange, *Recognizing the Public Domain*, 44 *Law and Contemporary Problems* 147-178 (1981). available at: https://scholarship.law.duke.edu/faculty_scholarship/824; Jessica D. Litman, "The Public Domain." *Emory L. J.* 39 (1990): 965-102, available at: <https://repository.law.umich.edu/articles/222/>.

vital component of the copyright system essential to its balance, and available to users as a matter of right. To extend copyright, then, is to take from the public domain, enclosing the cultural commons and limiting users' rights in relation to protected works. This inevitably upsets the copyright balance and, in the absence of convincing countervailing benefits, only harms the public interests at stake. Consequently, the implementation of Canada's international obligations under the CUSMA must be accompanied by appropriate ancillary measures to ensure that the term extension does not affect the public domain beyond what is strictly necessary.

There are, to begin, some obvious and easy ways to reduce the impact of term extension on the public domain that can present no cause for controversy in respect of Canada's international obligations. As discussed in further detail below, these include: 1) making sure that there is no ambiguity regarding the calculation of the term of protection; 2) not extending the duration of protection to works prepared or published by or under the direction or control of Her Majesty; 3) explicitly excluding certain subject matter from copyright and/or from the term extension; 4) repealing or reforming statutory damages; and 5) broadening the right of users including in respect of orphan, out-of-commerce, and under-exploited works. (We note that the Accompanying Measures Options presented in the Consultation Paper touch only upon a limited version of number 5).

1) ***Avoiding Ambiguity***: In most cases, calculating the duration of protection of a work created by a single author is straightforward. The calculation becomes more complex, however, as the number of co-authors grows. Most problematic is the determination of the term of protection of dramatic cinematographic works and collective works, since the Canadian Copyright Act does not specify who is to be considered the author of such works. (It should be recalled that, in contrast to the US approach, copyright term is tied to the death of the longest living author even for works made in the course of employment.) Implementing a rule whereby the term of protection is calculated solely in relation to the longest living author opens the door to serious legal uncertainty if the identity of the authors is not pre-established in the Act. Moreover, the term of protection of these works can potentially be extremely long if many individuals have made an original contribution.

In the United States by contrast, the term of protection of cinematographic works and collective works is much shorter, as these works are generally 'made for hire' and their term is calculated from the date of publication. In Europe, where the rule of the longest living author does apply, Article 2(2) of [*Directive 93/98/EEC harmonizing the term of protection*](#) clarified that term of protection of cinematographic or audiovisual works expires 70 years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work. Canada would do well to bring appropriate modifications to its Copyright Act to avoid granting longer protection than its commercial partners on its cinematographic works and collective works, to the detriment of the public domain.

2) ***Carving Out Crown Copyright***: Contrary to section 105(1) of the United States Copyright Act, according to which "Copyright protection under this title is not available for any work of

the United States Government”, the Canadian Copyright Act vests copyright ownership on a work prepared or published by or under the direction or control of Her Majesty, to the Crown. This right is a historical relic from the seventeenth century of the Crown’s prerogative power over publishing for use as a censorship tool to suppress “treason” and “sedition” (*Keatley Surveying Ltd. v. Teranet Inc.*, 2019 SCC 43 [49]). The Court warned against an over-expansive interpretation of section 12 of the Copyright Act, as it might encroach upon the public domain:

There is also a danger of Crown copyright undermining the very purpose it was meant to serve if interpreted too expansively. Sweeping classes of works into the scope of Crown copyright, (...), risks impeding the public interest in accessing these works and could compromise the existence of a robust public domain (see e.g. Barry Torno, *Crown Copyright in Canada: A Legacy of Confusion* (1981), at Summary). Put differently, the Crown’s public interest in ensuring the accuracy and integrity of government documents cannot lead to such an expansive Crown copyright regime that the public interest in accessing information is harmed. [54]

The Court recommended giving a narrow interpretation to this provision to preserve the balance between the rights of creators of works and their users. It would go against the Supreme Court’s view on the importance of maintaining a balance of interests to extend the term of protection on works classified as falling under the Crown copyright regime. Moreover, in the context of the CUSMA, it would be highly paradoxical to impose even greater restrictions on the use of works prepared or published by our own Canadian Government, while works created by the United States Federal Government remain unprotected. Clearly, CUSMA imposes no such obligation, and there is no reasonable justification for doing so.

