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Archival Community Response to “A Consultation on How to Implement an Extended General Term of Copyright Protection in Canada”

Presented by the Canadian Council of Archives
Endorsed by the Association of Canadian Archivists and
l'Association des archivistes du Québec



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EXECUTIVE SUMMARY

We have carefully considered and commented on all the options and other considerations presented in the consultation paper on the implementation of the extended general term of copyright protection in Canada resulting from the CUSMA treaty. In addition to these comments, we wish to present for consideration a new option that we believe responds more directly to the problems of unpublished orphan works in archival holdings.

Recommendations

Our recommendations include:

- An exception for unpublished orphan works in the permanent collections of non-profit Libraries, Archives, and Museums (LAMs), option 7, which directly addresses the issues for archival materials
- Amendments to establish the term of protection for unpublished Crown works at 50 years from the time of creation, more closely aligning term of protection for both published and unpublished Crown works in Canada
- A comprehensive study that will identify the ways Crown copyright is currently addressed by various levels of government, identify the many problematic issues, explore the solutions adopted by other countries, consult with stakeholders, and recommend appropriate measures that will transform this outdated provision into a measure that serves the public interest in the digital age
- Open discussion is required without delay to clarify Canada's international obligations and how they affect a registration process. .
- Engagement without delay in a respectful, and transparent collaboration with Canada's Indigenous Peoples, to amend the Copyright Act in ways that recognize a community-based approach to copyright protection of Indigenous knowledge (The Archives Community commits to actively participate in this process in all ways that are appropriate.)
- Repeal of Section 14(1), or amendment to permit the author to assign to LAMs the reversionary interests along with the copyrights. If the section is not repealed, the reversion interval should be adjusted from 25 years to 35 years in response to the new general term of protection as a result of CUSMA.
- Limited liability for LAMs in the use of orphan works
- Stand-alone copyright legislation that will be limited to the necessary amendments to implement CUSMA

INTRODUCTION

This submission is made on behalf of the Canadian Council of Archives in response to the Government of Canada's consultation paper on the implementation of the extended general term of copyright protection in Canada resulting from the CUSMA treaty. The submission has been fully endorsed by l'Association des archivistes du Québec, and the Association of Canadian Archivists.

This matter is of great importance to the archival community. We regret the extremely short time period which was available for the consultation and we hope there will be further opportunity to comment on and respond to legislative initiatives.

Background

The extension of the general term of copyright protection in Canada has many serious negative consequences for Libraries, Archives, and Museums (LAMs) and for our public service mission which is to acquire, preserve, and provide access to our documentary and cultural heritage for researchers and users in Canada and world-wide. Mitigation of the negative impact of these changes is essential. This term extension will have the following harmful consequences:

- It will restrict dissemination of an increasing number of works which cannot be made available despite their lack of commercial value.
- It will diminish the public domain in Canada.
- Archives hold a disproportionate number of orphan works. The number of orphan works will increase because longer terms make it more difficult to identify or locate heirs.
- Researchers expect online access to archival resources of enduring historical value, a situation exacerbated by the COVID19 pandemic, which closed archives and libraries around the world. LAMs will be unable to provide online access to the block of works whose copyright term is extended by 20 years, thereby exacerbating existing physical and financial barriers to access of important historical documentation.
- Archival holdings are acquired and preserved in LAMs because they have enduring historical value. When they cannot be used and re-used in new creations, there will be a loss of both economic and social benefits that would result from open, facilitated access to millions of archival orphan works that were not created for commercial exploitation and that have no commercial value.
- Any economic benefit for rightsholders of mostly unpublished archival holdings will be extremely limited, in contrast to the increased burden on non-profit LAMS as they attempt to clear rights for orphan works with limited or nonexistent commercial value.

It is crucial that mitigation measures be implemented to counter the harm of term extension imposed by CUSMA to the public service mission of non-profit LAMs.

What is Special About Archives?

