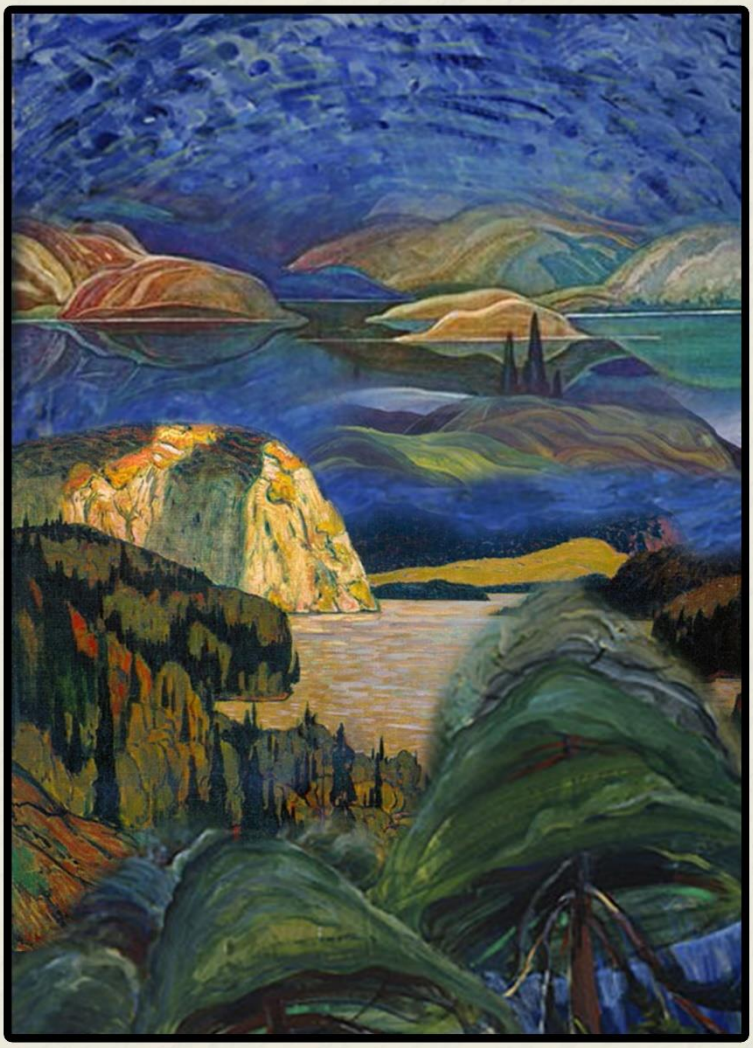
# The Public's Domain:
# How Can Canada Benefit from Copyright Term Extension?



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# Table of Contents

## Introduction

Since the beginnings of copyright law, there has been a push to increase the term of protection. In fact, during the development of copyright in the United Kingdom, a proposal for a perpetual copyright was described as "a tax on readers for the purposes of giving bounty to writers".[1] At the international level, there has been a similar attempt to extend the length of the copyright term from the early days of the *Berne Convention* leading to the now standardized term of life of the author + 50 years (50*pma*).[2] Albeit the standardized length of protection, some countries have extended their term of protection past 50*pma* in the name of harmonization with other countries.[3] These extensions come at a dramatic cost to the community that surrounds that bundle of rights arising from copyright.

Copyright is more than a binary relationship between only creators and users. One must simply look to the issues surrounding orphan works and out-of-commerce works to see how there is an entire environment that encompasses the bundle of rights that are copyright protection. From libraries and archives to schools and not-for-profit groups, copyright exists in a complex and delicate ecosystem. Extending the length of copyright protection without adequate measures to mitigate the harm to that relationship destroys the fragile balance between all stakeholders. Written in response to the Government of Canada's consultation on how to extend the term of copyright protection in Canada[4], this report highlights how extending the term of protection has a costly impact on many more than those who benefit. This is why CIPPIC endorses the approach suggested by both scholars[5] and the Standing Committee on Industry, Science and Technology in its statutory review of the *Copyright Act*.[6] A registration system for additional years of copyright protection is the most effective method to minimize harms to the Canadian creative community and the public domain[7] all while offering Canada a database of significant works and their scheduled date of entry into the public domain.

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[1] Ultimately, this characterization led the House of Commons to favour an extended term of protection instead: Mark Rose, "Nine-tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain" (2003) 66 Law & Contemp Probs 76 at 83 <scholarship.law.duke.edu/lcp/vol66/iss1/3/>.

[2] Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (London, UK: Centre for Commercial Law Studies, Queen Mary College, 1987), at 324-334.

[3] E.g. UK, HC Deb (18 December 1995), vol 268, col 1254 (The Minister for Science and Technology) <hansard.parliament.uk/Commons/1995-12-18/debates/98fc518a-f454-460d-9061-4a831d4371c7/Copyright>.

[4] "Consultation paper on how to implement an extended general term of copyright protection in Canada" (2021), online (pdf): *Innovation, Science and Economic Development Canada* <www.ic.gc.ca/eic/site/693.nsf/vwapj/consultation-implement-extended-term-copyright-protection-Canada-en.pdf/$file/consultation-implement-extended-term-copyright-protection-Canada-en.pdf> [Consultation Paper].