3) *Explicitly Excluding Certain Subject Matter from Protection/Extension:* Canada should expressly exclude certain subject matter or public domain elements of copyright protected works from copyright protection. While such exclusions are already well-established in the jurisprudence, it would be prudent to adopt language equivalent to § 102(b) of the US Copyright Act, for example, which provides: “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” Moreover, current debates suggest that there may be a need to expressly exclude from protection: facts and data (apart from their original selection and arrangement); computer- or AI-generated works; and DNA, whether as a storage medium or a coding program. In addition, Canada should consider whether it is possible to exclude particular categories of works from the term extension: computer software, for example, is primarily functional but nonetheless categorically protected by copyright for a term that is already irrationally long in relation to its commercial and practical utility.³⁰

³⁰ See David Lametti, *Coming to Terms with Copyright*, in *The Public Interest: The Future Of Canadian Copyright Law*, pp. 480-516, at M. Geist, ed., Toronto, Irwin Law, 2005
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1758903.

4) **Repealing or Reforming Statutory Damages:** Statutory damages are a rarity among the copyright laws of various nations. According to a survey from 2013, only twenty-four out of the 179 World Intellectual Property Organization (WIPO) member states have had statutory damages for copyright infringement. Among the advanced economies only Canada, Israel, Republic of Korea, Singapore, and the United States have statutory damages, while most do not.³¹ The rarity of statutory damages is not surprising considering that they entitle a plaintiff to ask for statutory damages in lieu of actual damages or an accounting of defendant's profits, at any point up to the entry of final judgment. They present an extraordinary remedy because they can allow successful plaintiffs to recover substantial monetary damages without any proof that the plaintiff suffered any actual harm from the infringement, or that the defendant profited from the infringement.³²

Various 19th century UK and Canadian copyright statutes contained provisions allowing copyright owners to ask the court to impose a monetary penalty on infringers and recover those penalties without proving losses. The availability of such penalties gave rise to notorious abuses, including by copyright "trolls", the existence of which prompted their disappearance from the UK 1911 Copyright Act and the Canadian 1921 Act. In 1997, Parliament reintroduced statutory damages, the availability of which has not only resulted in new forms of copyright trolling but more broadly deepened the chilling effect of potential liability for copyright infringement on many legitimate uses.

CUSMA does not require Canada to have statutory damages. Rather, Article 20.81 requires Canada to "establish or maintain a system that provides for one or more of the following: (a) pre-established damages, which shall be available on the election of the right holder; or (b) additional damages [such as exemplary or punitive damages]." Since punitive damages are available in all Provinces,³³ Canada can comply with CUSMA even if it repeals statutory damages and reverts the law to its pre-1997 status. Doing so will help reduce the chilling effect of potential liability and therefore minimize the negative impact of copyright law in general, and extended term in particular, on freedom of expression.

Even if Canada chooses to maintain statutory damages, conditioning their availability on timely registration (or, where applicable, preregistration), as is required in the US, is a simple common-sense measure. Since the Berne Convention does not require statutory damages, conditioning their availability on registration does not run afoul the prohibition on formalities under Article 5(2) of Berne.³⁴ Another term-extension mitigating measure could be limiting the availability of statutory damages to a limited number of years following the creation or first publication of a work, which is typically the period where the harm from infringement may be more substantial. Clearly, the justification for statutory damages in

³¹ Pamela Samuelson, Phil Hill & Tara Wheatland, "Statutory Damages: A Rarity in Copyright Laws Internationally, But For How Long?" (2013) 60 J Copyright Soc'y USA 529 at 534-35.

³² *Id.* at 53.