Archives are the materials created or received by a person, family or organization in the conduct of their affairs. They are preserved because of the enduring value of the information they contain or as evidence of the functions and responsibilities of their creator. The [Universal Declaration on Archives](#) clearly expresses the public interest role that archives fulfill:

“Archives are a unique and irreplaceable heritage passed from one generation to another. ... They are authoritative sources of information underpinning accountable and transparent administrative actions. They play an essential role in the development of societies by safeguarding and contributing to individual and community memory. Open access to archives enriches our knowledge of human society, promotes democracy, protects citizens’ rights and enhances the quality of life.”¹

It is useful to note that archives and archivists serve both the creator and the user stakeholder communities. Creators are our donors and we have both legal and ethical obligations to safeguard their materials and to uphold their intellectual property rights in all of our activities. We also serve the user community by acquiring, preserving, and making accessible, the documentary heritage of Canada.

The nature of archival material presents particular challenges from the perspective of copyright. The combination of vast numbers of works, the fact that most were not created for commercial purposes, the high proportion of orphan works, and the absence of licensing models means that solutions are not obvious. Archivists work with paper, film, audio, and digital records. Most archival materials are the accumulated records of governments, companies, charities, families and individuals. They consist of works like letters, diaries, emails, financial statements, minutes of meetings, reports, photographs, audio recordings, and home movies. Each letter, photo or report is a distinct work protected by copyright. Their extent is vast – it is not an exaggeration to say that Canada’s archives hold billions of works. This has implications for any diligent search and record keeping requirements.

While archival holdings include some published materials, they were not (for the most part) created for commercial purposes or for dissemination to the public, and thus are largely unpublished. The unpublished nature of the great majority of archival holdings has several consequences. Few have any commercial value; thus, rightsholders are unlikely to be interested

¹ International Council on Archives, *Universal Declaration on Archives* (Paris, 2011), <https://www.ica.org/en/universal-declaration-archives>

in monetizing this intellectual property; in fact, many are unaware that they are copyright owners.

Furthermore, archival holdings contain a high proportion of orphan works,² that is, works for which the copyright owners cannot be identified or located. Copyright owners of these materials have little or no vested interest in being readily traceable to grant permission for use or to derive income from their creations. For example, the papers of a cabinet minister may contain thousands of letters and emails from citizens, bureaucrats, and other officials. An archive wishing to digitize these records and make them available online, would have to undertake a labor-intensive and costly (also possibly fruitless) process of contacting thousands of rightsholders.

Moreover, for archival material, there are no effective licensing models. Given the minimal financial value of most archival materials and the difficulty in identifying and locating rightsholders, collective societies are not viable options.

Archival material serves as the raw material for countless new works in all formats. In order to achieve a satisfactory public policy resolution, any attempt to mitigate the harmful effects of term extension must consider the particular characteristics of archival material.

In this consultation response, our remarks are largely limited to matters relating to unpublished materials, which comprise the vast majority of archival holdings. We leave it to other stakeholders to respond in detail to issues related to published materials, which comprise only a small portion of archival holdings.

² While there are no studies of the extent of orphan works in Canadian archives, studies in other countries have found that archives hold a disproportionate amount of Orphan Works. There is no reason to believe that the Canadian situation is any different. See Rebecca Giblin, "Reimagining copyright's duration," in Rebecca Giblin & Kim Weatherall, eds. *What If We Could Reimagine Copyright?* (Acton, Australia, 2017), pp. 189-90.

OPTIONS PRESENTED IN THE CONSULTATION PAPER

Option 1

Expand Canada's current orphan works licensing regime /extend regime to out-of-commerce works

Response

The current regime consists of applying to the Copyright Board for a limited licence for use of published works whose owners cannot be located i.e., orphan works. The Copyright Board has long experienced multiple ongoing serious problems and these problems remain, despite numerous attempts to address them. Adding requests for potentially thousands of unpublished works would completely overwhelm the Copyright Board system. In addition, there are numerous problems with the basic idea of a Board licence:

- The licence is restricted to in-Canada distribution and is not suitable for mass digitization projects of archival holdings for global online access.
- The licence is time-limited, but archival digitization projects for online access do not have time limits for access.
- Royalty determination is unclear for published works and is likely to be even more challenging for unpublished works where there are few, if any, norms. The Board has no experience or expertise in assigning value to unpublished materials.
- Payment for works without commercial value does not make sense.
- Payment to collective societies that do not represent the rightsholder and that will simply keep the money is nothing more than a tax on non-profit institutions that have an important public mission.

Recommendation

This option is unsuitable for archival materials in LAMs.