[5] Carys J Craig, "Meanwhile, in Canada… a surprisingly sensible copyright review" (2020) 42:3 Eur IP Rev 184 at 187-188; Jordan Fine, "Negotiating with Ghosts: The Arbitrariness of Copyright Terms" (2017) 29 IPJ 333 at 350-353; as well as William M Landes & Richard A Posner, "Indefinitely Renewable Copyright" (2003) 70:2 U Chi L Rev 471 who discuss the economic value of a registration system based on American data.

[6] Standing Committee on Industry, Science and Technology, "Statutory Review of the Copyright Act" (June 2019) at 38, online (pdf): <www.ourcommons.ca/Content/Committee/421/INDU/Reports/RP10537003/indurp16/indurp16-e.pdf> [Industry Report].

[7] As a leading American copyright scholar said in an interview with Dr. Michael Geist about the proposed extensions: "Please don't make the same mistake we did. 23 years afterwards we know it wasn't just a mistake, it was a big mistake." "Episode 78: Jennifer Jenkins on What Copyright Term Extension Could Mean for Canada"

This report is split into five sections and explains how extending the term of copyright protection without appropriate accompanying measures does nothing more than enrich a select few at the expense of the greater community. Section one looks at the importance of the public domain; without the public domain, there could not be the modern conception of copyright. The section goes on to compare common arguments against the importance of the public domain with existing data. The data casts serious doubt on the strength with which proponents of copyright suggest the term extension is not harmful. Section two considers just how harmful term extension is. It considers harms from a policy perspective, an economic perspective, as well as a public interest perspective. Section three goes onto to look at the experiences of other countries: half-baked accompanying measures are nothing more than performative and have little practical impact. It highlights the importance of developing appropriate accompanying measures that mitigate the harms of extension lest emergency legislation be needed. Section four turns to the proposed registration-based system. A made in Canada approach, this system would effectively mitigate the harms of term extension discussed in the preceding sections. More importantly, this section highlights that a registration based system has already been considered by others—including a former official from the US Copyright Office. Section five turns to obligations under international law. A common complaint about a registration system based system is the potential violation of international law.[8] Looking to the major international treaties, it becomes clear that these hesitations are misguided. International law imposes minimum standards of treatment, not maximums, provided there is national treatment. Thus, a registration system available to all copyright holders for an additional term of protection on top of the minimum requirements would pass legal scrutiny.

CIPPIC urges the following approach to any extension of copyright term beyond the Berne minimum:

(i) realize the fundamental place of the public domain within Canadian copyright,
(ii) recognize the harms that term extension will have on the Canadian copyright ecosystem,
(iii) understand the approaches undertaken in other jurisdictions have been unable to mitigate those harms which highlights the need for a made-in-Canada approach,
(iv) appreciate the benefits of requiring registration in return for the gift of a post-Berne copyright term, and
(v) appreciate that international law obligations impose minimum requirements, and do not constrain country-specific, tailored approaches to copyright beyond those minimums.

(1 March 2021) at 00h:08m:30s, online (podcast): *Law Bytes* <www.michaelgeist.ca/podcast/episode-78-jennifer-jenkins-on-what-copyright-term-extension-could-mean-for-canada/>.

[8] Consultation Paper, *supra* note 4 at 9.

# 1. The Importance of the Public Domain

Copyright and the public domain share a symbiotic relationship.[9] Professor Carys Craig has argued that the public domain must reflect and protect the "dialogic processes of culture in the face of increasingly restrictive intellectual property."[10] The public domain is central to modern copyright policy: it provides the space from which authors draw the incentives and protections of copyright.[11] In a very real way, the purpose of copyright is to endow the public domain: copyright provides limited incentives to today's authors so that their works may take their place in the public domain alongside those greats who have gone before.

Proponents of term extension often wrongly suggest the public domain will be unaffected by increasing the length of copyright protection.[12] An ever-increasing number of empirical studies undermines this argument. There are three common arguments against the value of the public domain: (1) works in the public domain will be less available to consumers; (2) works in the public domain will become overused and their value substantially reduced; and (3) works in the public domain will be tarnished by uses contrary to the interests of the owner of the original work.[13] Multiple empirical studies have disproven the validity of these arguments across various types of works.[14]

A 2009 study of music in film found there was no evidence of under-exploitation nor evidence of over-exploitation.[15] That is, a composition from the period examined appeared in movies once every 3.8 years upon entering the public domain and once every 3.3 years for a copyrighted work.[16] The study theorized that a possible explanation for this finding might lie in the costs associated with including the composition in the film. A copyrighted work could be easily licenced. However, other elements of a song are also protected. This imposes inherent limits on a public domain work being over-exploited.[17] The similar level of exploitation between both types of works casts doubt on the strength with proponents of term extension advocate in the name of "efficiency".