³³ *Cinar Corporation v. Robinson*, 2013 SCC 73 [CanLII], [2013] 3 SCR 1168, <<https://canlii.ca/t/g2fgx>>.

³⁴ Jane C Ginsburg & John M Kernochan, "One Hundred and Two Years Later: The U.S. Joins the Berne Convention" (1988) 13:1 Columbia-VLA J Law Arts 1-38 at 12-15.

future years, let alone many decades after the creation or first publication of the work, is much weaker.³⁵

5) Broadening User Rights: An extension of the term of protection should be accompanied by a corresponding expansion of users' rights. We have already suggested that, consistent with the US *Eldred* case, a general and flexible fair use doctrine may be an essential internal safeguard to ensure the consistency of free expression and extended copyright protection. We note that this was also suggested by the INDU Committee, which expressly identified the recommended expansion of fair dealing as one available measure by which "to mitigate the possible adverse impacts of term extension" (INDU Report at 35). The duration of copyright already produces well documented obstacles to the proper utilization of works. As time passes, authors and owners disappear and permissions become impossible to secure, while markets dissipate, and distribution slows to a halt. The availability and use of orphan, out-of-commerce and under-exploited works is unjustifiably obstructed. Extending owners' rights in such cases simply produces impediments to access and use without corresponding benefits for creators, contrary to the objectives of the copyright system and the values of free expression. Such harms cannot be adequately counterbalanced by limited exceptions; it is, however, essential that any extension of copyright term is accompanied by an expansion of limits and exceptions to copyright protection as a means to mitigate harm to the extent possible.

Obviously, it is vital that cultural heritage institutions have the right and the ability to use protected works in furtherance of their public interest mission. While the Copyright Act contains a number of exceptions directed at cultural heritage institutions, these are not sufficient to mitigate the negative impacts of a term extension on their patrons' access to culture and knowledge. It may be tempting to look over the fence for models to follow when dealing with older collections. Some foreign examples are worth considering, while others should be avoided. For instance, the European Union has sought a workable balance between the interests of the various stakeholders as it pertains to the use of orphan works and out-of-commerce works. The adoption of [Directive 2012/28/EU on certain permitted uses of orphan works](#) did not yield the intended effects: the diligent search requirement is so complex and cumbersome that cultural heritage institutions prefer not to rely on it when searching for the unlocatable authors of the millions of works in their collection. The provisions on out-of-commerce works in the [Directive 2019/790/EU on the Digital Single Market](#), which provide for extended collective licensing of rights on out-of-commerce works backed by an exception where collective licensing is impracticable, garnered greater support among European stakeholders when the Directive was adopted in 2019. It is too early to assess the impact of this solution, however, and even if some European stakeholders deem it to be a relative success, this should not be taken to mean that it is a satisfactory solution readily transplantable to the Canadian context.

Options 2, 3, 4, and 5 in the Consultation paper are all limited at the outset to "non-profit LAMS" and therefore fail *by design* to achieve any broader rebalancing of owner and user

³⁵ Ariel Katz, "Substitution and Schumpeterian Effects Over the Life Cycle of Copyrighted Works" (2009) 49:2 *Jurimetrics* 113-153.

rights to minimize harm to the public domain. Only Option 1 contemplates uses in the public interest beyond the context of non-profit LAMS but, with respect to an orphan works regime for out-of-commerce works, promptly proposes that “the ability to apply for a licence to use out-of-commerce works could be limited to non-profit LAMs.” While LAMs do indeed “play a critical role in society in terms of ensuring access to knowledge and preserving our cultural heritage,” not all operate on a non-profit basis. What is more, the public’s interest in the accessibility, availability, use, and enjoyment of cultural works is not reducible to the limited privileges bestowed upon non-profit LAMs, and nor should such institutions be tasked with mediating the public’s access to all such materials. We must not regard expressive works as akin to artefacts in a museum and be satisfied with exceptions that are limited to uses by or at cultural institutions, especially given the opportunities for enjoying works in various ways that current and emerging technologies provide. It should be obvious, particularly in today’s technological environment, that channelling all “accompanying measures” through intermediary non-profit cultural institutions is unnecessary and falls well short of the mark.