If this option is selected, a possible alternative would be to exclude unpublished Orphan Works preserved in the permanent holdings of a non-profit LAM from any collective licensing scheme.

Option 2

Collective licensing regime(s) to facilitate use of orphan works and/or out-of-commerce works

Response

Collective societies provide appropriate mechanisms for the exercise of copyright and related rights, in cases where the individual exercise by the rightsholders would be impossible or impractical.

Collective licensing does not work for archives. Very few of the copyright works in archives were created for commercial purposes. They are preserved to provide information and evidence about what was done and why. They are largely unpublished, and few have commercial value. Canadian LAMs contain billions of individual works whose rightsholders have no commercial interests to protect.

Imagine that you are seeking to contact all the individual authors, people and institutional rightsholders that corresponded with a government agency, a company, or an individual. How many will there be? Thousands. The time and effort required to locate and contact them is enormous; In fact, many of them may be unknown and/or unlocatable. How many are likely to join a copyright collective society? Few or none, since the letters, emails, minutes, and family photographs were not created for financial gain.

Given the very limited monetary value of orphan works, it is unrealistic to suggest that any collective society would be interested in licensing archival holdings. It is equally difficult to imagine what sort of tariff the Copyright Board might establish, given that the valuation of archival materials is well beyond the Board's experience and expertise. Board licensing of published works is very little used (an average of 11/year between 1990 and 2020), and it is unrealistic to expect the Board could deal with additional requests for potentially thousands of licences in a timely fashion.

Since so many of the unpublished archival works in LAMs are orphan works, payment to collective societies for use of these works is unlikely to go to the legitimate rightsholders since they are unknown or unlocatable. Licences are time-limited and available only for use in Canada, both of which limit their usefulness for online digital collections.

Recommendation

Collective licensing is not an acceptable option for archival holdings in LAMs.

If this option is selected, it is important to exclude unpublished Orphan Works preserved in the permanent holdings of a non-profit LAM from any collective licensing scheme.

Option 3

Permit the Use of orphan works and/or out-of-commerce works, subject to claims for equitable remuneration

Response

This issue is a major concern for archivists since archival holdings contain a vast number of orphan works. Although they form a significant part of our documentary heritage, orphan

works are often not selected for digitization and/or online access because of uncertainty over the legal protections that apply to their use. If the author is unknown, as is often the case, the work falls into an indeterminate black hole with no discernible end to the term of copyright. If the author is unlocatable, it is impossible to negotiate agreement for use of the work(s). A requirement for a diligent search can involve providing evidence of research for thousands of individual works that might be involved in a digitization project.³ For example, the Sir Arthur Currie Collection housed in the McGill Archives⁴ consists of 411 files – each of these files contains between 25 to 500 individually authored documents, none of which have been published and many of which are orphan works. Another digital collection which has significant public benefit is the Wilder Penfield Fonds⁵ in the McGill Archives. This is a heavily consulted collection and it consists of 44.7 meters of textual records much of which is correspondence, 11,797 photographs, 3885 illustrations and 2638 glass slides, many of which are uncredited. Experience in jurisdictions where requirements for a diligent search have been enacted to apply to unpublished materials found in archives, has resulted in rigid requirements that are designed to protect monetary interests, and that are not normally applicable to unpublished archival holdings.⁶ For materials held in archival institutions, which are by definition non-profit, mitigation could include changing the requirement to “reasonably diligent search”.

It is rare that a legitimate rightsholder would come forward with a claim for remuneration for unpublished archival holdings. Problems can arise establishing what is “fair remuneration”. Although there is scant documentation available for unpublished material, the experience of LAMs with establishing fees for use of published materials indicates that this can be problematic. For example, unlimited access to a library-purchased e-book usually costs anywhere from \$100 to \$500 whereas a licence to digitize an otherwise inaccessible book (not available for commercial use), for one class often costs thousands of dollars for use during a single term – this sum to be paid again for subsequent terms. In cases where no agreement on equitable remuneration can be reached, the already beleaguered Copyright Board does not have the expertise to establish equitable remuneration norms for the wide variety of unpublished materials that are included in archival holdings, very few of which are created for commercial exploitation, or have commercial value.