A 2013 study of the audiobook market found that a work in the public domain was twice as likely to be available than a work that was still protected under copyright. Furthermore, there

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[9] James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (New Haven: Yale University Press, 2008) <www.thepublicdomain.org/download/>.
[10] Carys J Craig, "The Canadian Public Domain: What, Where, and to What End?" (2010) 7 Can J L & Tech 221.
[11] *Ibid* at 238.
[12] See, for example, George Robert Barker, "Common Myths About the Economic Effect of Copyright Term Extensions for Sound Recordings" (2 May 2015) at 19, online (pdf): *SSRN* <papers.ssrn.com/sol3/papers.cfm?abstract_id=2600769>.
[13] Christopher Buccafusco & Paul J Heald, "Do Bad Things Happen When Works Enter the Public Domain: Empirical Tests of Copyright Term Extension" (2013) 28:1 Berkely Tech LJ 1 at 13-17.
[14] A study in 2017 considered the tarnishment argument in the scenario often alluded to: pornographic representations of copyright protected works. The empirical experiments found that consumers experienced little, if any, reduction in their desire to consume the original works in question. In fact, the tarnishing versions might intensify desires to consume them: Christopher Buccafusco, Paul J Heald & Wen Bu, "Testing in Trademark and Copyright Law: The Effect of Pornographic Versions of Protected Marks and Works" (2017) 94 Wash U L Rev 341 at 391.
[15] Paul J Heald, "Bestselling Musical Compositions (1913-32) and Their Use in Cinema (1968-2007)" (2009) 6:2 Rev Econ Research on Copyright Issues 31.
[16] *Ibid* at 38-40.
[17] *Ibid* at 42.

was only a maximum price difference of $3.[18] The study also considered the possibility of tarnishment of the works. The data showed almost no support for potential tarnishment: there was no statistically significant difference between listeners' judgements of the quality of professional audiobook readers of texts under copyright and those in the public domain.[19] While there was a noted difference in the quality between the professional audiobooks and those recorded by amateurs, the correlation between recording quality and price did not follow the arguments of term extension advocates. The study found there might be a modest association between the quality of a recording, that effect is not related to the protection of said work by copyright.[20]

A 2019 study considered the availability of eBooks in public libraries across Australia, Canada, New Zealand, and the United States. The data suggested that extending the length of protection may lead to less investment in works rather than more as proponents of term extension suggest.[21] Works in the public domain were more prevalent than those that were protected by copyright. Canada had 15% more works in the public domain than the US; New Zealand had 5.6% more works than Australia. When the value of the US book market is taken into account, these findings further support the arguments against a continued copyright term extension. New Zealand is worth a fraction of 1% of the US market, but had 11.7% more books in the public domain than the US.[22]

The data is striking. It shows that a robust public domain should be central to copyright policy. The public domain stimulates culture, promotes innovation, and provides greater access to common heritage. CIPPIC urges the Government to recognize the value that the public domain holds in considering approaches to post-Berne term extension.

[18] Buccafusco & Heald, *supra* note 13, at 21-22.
[19] *Ibid* at 26.
[20] *Ibid* at 28.
[21] Jacob Flynn, Rebecca Giblin & Francois Petitjean, "What Happens When Books Enter the Public Domain: Testing Copyright's Underuse Hypothesis across Australia, New Zealand, the United States and Canada" (2019) 42:4 UNSWLJ 1215 at 1233.
[22] *Ibid* at 1235.

## 2. The Harms of Copyright Term Extension

Term extension is no part of a "balanced approach" to copyright policy. Well-known works remain controlled and profitable for a limited group of rights holders for longer. The long tail of copyright-protected works that have fallen out of print or were never commercial in the first place will remain alienated from a public that might otherwise have revitalized them. Orphaned works fade further from view, and risk being lost forever. The public domain is frozen in time. All are deprived of their shared heritage; creators are prevented from building upon the works of the past. This all occurs without considering the role of public-minded stakeholders who provide access to culture at reduced costs to users. Those stakeholders lack the financial means preventing them from easily purchasing works. Furthermore, term extension apologists frequently invoke economics in the hopes to justify these harms. Multiple sources cast serious doubt on the strength of those economic arguments.

### a. Term Extension Undermines Copyright Policy

Extending copyright term promises to upset copyright's policy balance without offering the Canadian public any concrete benefit in return. Term extension tips copyright's balance in favour of not the creator, but their distant relatives. This shift contradicts Canadian copyright law's foundational objective: balancing a just reward for the creator with the public interest in the encouragement and dissemination of works of the arts and intellect.[23]

The Supreme Court of Canada has recognized the unique place of copyright in Canada. In the foundational decision *Théberge v Galerie d'Art du Petit Champlain*, the majority remarked that "excessive control by holders [of copyright] may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long term interest of society as a whole."[24]The Court explained that this delicate relationship between the interests of the creator and the public interest of society is the reason why the *Copyright Act* grants only limited rights to copyright owners and balances those rights with user entitlements.[25] The very nature of the system in Canada is not designed to favour one party over the other.

Extending the copyright term of works that have already been created ignores this essential relationship between creators and the public domain. Empirical studies have concretely demonstrated that common arguments favouring term extension are not reflected in practice.[26]A limited number of works will remain profitable at the expense of the Canadian

[23] *Théberge v Galerie d'Art du Petit Champlain inc*, 2002 SCC 34 at para 30.
[24] *Ibid* at para 32.
[25] *Ibid*.
[26] See generally, Paul J Heald, "Bestselling Musical Compositions (1913-32) and Their Use in Cinema (1968-2007)" (2009) 6:2 Rev Econ Research on Copyright Issues 31; Christopher Buccafusco & Paul J Heald, "Do Bad Things Happen When Works Enter the Public Domain: Empirical Tests of Copyright Term Extension" (2013) 28:1 Berkely Tech LJ 1; Christopher Buccafusco, Paul J Heald & Wen Bu, "Testing in Trademark and Copyright Law: The Effect of Pornographic Versions of Protected Marks and Works" (2017) 94 Wash U L Rev 341 as well as Jacob Flynn, Rebecca Giblin & Francois Petitjean, "What Happens When Books Enter the Public Domain: Testing Copyright's Underuse Hypothesis across Australia, New Zealand, the United States and Canada" (2019) 42:4 UNSWLJ 1215.

public. As a result, term extension needlessly diminishes the public domain and exacerbates existing issues such as orphan works.

