

CDCE's brief in the context of the

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

March 12, 2021

Presentation of the CDCE

The Coalition for the Diversity of Cultural Expressions (CDCE) brings together the main Anglophone and Francophone professional organizations in the cultural sector in Canada. It is made up of some 40 organizations that collectively represent the interests of more than 200,000 professionals and 2,000 organizations and businesses in the book, film, television, new media, music, performing arts and visual arts sectors. The CDCE intervenes primarily to ensure that cultural goods and services are excluded from trade negotiations and that the diversity of cultural expressions is present in the digital environment.

Introduction

In October 2020, the CDCE published its recommendations for the revision of the *Copyright Act*¹. This exceptional convergence of organizations in the sector demonstrates the urgency of revising this law, which is vital for the entire cultural ecosystem. Beyond their particular priorities, the CDCE members have rigorously taken up the challenge of identifying the recommendations needed to close the growing gap between what rights holders can legitimately expect and what the *Copyright Act* now offers.

Before going any further, we wish to reiterate our satisfaction with the proposed extension of the term of copyright. This is an important request, made by our members in order to irrigate our ecosystems with new resources that will make it possible to support a greater number of creative projects, resources that are more than necessary in the current context.

On the other hand, we feel that the new cycle of consultation that is beginning does not head in the right direction. First, because it seeks to limit the benefits of the extension for rights holders. In addition, this consultation is not limited to technical issues, it addresses new topics that require more research outside of this consultation. Second, because it further delays the time at which a bill can be introduced. Finally, there are fundamental issues for us that should receive the full attention of the departments responsible for the review.

We will make three recommendations:

- 1- Implement immediately and automatically the extension of the term of copyright.
- 2- Postpone the study of reforms on access to orphan works and out-of-commerce works to a future revision of the *Copyright Act*.
- 3- Include in the upcoming revision the other recommendations made by the CDCE, even if they are not the subject of technical consultations.

¹ CDCE (2020), [Recommendations for the revision of the Copyright Act](#).

In the following sections, we will address the main comments that CDCE members collectively wish to make.

1- Do not limit the benefits of copyright term extension

In its recommendation document, the CDCE had called for the immediate and automatic implementation of the extension of the term of copyright. We are therefore pleased to note the absence in the consultation document of a proposal to make the extension conditional on the registration of works.

However, we note that new proposals have been made to consider the adoption of other restrictions, or even new exceptions. This could limit the benefits of this extension for rights holders. It should be recalled that an impact assessment conducted by the European Commission concluded that a rights extension would have a positive impact on cultural diversity by increasing the resources available to support the development of new talent, without necessarily leading to an increase in prices².

Also, Access Copyright indicates in the brief it prepared for this consultation that the current mechanism for orphan works, with respect to text-based and visual works, has been used only one to three times a year and that extending the term of the right should not have a major impact on requests for access to these works. The Copyright Board's 2019-2020 Annual Report documents a total of 21 applications for all works for that fiscal year, resulting in 8 licences being issued³. Given the number of applications, and even if it can be difficult to appreciate the magnitude of the need, there is no urgency to address this issue.

Recommendation 1

Implement immediately and automatically the extension of the term of copyright.

2- Technical consultations should be truly technical

Let us first recall that the revision of the *Copyright Act* began in 2018. A few hundred witnesses and briefs were submitted to two parliamentary committees. Not only was the issue of orphan works not the subject of any recommendations during the last consultations, but this question was raised marginally by a handful of stakeholders. As for the issue of out-of-commerce works, we found no trace of it.

The framework for this consultation does not, and should not, allow for the discussion of policy issues that have not been adequately addressed through normal research and consultation processes. If they were to be discussed, they should be given much more time and be done in the context of parliamentary business.

3- Issues related to access to orphan works and out-of-commerce works could be examined in a future reform.

The consultation document indicates that one of the avenues being considered is to extend the duration of the right without accompanying measures:

² [Summary of the Impact Assessment on the Legal and Economic Situation of Performers and Record Producers in the European Union](#), COM(2008) 464 final, SEC(2008) 2287

³ Copyright Board Canada (2020), [2019-2020 Annual Report](#), p. 19.

"Implementing term extension in this manner would not close the door to the possibility of future reforms to address the concerns raised by some stakeholders in relation to access to orphan works and out-of-commerce works."