Recommendation

Orphan works is an important issue for archival holdings because of their vast numbers in LAM holdings. Within these constraints, this option could be viable if:

- For unpublished orphan works, there must be due consideration to the public benefit of increased access in relation to the minimal harm to rightsholders. There must be a

³ Jean Dryden, “The Role of Copyright in Selection for Digitization,” *The American Archivist*, 2014, Vol. 77, No. 1, p. 72.

⁴ <https://archivalcollections.library.mcgill.ca/index.php/sir-arthur-currie-collection>

⁵ <https://archivalcollections.library.mcgill.ca/index.php/wilder-penfield-fonds>

⁶ See, for example, the detailed process for licensing orphan works in the U.K. (www.gov.uk/guidance/copyright-orphan-works).

provision of immediate takedown, or agreement on equitable payment for future use, if a rightsholder makes a claim of infringement, but no statutory damages for past use. This will result in substantial public benefit by making these works accessible with negligible harm to rightsholders

- For unpublished archival holdings in LAMs, mitigation could include changing the requirement to “reasonably diligent search” for unpublished orphan works in a LAM.
- There is an option to simply remove the work(s) if a copyright holder comes forward and no agreement can be reached for future use.
- Since using the Copyright Board is not a realistic option for establishing equitable remuneration for all the reasons outlined in option 1, alternatively, in cases when a copyright holder comes forward, a mechanism could be established to develop some model norms for what is “equitable remuneration”. These norms for continued use of unpublished materials in digitization projects that provide online access of archival holdings should be fair to both rightsholders and LAMs and they can provide non-binding guidance in discussions regarding what is an equitable payment for use of a variety of materials.
- Given that each letter or photograph is a separate work, documenting evidence of (largely unsuccessful) searches for the rightsholders of orphan works would be laborious. Unduly onerous recordkeeping should not be required.

See also below our Option 7 for a similar approach to resolving issues affecting unpublished orphan works held in non-profit LAMs.

Option 4

Exception for use of works during the final 20 years of protection

Response

Upon first reading, permitting non-profit LAMs to use works during the additional 20 years of protection appears to be a reasonable solution. However, the option presents certain obstacles for LAMs whose holding include archival materials.

Recommendation:

For this exception to be effective for archival materials, it should address the following issues:

- Definition of “use”
Copyright is directly implicated in many archival functions, including making copies for research and display, translating documents for research and display, playing audio-visual works in public reading rooms, and disseminating copies online. Consequently, “use” must be defined comprehensively to include all rights necessary to achieve LAMs’ public interest missions, i.e., reproduction, performance in public, communication to the public, public exhibition, and translation. We have no objection to such a provision

being limited to uses with no motive of gain beyond the ability to cover direct and indirect costs (Copyright Act, s 29.3)

- Application to both published and unpublished works
While the majority of archival materials consist of unpublished works, archival holdings also include some published works. While the U.S. “solution” (17 USC §108(h)) is limited during the last 20 years of protection to published works that are not commercially available, a similar Canadian solution must apply to both published and unpublished works. With regard to published works, we agree that the exception should be applicable only to published works that are not commercially available.
- Extend application to sound recordings that are not commercially available
Archival holdings include sound recordings that were never created for commercial purposes, such as oral history interviews, recordings of meetings, and seasonal greetings shared within families. To be truly useful, such an exception must cover sound recordings that are in the permanent collections of LAMs, and that are not commercially available.

Most significantly, this option, as it stands, is unworkable for many unpublished orphan works. If the identity of the author is unknown, there is no way of knowing when (or whether) the author died. It is impossible to know when such works reach the 20-year threshold that would mark the beginning of greater access. Therefore, this option would be workable only if combined with other measures that address unpublished orphan works where the identity/date of death or creator are unknown.

There is also a problem with the requirement to document uses made of individual works. Canadian archives hold billions of individual works which are not catalogued at the item level. Having to track such uses, item by item, would be an onerous record-keeping requirement for institutions holding archival material. Furthermore, what would be the reason to keep such records? Who would use them?