Apologists for copyright term extension fundamentally misapprehend the nature of the public domain. The public domain is not a wasteland, nor a body of work free of economic activity. From an economic perspective, the public domain represents a return of competition to the publishing of individual works. The Canadian public benefits from a robust and competitive publishing marketplace for public domain works stretching from the Platonic dialogues to *Anne of Green Gables*. From a philosophical perspective, the public domain embodies the corpus of humanity's intellectual endeavours. Works whose terms expire do not so much fall out of copyright as join the works of the minds both great and small that have gone before us.

Term extension has no remedial effect: it benefits no vulnerable group and addresses no injustice. Term extension rights no wrongs. Granting copyright owners an additional 20 years of protection does nothing more than maintain the profits of an already powerful limited group. A *Financial Time*s editorial summarized reality well:

> Copyright extension is, in the main, just the well-known strategy of powerful companies: profit-grabbing through lobbying for state protection. That is bad enough. Worse is the chilling effect it can have on creativity: the industry is already on a legal crusade against the sampling of copyrighted material into new original work. This is like the Grimm brothers' descendants suing Disney for using their fairy tales.[27]

In this digital age, copyright covers software and original compilations of data. Extending liability for reproduction of such works contradicts innovation policy in the 21st century. Access to these works should be promoted rather than restricted.

Blanket term extension will lead to twenty years without any enrichment of Canada's public domain. This is harsh treatment of user rights enjoyed by Canadians that comes at a time when digital technologies promise a greater access to our shared heritage than ever before. Authors whose works that are currently scheduled to fall into the public domain over the next twenty years include the likes of Canadians Lawren S. Harris (Group of Seven artist, d. 1970), Edwin Holgate (artist, d. 1977), Ethel Wilson (novelist and poet, d. 1980), Marion Engel (novelist, d. 1985), and Elizabeth Smart (author, d. 1986). Internationally, works from Erle Stanley Gardner (author, d. 1970), M.C. Escher (artist, d. 1972), Picasso (artist, d. 1973), J.R.R. Tolkien (author, d. 1973), Agatha Christie (author, d. 1976), Norman Rockwell (artist, d. 1978), Alfred Hitchcock (filmmaker, d. 1980), Jean-Paul Sartre (philosopher, d. 1980), John Lennon (songwriter, d. 1980), Bob Marley (songwriter, d. 1981), Orson Welles (filmmaker, d. 1985), Frank Herbert (author, d. 1986), Simone de Beauvoir (philosopher, d. 1986), and Andy Warhol (artist, d. 1987) will enter the public domain. Their works have had a monumental impact on modern-day culture; freezing the public domain ignores the power they would have upon the Canadian imagination upon entering the public domain.

A blanket extension of copyright term ignores the realities of modern copyright law. When the United Kingdom extended the length of their copyright term, one member of Parliament illustrated theses complexities by noting that Hitler's death in 1945 meant that *Mein Kampf*

[27] "Do not enclose the cultural commons", Editorial *The Financial Times* (19 April 2009), online: <www.ft.com>.

would have its copyright revived.[28] Such a loaded work illustrates just how many fundamental questions overlap with extending the copyright term. Commentators from Australia have rightly noted: a rushed term extension driven by politics does little to improve the state of copyright law.[29] Not adopting informed accompanying measures would ignore the lessons of the past.

## b. The Economic Harm of Term Extension

Economists and industry have long debated the "right" length of copyright term. No matter the existing length of the term, proponents of term extension regularly invoke an image of economic efficiency to justify the term extension. However, recent studies have proceeded to systematically undermine the power of such arguments.

The UK's Gower Review of Intellectual Property (Gower's Review) concluded that proponents of term extension were only concerned about increasing profit for themselves rather than society as a whole.[30] The Gowers Report stated that at the time, the estimated optimal term length was seven years at most.[31] More importantly, the report found that marginal incentives that arise from term extension are "likely to be very small beyond a term of 25 years".[32] In a subsequent editorial, the author of the Gower's Review summarized reality: copyright is economic, not moral; the empirical data shows term extension has high public costs and negligible benefits for creatives.[33]

Those pushing for an ever-expanding term of protection attempt to discredit arguments advanced in the Gower's Review. Generally, they point to research from 2015 by Professor George Barker.[34] Barker's research looked at "myths" advanced by those advocating for tapping the brakes on term extension. He critiqued issues in the economic models that were used and notably considered the "alleged" lack of incentive to create new works.[35] Barker also claimed that more works would enter the public domain. On these two points, it is worth remembering that Barker was looking at the term extension of sound recordings, which were determined by the date of fixation for a fixed period of fifty years—potentially within the lifespans of sound recording makers! Barker was not speaking to the marginal incentive effect of a term extension from fifty to seventy years after the death of the author. Moreover, as the data discussed earlier showed, an increase in the length of the copyright term negatively impacts the availability of works in the public domain.

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[28] UK, HC Deb (18 December 1995), vol 268, col 1260 (Mr. Geoffrey Hoon) <hansard.parliament.uk/Commons/1995-12-18/debates/98fc518a-f454-460d-9061-4a831d4371c7/Copyright>.