The Consultation Paper Options are also unsatisfactory insofar as they propose extending existing systems and models that are already, demonstrably, not working well. The existing orphan works regime is widely recognized to be entirely inadequate to its task,³⁶ and there is little comfort to be gained in the idea of extending it. Apparently, the existing regime affords an average of approximately twelve licences a year. Almost inevitably, the costs of such a mechanism, no matter how streamlined the procedure and regardless of the rate of license fees, would be greater than the benefits it generates. It can be inferred that the existing orphan works regime functions more to quell objections than to alleviate actual harms or reduce chilling effects. There is no reason to believe that an expanded system would function differently or effectively mitigate the term extension. Rather, it would have to be substantially revisited. One preferable approach might be to follow the Israeli example,³⁷ which essentially establishes a default that permits free use of works whose owners are unlocatable unless or until the copyright owner emerges to negotiate a license. Only this kind of approach—one that shifts the benefit of the doubt to the user—could, for example, facilitate the kind of mass digitization efforts by LAMs that are so important to the preservation of Canada’s culture, knowledge, and the public domain.³⁸ The orphan works problem will be seriously exacerbated by the term extension, and the goal must be to facilitate the use of such works to the greatest extent possible—not to construct additional obstacles and disincentives to uses that unambiguously serve the public interest.

The Options that anticipate increased reliance on collective licensing are open to a similar critique. As recognized in the INDU Committee’s Review of the Copyright Act, Canada’s collective management schemes currently suffer from a “black box” problem, with little transparency around their repertoire, their licensing practices, and their distribution

³⁶ Jeremy de Beer and Mario Bouchard, “Canada’s ‘Orphan Works’ Regime: Unlocatable Owners and the Copyright Board” 10(2) Oxford University Commonwealth Law Journal, p 215, Winter 2010, Available at SSRN: <https://ssrn.com/abstract=1916840>; Ariel Katz, “The Orphans, The Market, and the Copyright Dogma: A Modest Solution to a Grand Problem” (2012) 27(3) Berkeley Technology Law Journal 1285, Available at <http://hdl.handle.net/1807/88397>.

³⁷ Copyright Act, 5768-2007, 2007 LSI 34 (2007), s 27A.

³⁸ Katz, *supra* note 36 (discussing “remedy tweaking”).

schemes. The idea of extending collective licensing to alleviate concerns around term extension cannot reasonably be entertained without attention being paid to accompanying measures that would ensure the transparency, accountability, and fair distribution scheme of collectives (as per INDU Recommendations 35 and 36). To the extent that the Government is tempted to look to ECL models in the EU, it should be noted that the EU has made significant efforts to improve the functioning and accountability of Collective Management Organisations, seeking to establish common governance, transparency, and financial management standards, and so forth. This is work that is long overdue in Canada, but which remains to be done.

Even if the existing problems with collective licensing could be resolved, adopting collective licensing solutions to orphan or out of commerce works could be objected to on more fundamental grounds: works become orphan or go out of commerce because the holders of the copyright in them do not expect to profit from their exploitation, or expect that any profit they might earn will be smaller relative to the cost of commercializing them. If copyright holders elect not to commercialize their works, then they suffer no harms when their works are used by others. In cases such as these, the optimal solution is to permit users to use them. Such a solution results in a net social benefit: it benefits the user and larger society without harming the copyright holder. By contrast, solutions involving collective licensing allow the collective to set a monopoly price, which not only results in sub-optimal utilization, but also confers on the copyright owner supra-competitive rents for the works they consider least valuable. In fact, the ability to earn supra-competitive rents from the less valuable works creates a perverse incentive: it encourages copyright holders to withdraw from commerce any work, except for a select number of blockbusters. Rather than solving the problem of out of commerce work, such a solution may worsen it.