Option 5

Exception for use of works 100 years after their creation

Response:

Although this option seems to be intended to work with other options to provide a clear path to access when no other possibility is available, there are some problems with it in relation to archives. The 100-year term suggested in this option goes far beyond the reasonable timeframe for financial gain of the non-commercial unpublished materials that form the majority of archival holdings. A reasonable search into commercial use is standard best practice in archives. The majority of material published even 50 years ago is beyond the point at which they accrue any significant financial value,⁷ and this is even more true of the majority of unpublished works in archival holdings since these works were never created for commercial

⁷ Rebecca Giblin, *ibid.*, pp. 182-84.

purposes. Establishing a timeframe of 100 years will not increase remuneration for copyright owners of unpublished works, but rather it would perpetuate ongoing problems with orphan works, since even after 50 years rightsholders become difficult to track down. Cultural heritage works in archival holdings present many obstacles to public access, including physical and financial barriers to access. Digitization projects designed for online access are slowly addressing these problems. Good public policy should enable these efforts to increase access to such material for wide public dissemination.

Recommendation

As it stands, this option does not present a useful solution for unpublished archival materials. See below our Option 7 for a more viable approach to resolving issues affecting unpublished orphan works held in non-profit LAMs.

Option 5

Possible use of Option 5 to address some limited issues concerning unpublished Crown Works

Response

Applying this option to unpublished Crown works would make a clear path to use but the period of 100 years is unduly long for Crown works, which should be as publicly accessible as possible under the umbrella policy of Open Government. Removing the only remaining perpetual term of copyright protection in Canada (for unpublished Crown works) is long overdue but this is not a good resolution of the issue.

Crown copyright is far too complicated to be dealt with in a piecemeal fashion. There are complex problems associated with copyright for both published and unpublished works. Archival collections include many Crown works, most of them unpublished. The problems with Crown copyright extend far beyond perpetual copyright protection. Successive studies of Crown copyright note its confusing nature, including the precise meaning of royal prerogative, the jurisdictions to which Crown copyright applies, and which government entities are covered.⁸ Crown copyright clearly deserves a comprehensive and systematic review.

Recommendation

Option 5 is not a solution to the multiple problems with Crown Copyright. Archives appreciate the recognition that there is a problem with perpetual copyright for unpublished Crown works. In a gesture to address the perpetual copyright issue, we would welcome a move to amend the term of protection for unpublished Crown works to 50 years from the time of creation, more closely aligning term of protection for both published and unpublished Crown works in Canada.

But this would address only a small part of the problems with Crown copyright. Crown copyright is a holdover from former days and it is long overdue for a comprehensive overhaul.

⁸ Jean Dryden, (2017, September 22). *Rethinking crown copyright law*. Retrieved March 01, 2021, from <https://policyoptions.irpp.org/magazines/september-2017/rethinking-crown-copyright-law/>

We recommend that the federal government commission a comprehensive study that will identify the ways Crown copyright is currently addressed by various levels of government, identify the many problematic issues, explore the solutions adopted by other countries, consult with stakeholders, and recommend appropriate measures that will transform this outdated provision into a measure that serves the public interest in the digital age. In collaboration with the library community, the archival community has undertaken several concrete efforts since 2019 to move this undertaking forward. Comprehensive change to the Crown copyright provisions are urgently required but this is well beyond the scope of this consultation.

Option 6

INDU Committee Recommendation

The INDU Committee recommended amending the Copyright Act to include a registration process to permit enforcement of the final 20 years of a potential Life + 70 general term of protection. However, the consultation paper indicates this approach “raises serious questions in the context of Canada’s international obligations”. The archival community found this option a good one to mitigate term extension harms. We believe that further clarity and open discussion is required immediately regarding the ramifications of Canada’s international obligations and how they affect a registration process. In the absence of legal clarity on this issue, the archival community proposes Option 7 that more directly addresses orphan works issues for unpublished materials, which comprise a significant portion of our holdings.

OPTION 7

Exception for archival materials in the collections of non-profit LAMs

The consultation paper makes it clear that the government has recognized that any term extension will have significant negative consequences for LAMs. Options 1-3 directly target orphan works and out-of-commerce works preserved in LAMs. Regrettably, although some of the available options may be suitable for *published* works held by LAMs, none of the options on its own is workable for the billions of orphan works held in archival collections. (See also our comments on Option 3, 4, and 5 above).