[29] Maree Sainsbury, "Governance and the Process of Law Reform: The Copyright Term Extension in Australia" (2006) 9: Special Issue Canberra L Rev 1 at 13-16.

[30] UK, *Gowers Review of Intellectual Property* (Independent Report) (London: The Stationary Office, 2006) at 50 <www.gov.uk/government/publications/gowers-review-of-intellectual-property>.

[31] *Ibid*.

[32] *Ibid*.

[33] Andrew Gowers, "Copyright extension is out of tune with reality", *The Financial Times* (14 December 2008), online: <www.ft.com>.

[34] See generally, Barker, *supra* note 12.

[35] *Ibid.*

Barker remarks that the economic reports behind the Gower's Review failed to account for the power of digital piracy. He explains that the growth in digital piracy from the turn of the millennium led to a decrease in 70% of music revenues in real terms. He suggests that a longer term of protection therefore enhances profitability of investment and offset the loss from piracy.[36] Raising the spectre of "piracy" as justification for pillaging the public domain is such a novel claim that it merits a closer look.

### i. Post-Millennial Copyright Infringement in Context

A 2017 report from the European Union looked specifically at the displacement of copyrighted material in six member states.[37] That report puts digital copyright infringement into a 21st century perspective. The EU report found that there was no significant statistical evidence of net displacement of sales by online copyright infringement.[38] The authors estimated a 0% net displacement rate for music since displacement of physical sales by illegal downloads or streams is positively compensated by live concert visits. The report found the displacement rate of illegal book downloads was insignificant. Notably, there was a positive effect on illegal transactions involving games, 24%. The report found that the gaming industry has been successful in converting illegal users to paying one by different offers related to gameplay. While the report found modest displacement for films and television, it is difficult to see how term extension for such works could offset infringement of new and current top-selling works.[39]

A subsequent report from December 2020 looked deeper at infringement for film, music and TV.[40] The 2020 findings suggest that the offsetting "lost profit" from infringement as suggested by Barker is a well-intentioned but misplaced effort. Two patterns emerged from the 2020 report: (1) infringement followed commercial success; and (2) films that were successful in the producing country without a wide international distribution were subject to higher infringement rates. This meant that US productions accounted for 84% of the dataset considered. In total 96% of EU film infringement involves American, British, French, and Italian works. In contrast, films from Canada, Australia, China, Finland, Germany, India, and Russia accounted for 1.8% of admissions in EU cinemas yet made up 2.8% of film piracy.[41] The report arrived at important conclusion about infringed films: each time admissions to a film increased by 10%, illegal downloads increased by 3.7%.[42] If a film is not live action, infringement is generally 48% lower and a film produced prior to 2017 will suffer 58% less piracy. Notably, domestic films (where a producer is from the country of consumption) are subject to 37% less piracy whilst co-production are at 25%.[43]

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[36] *Ibid* at 4-6.
[37] European Commission, "Estimating displacement rates of copyrighted content in the EU: Final Report" (22 September 2017) at 7-8, online (pdf): *Publications Office of the EU* <op.europa.eu/en/publication-detail/-/publication/59ea4ec1-a19b-11e7-b92d-01aa75ed71a1> [2017 Displacement Report].
[38] *Ibid.*
[39] *Ibid* at 14-15. For the detailed quantitative analysis see 117-149.
[40] European Union Intellectual Property Office, "Online Copyright Infringement in the European Union" (20 December 2020) at 8, online (pdf): *Publications Office of the EU* <op.europa.eu/en/publication-detail/-/publication/2e80c073-5f89-11eb-b487-01aa75ed71a1/language-en>.
[41] *Ibid*.
[42] *Ibid* at 22.
[43] *Ibid* at 23.

Taken together, these two reports from the European Union shine an empirical light which dampen the power of the "piracy" bogeyman. More importantly, they cast serious doubt on the strength that term extension can have to offset revenue loss due to piracy. The risk of a copyright protected work being pirated is not tied to its existence, but its currency and popularity. Extending the term of protection bears no rational correlation to the harm claimed, and amounts to theft from the public domain.

### ii. Term Extension Does Not Incentivize the Creation of New Works

The effect of term extension on economic incentives should be looked at as a question of market failure. First, the incentives of copyright obviously can have no effect of works already created, and even less on authors long dead. So, with respect to existing works, any incentive function could only function on dealings with already-published works. The argument must be that the economic benefit to Canada of a further twenty-year period of exclusivity must outweigh the benefits of a return to an ordinary competitive marketplace. This is an extra-ordinarily high burden to meet. With respect to future works, it is a claim that the current extravagant term of copyright remains insufficient to permit creators to recoup the costs of authorship. No one could conceivably make such a claim in good faith. Simply, copyright term covers a period of time so in excess of marketplace planning as to be irrelevant to such calculations. In business, a five-year plan is ambitious. A "lifetime-plus-seventy-year-plan" is fiction.

Nonetheless, Barker focused on findings from both Stan Leibowitz and Abraham Hollander to suggest that term extension leads to new work. Leibowitz found a 20-year increase in term would increase present values of works by 3% to 10%; Hollander found a 2.3% increase with a 7% discount rate. Barker highlights that albeit small, these figures demonstrate how there would be additional incentive to create new works. [44] We observe that Barker considered not extension of the general term of life plus fifty, but the much, much shorter term for protection of sound recordings.