III. Confronting the Economic, Social and Cultural Costs of CUSMA Compliance Head-on

None of the above measures significantly minimizes—never mind adequately counterbalances—the costs and harms imposed by an extended term. The options presented in the Consultation Paper are, by and large, band-aids for bad policy; they would eke out limited exceptions and add administrative complexities without substantially diminishing harms. Piecemeal approaches that establish onerous conditions on an exceptional basis, and/or demand proactive and cumbersome processes, are inevitably unable to counteract the chill imposed by lengthy terms and expansive rights of control. Even in combination, then, the suggested options are insufficient to limit the depletion of Canada’s public domain or to minimize the impairment of freedom of expression--as required by Canada’s Constitution.

A. A Registration Requirement for the Supplemental CUSMA Term

The only possible route that could significantly minimize the impact of copyright term extension is the registration requirement recommended by the INDU Committee, which has been inexplicably removed from consideration in the Consultation Paper. We urge the

Government to put this back on the table and to give this option the serious consideration that it deserves.

As noted in the Consultation Paper, the INDU Committee recommended that any enactment of the CUSMA extended term should ensure that “copyright in a work cannot be enforced beyond the current term unless the alleged infringement occurred after the registration of the work” (Recommendation 6). In other words, parties would be required to register their copyright in order to enforce it in respect of uses occurring after the author of the work has been dead for over 50 years. We note that this pragmatic approach was arrived at by the Committee following a lengthy and wide-ranging consultation process. It offers an elegant solution that is consistent with the objectives of term extension and Canada’s international obligations but also protective of the public domain to the extent possible.

Where works continue to hold economic value, the copyright owner has an economic incentive to exploit the work and is able to do so while enjoying the benefits that copyright protection affords; where, on the other hand, the economic value of the work is no longer worth the time or cost of securing registration, it remains free for all to use without fear of infringing the rights of an unknown owner. Copyright protects virtually every minimally original expression that is fixed, the vast majority of which are never commercially exploited at all. Amongst works that are commercially distributed, the vast majority are marketable commodities for a matter of a few years or decades at most. The fraction of all expressive works that will be registered for this supplemental twenty-year term is likely to be tiny³⁹— but it will represent the kinds of enduringly valuable works at which copyright extensions are aimed (and the copyright owners who hope to benefit from them). If these works and these owners represent the <1%, then registration ensures that term extension does not needlessly capture the other >99% in its nets.⁴⁰

As moral rights in Canadian law are more expansive and inclusive than in US law, and subsist for the same term as the copyright in a work, a registration requirement would also address concerns over their unnecessary extension or constraint on fair uses of a work. In short, a registration requirement is more likely to constitute minimal impairment of the constitutional right to freedom of expression and so is more likely to survive constitutional scrutiny under s. 1 of the *Charter*.

Just like patent maintenance fees, the payment of which encourage patent holders to maintain protection only to inventions that are valuable enough to maintain, the “added costs” that the Consultation Paper identifies as a cause of concern are in fact a feature, not a bug, of the recommended registration requirement: if these minimal costs are worth incurring, then we can infer that the work has sufficient value to incentivize its ongoing commercial distribution (thus alleviating the concern that the added term will cause the work to “disappear,” keeping it “locked up and out of the public eye.”)⁴¹ The result is to

³⁹ Christopher Jon Sprigman, “Reform(aliz)ing Copyright” (2004) 57 *Stanford Law Rev* 485.

⁴⁰ See Jennifer Jenkins On What Copyright Term Extension Could Mean for Canada, *LawBytes Podcast* (March 1, 2021), available at: <https://www.michaelgeist.ca/2021/03/law-bytes-podcast-episode-78/>.

⁴¹ Paul J Heald, “The Impact of Implementing a 25-Year Reversion/Termination Right in Canada”, *supra* note 7 at 10.

preserve the public domain as the default while permitting the additional twenty years of protection as a supplementary term for all who proactively seek to secure it. This way, Canada will avoid the incalculable costs of a two-decade blanket freeze on all works entering the public domain.