We wish to propose an alternative solution that addresses these needs. The proposal provides a made-in-Canada solution to unpublished orphan works deposited in LAMs. The option codifies established professional practices. As the Supreme Court noted in the context of fair dealing, “It may be relevant to consider the custom or practice in a particular trade or industry to determine whether or not the character of the dealing is fair.”⁹

⁹ *CCH Canadian v Law Society of Upper Canada*, 2004 SCC 13, ¶155, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2125/index.do?q=CCH>

The beneficiaries would be non-profit LAMs, since libraries and museums (as well as archives) preserve and maintain archival collections.

This proposed exception is limited **to unpublished orphan works in the permanent collections of non-profit LAMs**. Few realize the magnitude of the orphan works problem in archival collections – there are billions of orphan works in LAMs. Where the rightsholder is known, archivists seek the necessary permissions to include work in digitization projects intended for online public access on a website. However, most archival holdings were not created for commercial purposes. Consequently, they were not published and are of little monetary value. Identifying and locating the rights holder(s) of **each** work is extremely time-consuming, laborious, and often fruitless. The effort required is wildly out of proportion to the monetary value of the works involved.

Archival materials include textual documents, photos, film, audio, and digital records. Determining the monetary value (if any) of individual works is also laborious, and time-consuming, due to an absence of data relating to market value. Even if it had the resources, the Copyright Board lacks the expertise to determine the value of thousands of unpublished orphan works.

Those who deposit records in archives do so because they want the material to be available for research. Increasingly, researchers expect that the material will be available online, an expectation that has been heightened during the pandemic when archives and libraries were closed, and only digital access was possible.

Archivists deal in aggregates rather than items. That is, the materials created and received by an organization, family, or individual are treated as a unit, which contains many individual works. Since the whole of an archival collection is greater than the sum of its parts, when selecting digitization projects, archivists prefer to digitize entire collections so researchers understand the context of the records and the relationships between items. Omitting the orphan works does a great disservice to researchers because it skews the understanding of the material.

The magnitude of the orphan works problem implicates any record-keeping requirement. Any requirement to keep records of searches for rightsholders, uses, or commercial availability of thousands of individual works would be onerous, and to what end? Who would use the records?

This is clearly an area in dire need of realistic measures to mitigate the effects of term extension. Archivists eloquently describe their experiences with orphan works:

Municipal Archives (Nova Scotia)

“When we are able to track down a copyright owner to request permission to use a work, or to transfer their copyright, I have never had anyone refuse or request any compensation more than a citation credit. Far more often we spend hours searching for obituaries or addresses of next-of-kin or business registrations and still come up with uncertainty about who and where the copyright owner is. It is also a complicated task to keep track of the research done, dates of death and the permissions given. It feels like a large investment in time to comply with a requirement that is needed for only a narrow band of creative works and creators.”

Municipal Archives (Ontario)

The Archives has home movies (1950s-1990s) containing rare footage of an immigrant community. The creator (who deposited the materials) has died; his only child has left the country and cannot be located.

Academic Library (Ontario)

“... This means having to attempt to identify dozens if not hundreds of authors, disambiguate their names with very little information on who authors are (something may be signed & dated with an address, but identifying which "Donald Smith" rented an apartment in the city of Toronto in the 1930s is nearly impossible) and THEN identify who their copyright management fell to at the time of their death. It is rarely worth the hours of research & checks, especially when most people don't even understand that they own their copyright.”

The following exception offers a viable and elegant solution to the orphan works problem for unpublished works in non-profit LAMs without causing undue harm to copyright owners.

30.22 (1) It is not an infringement of copyright to make a copy of an unpublished work or sound recording that is deposited in the permanent collection of a LAM and make it available to the public (OR communicate it to the public by telecommunication) for the purposes of research or private study, provided that:

- a. This exception applies to orphan works created more than 25 years ago.
- b. The copies are accompanied by a message that says: (a) that the copy is to be used solely for the purpose of research or private study and (b) that any use of the copy for a purpose other than research or private study may require the authorization of the copyright owner of the work in question.
- c. The quality of the copy made available online is suitable for research and private study only [but not publication]
- d. The work will be removed if the copyright owner comes forward and no agreement can be reached regarding continued use of the copy by the LAM.
- e. The copyright owner cannot be identified or located after a reasonably diligent search.