A study looking at the impact of term extension in scientific circles found that term extension negatively impacted the publication of new knowledge. Shorter copyright terms allowed scientists to have an easier access to articles and journals to further their research. This resulted in an increase in the overall number of publications.[45] Conversely, longer copyright terms had a greater impact on scholars with limited access publications. Those scientists were unable to access works still protected by copyright—which further exacerbated inequalities between groups of scientists, and hurt all scholars.[46]

A 2018 study from the European Union on the impact of their 2011 term extension for music performers highlights just how uncertain the impact of term extension is on the creative industry.[47] The study considered whether term extension was the best tool to achieve the

[44] Barker, *supra* note 12 at 18.
[45] Shahram Haydari & Rory Smead, "Does Longer Copyright Protection Help or Hurt Scientific Knowledge Creation?" (2015) 18:2 J Artificial Societies and Social Simulation (JASSS) at 3.2 <jasss.soc.surrey.ac.uk/18/2/23.html>.
[46] *Ibid* at 3.3-3.4.
[47] European Parliament, "Implementation of the Directive 2011/77/EU: Copyright term of protection" (16 May 2018) at 13, online (pdf): *Publications Office of the European Union* <op.europa.eu/en/publication-detail/-

underlying policy goals of copyright, concluding that it was not. Extending the length of protection did not reduce digital piracy and the position of music performers in society already placed them at a disadvantage relative to powerful record companies.[48] Not all performers benefited from the term extension[49], nor did the extension necessarily lead to investment in new works.[50] Two member states also raised concerns about the cost to the user but it was too early in the directive's implementation to have detailed empirical data.[51]

The EU's review illustrates that while certain economic models suggest term extension for shorter copyright terms may spur investment in new works, in practice that effect would be marginal. Economic models are just that, models. They theorize what will happen in practice but do not necessarily reflect reality. The question becomes what will occur in practice. As the EU experiment demonstrated, while there is the possibility that term extension will spur the creation of new works, that is not necessarily the case. Thus, one cannot rely solely on possibilities as justification for a development that comes at such a cost to stakeholders.

### iii. Term Extension Extends the Harms of Monopoly

It is useful to keep in focus exactly what copyright term extension is: an extension of a monopoly. Ordinarily, we consider monopolies inefficient and harmful economic structures to be avoided so far as possible. Extension of a monopoly from fifty to seventy years after the death of an author violates this cardinal rule, imposing extra costs on consumers and inflicting the economic harm of the deadweight loss associated with consumers priced out of the marketplace without addressing any corresponding market failure. Copyright term extension is self-inflicted economic harm.

However, term extension also imposes a cost on creators and the industries that commercialize creative works. The extension of copyright term delays the entry of innovative downstream products and services, including new works built on public domain works. This permits a much wider range of publications in the marketplace, from free online services such as Project Gutenberg Canada to costly and sophisticated annotated and referenced classical works. It is worth remembering that the costs of monopoly include elimination of the benefits of competition.

Term extension also imposes costs on non-commercial activity, such as those of non-profits, historical associations, and genealogical hobbyists who rely on the public domain to allow their activities to occur at all. This significant group of stakeholders is not simply "priced out of the marketplace": in some cases, any hint of liability at all will put a stop to the activity entirely. Not all of the costs of monopoly are purely economic.

Finally, it is worth remembering that the expiration of a copyright does not prevent prior copyright owners from continuing to exploit their formerly exclusive works. They must now simply compete when doing so or, in other words, return to default marketplace conditions.

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/publication/e6b74ff9-597c-11e8-ab41-01aa75ed71a1/language-en/format-PDF/source-195706576> [Directive Implementation Report].

[48] *Ibid* at 17.

[49] *Ibid* at 38.

[50] A correlation between a rise in new releases in Portugal and the term extension could not be established: *Ibid* at 98

[51] *Ibid* at 40-41.

Having had in many cases over a century in which to recoup development costs and experiment in the marketplace, they remain in an advantageous position to do so.

## c. Public-Interest Stakeholders Lack the Means of Others

Preserving a society's culture is paramount. The record or our common creative efforts serves the common good; we divert and frustrate efforts to curate and preserve this record to the detriment of all. Libraries and archives are the common preservers and conservationists of cultural records throughout history.[52] While this undertaking is noble, these organizations generally lack the resources of market stakeholders focused on private interests. Technological evolution has further exacerbated the issues these public-interest stakeholders face. Works might be too costly, out of print, or the copyright owner might be unable to be found (an orphan work). Licencing agreements are costly; transforming the work into a manageable copy or reproducing it for use of library patrons could raise infringement issues.[53]

The American term extension in the 1990's attempted to rectify this challenge with a pointed exception benefiting public interest stakeholders. A consortium of libraries and similar associations submitted a brief as *amici curiae* to the Supreme Court of the United States in the case *Eldred v Ashcroft*, considering the constitutionality of term extension legislation.[54] The brief argued that the exceptions within the extension legislation were ambiguous and prevented a meaningful mitigation of the risks associated with term extension. Specifically, "normal commercial exploitation" and "reasonable price" – essential terms protecting such stakeholders from liability for preservation activities—had not been clearly defined. For public interest groups with limited means, they ran a substantial risk of being subject to infringement proceedings if a rights holder alleged a work was still subject to normal commercial exploitation or available at a reasonable price.[55] We take from this experience that protecting public interest stakeholders from the harms of term extension cannot adopt exceptions based on judgements or subjective assessments. Rather, safe harbors with clear borders is necessary to protect such stakeholders and the public good they serve.