We support this approach and agree that a thorough study on possible regimes for orphan works and out-of-commerce works should eventually be launched. But we insist that this study take place after a more urgent review of the Act on the priority issues identified in the reports of the parliamentary committees.

Recommendation 2

Postpone consideration of reforms on access to orphan works and out-of-commerce works to a future review of the *Copyright Act*.

4- The revision of the *Copyright Act* must include issues other than those that will be addressed in the technical consultations.

The CDCE made 13 recommendations to improve the *Copyright Act*, which are reproduced in the appendix. We assess the impact of our recommendations to amend the Act at a minimum of \$136 million in own-source revenues, paid by businesses for the use of content, which could be reinvested annually in cultural ecosystems and the Canadian economy. And this does not even include the implementation of certain measures such as extending the term of copyright, the benefits of which are certain but could not be evaluated.

In addition to extending the term of copyright, some of our recommendations had also been proposed by both the INDU and CHPC committees, for example, the abolition of the public performance royalty exemption for performers and producers for commercial radio or the establishment of dissuasive sanctions for misuse of the system. We see no reason not to move forward with these consensus changes.

Other recommendations that we believe are essential are: amending the provisions relating to fair dealing for educational purposes, confirming the mandatory nature of the tariffs set by the Copyright Board, harmonizing the remedies of collecting societies in terms of statutory damages, making network services more accountable and improving the Act to counter piracy.

In addition, the CDCE has made numerous recommendations to bring the system back to its mission and for Canada to catch up with a number of rights that are still unrecognized or mechanisms that are only partially in place. Thus, the CDCE proposes to improve the private copying regime, to amend the definition of sound recording, to recognize the rights of performing artists on audiovisual media, to establish the resale right of artistic works and to introduce the neighbouring right for newspaper publishers.

Finally, during the 2018 consultations, several stakeholders requested that the government undertake consultations "to explore ways to protect traditional arts and cultural expressions from misappropriation and copyright infringement, and to reconcile Indigenous notions of ownership with the Act"⁴.

We understand that some of the issues that are important to us will be raised in the upcoming consultations. However, we insist that the next reform also include the other CDCE recommendations, even if they are not the subject of technical consultations.

The addition of more than 30 exceptions in as many years, some of which are in contravention of international law, has completely unbalanced cultural ecosystems. As noted by the Société des auteurs de radio, télévision

⁴ Report of the Standing Committee on Industry, Science and Technology (2019), STATUTORY REVIEW OF THE COPYRIGHT ACT, Dan Ruimy, chair, p. 29.

et cinéma (SARTEC), the exceptions now occupy 40% of the text of the Act, a striking picture⁵. It would be absolutely deplorable if the next revision made the situation even worse.

Recommendation 3

Include in the upcoming revision the other recommendations made by the CDCE, even if they are not the subject of technical consultations.

5- There is an urgency to act

Copyright has been far too badly abused with the 2012 revision and, even before the pandemic, it no longer allows for fair remuneration for the use of the work of artists and creators, nor did it ensure the long-term diversity of cultural expressions. The cultural sector was already badly affected by the growing supply of online content and is now collapsing. It was recently reported that one in four people working in the sector lost their jobs in 2020⁶.

At a time when public finances are already under pressure, the revision of the *Copyright Act* presents itself as a fair and relevant market solution to contribute to the creation of rich, innovative and diverse cultural expressions.

This is no doubt why the Standing Committee on Finance (FINA) recommended in its report last February that the government "Complete the review of the *Copyright Act* during the year by making the necessary amendments to the Act to ensure that rights holders receive fair compensation for the use of their works."⁷

We can only support this recommendation.

⁵ Société des auteurs de radio, télévision et cinéma (2018), Mémoire de la SARTEC au Comité permanent du Patrimoine canadien dans le cadre de son Étude du modèle de rémunération pour les artistes et les créateurs à l'occasion de l'examen quinquennal de la Loi sur le droit d'auteur, p. 4.

⁶ CAPACOA (2021), [2020: The Year One in Four Arts Worker Lost Their Job](#).

⁷ Report of the Standing Committee on Finance, Hon. Wayne Easter, Chair (2021), [Investing in Tomorrow: Canadian Priorities for Economic Growth and Recovery](#), p. 37.