Another significant advantage of introducing a registration requirement for the last 20 years of protection would be to provide users and the public with reliable information pertaining to the identity of the author or the rights owner. This would in turn facilitate the licensing of these works, enabling their exploitation and reducing the occurrence of orphan works. Registration would also facilitate the calculation of the term of protection.⁴²

A registration requirement imposed on the last 20 years of protection would be consistent with the prohibition on formalities laid down in Article 5(2) of the Berne Convention, since the prohibition applies only with respect to the minimum requirements for protection provided under the Convention, *i.e.* for the duration of the life of the author plus fifty years post mortem auctoris. The prohibition does not apply to a prolongation of the protection conferred under the Convention. Simply put, there is no serious basis that we can see for the cursory conclusion that a registration requirement presents “serious questions” in light of Canada’s international obligations. Formalities would not be a precondition for rights acquisition but only for accessing additional protections during the supplementary (*Berne-plus*) term. Such formalities may not be “the norm internationally” (though the Consultation Paper notes that they do play a mitigating role in the US copyright system), but that has no bearing on whether they are an available option consistent with our international commitments in respect of the surplus term. We are confident that they are. We further note that Maria Pallante, president and chief executive officer of the Association of American Publishers and the Former US Register of Copyrights, arrived at the same conclusion when she wrote:

[P]erhaps the law could shift the burden of the last twenty years from the user to the copyright owner, so that at least in some instances, copyright owners would have to assert their continued interest in exploiting the work by registering with the Copyright Office in a timely manner... This should not, as far as I can see, present insurmountable problems under international law. The Berne Convention requires a minimum term of life plus fifty years, defers to member states as to the treatment of their own citizens, and provides the term of protection of the country of origin for the works of foreign nationals. See Berne Convention for the Protection of Literary and Artistic Works, ...art. 7. At the same time, copyright owners who choose to assert their continued interests would have the full benefit of the additional twenty years, subject to the requirement of additional registration.⁴³

⁴² See Stef van Gompel, “Copyright Formalities in the Internet Age: Filters of Protection or Facilitators of Licensing” 28 Berkeley Technology Law Journal 1425 (2013), available at SSRN: <https://ssrn.com/abstract=2420312>. Van Gompel suggests that a registration requirement may not be compatible with Berne, but we do not find his explanation persuasive.

⁴³ Maria Pallante, “The Next Great Copyright Act”, The Columbia Journal of Law & the Arts, Volume 36, No. 3 (2013) https://www.copyright.gov/docs/next_great_copyright_act.pdf p. 337. Jane Ginsburg has concluded that requiring registration/recordation of title prior to enforcement of a right (rather than as a condition of its subsistence) is not a prohibited ‘formality’ even during the required Berne term of life plus fifty: Jane C.

B. Enacting the Extended Term as a Standalone “CUSMA” Right

With the advantages of a registration requirement in mind, we strongly advise against enacting the term extension by replacing the word “fifty” with “seventy” in section 6 of the Copyright Act. Rather, the current section 6 could remain unaltered and a new section 6.3, for example, could make separate provisions for the “CUSMA Supplementary Term of Protection.” This would allow the clear specification of registration requirements for the supplementary term. It would also perform an important signalling function: it would signal Canada’s principled commitment to the preferred Berne minimum term of protection; it would also communicate the contingency or conditionality of the supplementary term as a concession made in the context of mutually beneficial CUSMA trade relations, thereby providing a point of continuing leverage in future trade negotiations.

C. Limiting the Extended Term to New Works Only (and Other Options for Mitigating Harms)

In 1976, when the US enacted its current *Copyright Act* and switched to a general “life plus” term of protection, it applied that basis of protection only to works created after January 1, 1978. Works created prior to that date continued to be protected on the basis of a fixed term. At the time, the US was not a member of the Berne Union, but even when it joined Berne, it maintained the fixed term for pre-1978 works. While there are doubts whether this distinction is consistent with the Berne Convention, the US has relied on Article 18(3), taking the view that that Article gives it full discretion to decide whether to maintain or abolish that distinction.