[52] Laura N Gasaway, "America's Cultural Record: A Thing of the Past" (2003) 40:3 Hous L Rev 643 at 645-646.
[53] *Ibid* at 646.
[54] *Eldred v Ashcroft*, 123 S Ct 769 (2003).
[55] *Eldred v Ashcroft* (Appellate Brief), 2002 WL 1059710 (U.S.) at 29.

# 3. Experiences in Copyright Term Extension

The late 20th century was marked with many countries extending the term of copyright protection. Such extension were designed to increase the term of protection to be harmonious with other nations: the United Kingdom with the European Union, Australia with the US, and the US with the EU. While each country increased the length of protection to life+70, they each took a different approach to offset the harms associated with term extension. In reality, harm mitigation approaches were so limited that they have had little practical effect. Rights holders gained a windfall and other stakeholders paid the cost. American works from 1923 only entered the public domain in 2019—a dramatic 95 years of protection.

## a. Time-Limited Exceptions Off-setting Harms of Term Extension

Copyright term extension harms the public domain and innovation and imposes economic costs on the public. The United Kingdom and Australia both sought to off-set these harms by setting a time-limited exception for works who would have their copyright revived: if a publisher had taken steps to exploit a work entering the public domain, but the copyright in the work was revived, so long as the undertaking occurred within a designated period of time, then continuing that exploitation would not be considered infringement. The recent entry of F. Scott Fitzgerald's *The Great Gatsby* into the public domain, and the resulting works by a range of publishers[56], show the power of works that are no longer under copyright.

### i. UK Experience

The United Kingdom increased copyright term as part of harmonization with other members of the EU in 1995.[57] The Government of the day drafted the regulations to balance the benefits of term extension with the interests of those who would be "adversely affected".[58] However, these transitionary public domain provisions only considered a limited situation well before the regulations were introduced in December 1995. The time-specific carve-out considered only 1 January 1995 to 1 July 1995. If copyright in a work had ceased, and either an arrangement was made prior to the first of the year, or copies were made before the first of July, neither act was considered infringement.[59] Likewise, it was not considered infringement either if the copyright had expired in a work prior to 1 July when it was being

[56] E.g. *Nick*, a prequel to *The Great Gatsby*: Alison Flood, "The Great Gatsby prequel set for release days after copyright expires" (15 July 2020), online: *The Guardian* <www.theguardian.com/books/2020/jul/15/great-gatsby-prequel-2021-copyright-michael-farris-smith-f-scott-fitzgerald>.

[57] *The Duration of Copyright and Rights in Performance Regulations 1995* (UK), SI 1995/3297, s 18-23 <www.legislation.gov.uk/uksi/1995/3297>.

[58] UK, HC Deb (18 December 1995), vol 268, col 1255 (The Minister for Science and Technology) <hansard.parliament.uk/Commons/1995-12-18/debates/98fc518a-f454-460d-9061-4a831d4371c7/Copyright>.

[59] *The Duration of Copyright and Rights in Performance Regulations 1995* (UK), SI 1995/3297, s 23 <www.legislation.gov.uk/uksi/1995/3297>.

used.[60] However, "arrangement" was never clearly defined in the legislation leading to inherent issues with this approach.

The regulations define "arrangement" to mean simply "arrangements for the exploitation of the work in question".[61] This ambiguity was highlighted before the House of Commons as being fertile ground for litigation; even undermining the purpose of the accompanying measures.[62] In the government's view, this ambiguity was inherently necessary to keep the provision sufficiently general.[63]

### ii. Australia: More-Generous Time-Limited Exceptions

Australia undertook a similar choice to that of the UK when they extended their copyright terms to the life of the author + 70 years as part of the implementation of a free trade agreement with the United States.[64] Unlike the United Kingdom, Australia used Royal Assent of the agreement's implementing legislation as the cut-off. That is, if an agreement to deal with a work on the threshold of entering the public domain were to be entered into prior to the legislation receiving Royal Assent, that agreement would still be valid afterwards even though the work term extension. Although if the owner notifies the contracting party of the renewal and they cannot agree on reasonable compensation, then they can apply to the Australian Copyright Tribunal.[65]

**The (Limited) Value of This Approach:** These time limited exceptions can appear promising at first glance. After all, they recognize that there is value in works no longer protected by copyright—the public domain—and seek to protect the economic interests of good faith users from infringement actions. However, their effectiveness is limited. Extending the term of protection by 20 years has a longer impact than the limited length of the measures that the United Kingdom and Australia undertook. In other words, the limited benefit time-limited exceptions offer ignores the range of harms that come alongside the extension of the copyright term – particularly those borne by consumers facing a gratuitous 20 year extension of monopolistic pricing, as well as those borne by public interest actors, like archives, historians and libraries, interested in preserving culture represented by orphaned works and out of print publications.