- (2) The LAM may copy the work only on the condition that:
- a. the person who deposited the work, if a copyright owner, did not, at the time the work was deposited, prohibit its copying; and
 - b. copying has not been prohibited by any other owner of copyright in the work.
- (3) No action referred to in section 30.22 may be carried out with motive of gain.
- (4) A library, archive or museum, or person acting under its authority does not have a motive of gain where it or the person acting under its authority, does anything referred to in section 30.22 and recovers no more than the costs, including overhead costs, associated with doing that act.
- (5) No statutory damages may be awarded against a LAM that is sued in circumstances referred to in s 38.2.

OTHER ISSUES

Indigenous Knowledges

Indigenous Knowledges are not addressed as part of the Consultation

While the Copyright Act currently protects Indigenous Knowledges, just as it does other types of expression, the copyright system represented in the Act is based on the idea that copyright is owned by an author, and that the duration of copyright is based on that author's life. This system does not reflect an Indigenous approach based on community ownership of stories, songs, dances, names, and other creations, and the principle that such ownership is perpetual.

There are no specific provisions in the Canadian *Copyright Act* protecting Indigenous Knowledges. Canada has recently signed onto the *UN Declaration on the Rights of Indigenous Peoples*, in which Article 31 states that "in conjunction with Indigenous peoples, States shall take effective measures to recognize and protect the exercise of ..." Indigenous heritage, traditional knowledge and traditional cultural expressions. It's time for change!"

Although the changes to copyright term of protection included in the CUSMA treaty directly affect the term of protection of Indigenous Knowledges, the comprehensive adjustments to the Copyright Act required to address the Indigenous approach to copyright protection are well beyond the scope of this consultation. As we have done in the past, we strongly urge the federal government to engage without delay in a respectful, and transparent collaboration with Canada's Indigenous Peoples to amend the Copyright Act in ways that recognize a community-based approach to copyright protection of Indigenous knowledge. The Archives Community commits to actively participate in this process in all ways that are appropriate.

Reversion

Reversion was not directly addressed as part of the consultation, but the term extension affects reversion issues in LAMs.

When acquiring historical materials from donors, archival repositories and libraries often request that the donor assign to the archives or library the copyright in the acquired materials (to the extent that the donor is the rightsholder). Many donors assign their copyrights so they need not deal with requests for permission for reproduction and use. However, Section 14(1) currently provides that where an author has assigned the copyright in her papers to another party such as an archival repository or a library (other than by will), the ownership of the copyright will revert back to the author's estate 25 years after her death, and the estate will own the copyright for the remaining 25 years of the copyright term. This provision cannot be overridden by additional contract terms. Section 14(1) is an outdated relic inherited from the 1911 British Act. In addition to being undue interference in the freedom of an author to enter into a contract, this little-known provision is an administrative nightmare for archival and library institutions and donors' estates to manage.

Recommendation

We recommend that section 14(1) be repealed, or that section 14(1) be amended to permit the author to assign to LAMs the reversionary interests along with the copyrights. If the section is not repealed, the reversion interval should be adjusted from 25 years to 35 years in response to the new general term of protection as a result of CUSMA.

Limited Liability

Limited liability is important for non-profit LAMs as they carry out their public service mission. Any option for mitigating harms caused by CUSMA must include consideration of limited liability for use of orphan works, following reasonable search, up to the time a rightsholder claims infringement. At the time of such a claim, access to the work must cease unless ongoing use of the work is negotiated with the rightsholder. Limited liability for LAMs in these circumstances will enable digitization of important parts of our Canadian documentary heritage that would not be available to the public except in library and archives reading rooms, so it can be broadly accessed, while still protecting fair remuneration for rightsholders.

Legislative Instrument

The archives community strongly recommends stand-alone copyright legislation that is limited to the necessary amendments to implement CUSMA. The archives community believes that amendments to the Copyright Act should never be incorporated into an Omnibus Bill for which there is extremely limited opportunity to allow significant stakeholder input and discussion.

CONCLUSION

The extension of copyright term adversely affects access to the archival holdings in LAMs, particularly the vast extent of unpublished orphan works. Viable and effective measures must be implemented to mitigate the harmful effects of term extension. The proposals and recommendations in this submission include viable solutions that address the concerns of the archival community.

Submitted by: Canadian Council of Archives (CCA) Statutory Review Working Group

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