Presumably, this is the reason why Article 20.63 of CUSMA incorporates Article 18 of Berne. Since what’s good for the goose is good for the gander, there is no reason why an extended term under CUSMA should not be limited only to works created after the entry into force of the amendment. The benefits of such a limitation cannot be underestimated, as it would limit the negative impact of term extension to future works while relieving that burden on the public domain with respect to all existing works.

We close by noting that there are other possibilities for mitigating the costs or effects of the CUSMA term extension that have yet to be adequately considered. The possibility of limiting the supplementary term to the CUSMA parties, for example, while challenging in the context of national treatment requirements, may not be impossible given apparent limits on the Most Favoured Nation principle in respect of copyright term (see TRIPS, Article 4(b); Berne, Articles 7(8), 20). The possible benefits of a rights reversion scheme have also not been addressed, we note, either in the Consultation Paper or here, but are worth considering.⁴⁴ In

Ginsburg, *The US Experience with Copyright Formalities: A Love/Hate Relationship*, COLUMBIA JOURNAL OF LAW & THE ARTS, VOL. 33, P. 311, 2009-2010; COLUMBIA PUBLIC LAW RESEARCH PAPER NO. 10-225 (2010). Available at: https://scholarship.law.columbia.edu/faculty_scholarship/1624.

⁴⁴ See Heald, “The Impact of Implementing a 25-Year Reversion/Termination Right in Canada”, *supra* note 7; Rebecca Giblin and Joshua Yuvaraj, *Copyright Reversion and the Author's Interest Project* (September 6, 2020). authorsinterest.org, 2020, Available at SSRN: <https://ssrn.com/abstract=3687844>.

any event, the careful recalibration of Canada's copyright balance that is necessitated by term extension merits a more thorough investigation than the swift consultation period and superficial Consultation Paper have permitted.

The Government should engage in a thorough and genuine examination of all the available options for mitigating harm and minimizing restrictions on freedom of expression. Should it not do so, the resulting legislation will upset Canada's copyright balance, impose unnecessary costs on Canadians, deplete Canada's public domain, and be vulnerable to a constitutional challenge. Canada has a long and proud history of finding flexibilities in international copyright agreements and creating made-in-Canada policy solutions in order to ensure the protection of domestic interests even while embracing multilateralism.⁴⁵ There is no reason to foreclose such options here and now, in the face of such an obviously disadvantageous commitment to extend copyright's already lengthy term.

We thank you for taking the time to consider this joint submission. We would be happy to discuss any of the above.

Submitted Jointly By:

Carys Craig, Associate Professor, Osgoode Hall Law School, York University

Ariel Katz, Associate Professor, Innovation Chair-Electronic Commerce, University of Toronto, Faculty of Law

Lucie Guibault, Professor of Law and Associate Director, Law & Technology Institute, Schulich School of Law, Dalhousie University

Graham Reynolds, Associate Professor, Peter A. Allard School of Law, University of British Columbia

Bitá Amani, Associate Professor, Queen's University, Faculty of Law

Sara Bannerman, Associate Professor, Canada Research Chair in Communication Policy and Governance, Department of Communication Studies & Multimedia, McMaster University

Pascale Chapdelaine, Associate Professor, University of Windsor, Faculty of Law

Myra Tawfik, Professor of Law and EPI Centre Professor of Intellectual Property Commercialization and Strategy, University of Windsor, Faculty of Law

Samuel E. Trosow, Associate Professor University of Western Ontario Faculty of Law and Faculty of Information & Media Studies

⁴⁵ See Sara Bannerman, *The Struggle for Canadian Copyright: Imperialism to Internationalism, 1842-1971* (UBC Press, 2013); Myra Tawfik, "History in the Balance: Copyright and Access to Knowledge," in Michael Geist, ed., *From Radical Extremism to Balanced Copyright: Canadian Copyright and the Digital Agenda* (Irwin Law, 2010).