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[60] *Ibid* at 23(3).
[61] *Ibid* at 23(5).
[62] UK, HC Deb (18 December 1995), vol 268, col 1263 (Mrs. Edwina Currie <hansard.parliament.uk/Commons/1995-12-18/debates/98fc518a-f454-460d-9061-4a831d4371c7/Copyright>.
[63] UK, HC Deb (18 December 1995), vol 268, col 1272 (The Minister for Science and Technology) <hansard.parliament.uk/Commons/1995-12-18/debates/98fc518a-f454-460d-9061-4a831d4371c7/Copyright>.
[64] *US Free Trade Agreement Implementation Act 2004* (Austl) 2004/120, s 122 <www.legislation.gov.au/Details/C2005C00021>.
[65] *US Free Trade Agreement Implementation Act 2004* (Austl) 2004/120, s 118 <www.legislation.gov.au/Details/C2005C00021>.

## b. United States: Targeted Exception Benefitting Public-Minded Stakeholders

Copyright stakeholders are far from a binary group of producers and users. Some are public-minded groups like Project Gutenberg and similar institutions who seek to preserve records of society's cultural history. These groups are not in the same position as commercial stakeholders. They enjoy limited ability to offer access to works. Moreover, when dealing with out of print works and orphan works, they do not necessarily have the means available to obtain a copy for the work to include in the archive.

Measures accompanying the American term extension sought to remedy this inequality.[66] Instead of taking a time-based approach like the UK or Australia, the US included an exception for libraries, archives, and non-profit education institutions:[67] during the final 20 years of protection, if the work was not still commercially available at a reasonable price, the work could be used for preservation, scholarship, or research.[68]

This approach might respond to some issues for specific institutional stakeholders. However, the exception benefits such a limited group that critics say that it (or subsequent post-hoc measures) did not yield fruit.[69] Jennifer Jenkins, Clinical Professor of Law at Duke University and Director to the Center for the Study of the Public Domain, observed that the COVID-19 pandemic has only further exemplified how this targeted exception had a limited impact on society.[70] If one is unable to access those institutions, one loses access to the works.[71]

## c. Ireland: A Cautionary Tale in Term Extension

Ireland's experience with copyright extension shows how any accompanying measures must be well thought out to not hinder the future. The extension of the term of protection in the late 20th century revived the copyright in the works of literary greats like James Joyce.[72] Joyce's Estate has led a continued legal battle to control the use of the now re-protected works—some have observed that moral and economic rights have used to censor interpretations of Joyce's life and work.[73] The most dramatic of which arose in 2004 at Rejoyce Dublin 2004.[74] While the government of Ireland had wanted to celebrate the works of Joyce on the centenary of the day Joyce's *Ulysses* was set, his Estate threatened to sue the government, and other organisations involved, if there were any public readings as part of the celebration.[75]

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[66] *Sonny Bono Copyright Term Extension Act*, Pub L No 105-298, 112 Stat 2827, [*Sonny Bono Act*] <www.congress.gov/bill/105th-congress/senate-bill/505>.
[67] Consultation Paper, *supra* note 4 at 7.
[68] *Sonny Bono Act*, *supra* note 66, s 104.
[69] "Episode 78: Jennifer Jenkins on What Copyright Term Extension Could Mean for Canada" (1 March 2021) at 00h:22m:36s, online (podcast): *Law Bytes* <www.michaelgeist.ca/podcast/episode-78-jennifer-jenkins-on-what-copyright-term-extension-could-mean-for-canada/>.
[70] *Ibid.*
[71] *Ibid*.
[72] Matthew Rimmer, "Bloomsday: Copyright Estates and Cultural Festivals" (2005) 2:3 SCRIPTed 345 at 348-364.
[73] *Ibid* at 364.
[74] *Ibid*.
[75] *Ibid* at 374.

Consequently, there couldn't be any major public reading of Joyce's works at the festival; although festival participants defied the Joyce Estate and took to the streets to proclaim their favourite passages from *Ulysses*.[76] However, the celebration of Joyce led to a remarkable choice by the Irish legislator: pass emergency legislation to "balance the interests of stakeholders".[77]

Amendments to the Irish copyright law in 2000 effectively created what was considered an exhibition right.[78] Therefore, given the menace of lawsuits from the Joyce Estate, the Irish government passed the *Copyright and Related Rights (Amendment) Act*.[79] This legislation was designed to remove any ambiguity about the ability of institutions to display artistic and literary works—notably the exhibition "James Joyce and *Ulysses*" at the National Library of Ireland.[80]

[76] *Ibid* at 374-375.
[77] *Ibid* at 378.
[78] *Ibid*.
[79] *Copyright and Related Rights (Amendment) Act 2004* (I), 2004/18 <www.irishstatutebook.ie/eli/2004/act/18/enacted/en/print.html>.
[80] Rimmer, *supra* note 72 at 379.

# 4. A Made-In-Canada Approach: Registration for Post-*Berne* Term of Exclusivity

The *INDU Report* recommended a registration system for post-Berne terms of copyright protection.[81] A registration-based system for 20 years of additional protection allows the copyright term to be extended without many of the costs of blanket term extension identified in this submission. CIPPIC supports this proposal.

The wide-reaching impact of term extension has been recognized by many. Maria Pallante, former Register of Copyrights in the United States, considering potential revisions to the length of copyright highlighted that a registration system for the last twenty years would "balance" the interests of stakeholders.[82] In her view, if a copyright holder has an interest in exploiting a work, they can register with the Copyright office to assert their rights. If no registration occurs, the work would enter the public domain.[83] She further remarks that the *Berne Convention* is only a *minimum* protection; there should not be insurmountable problems under international law.[84]

Noted legal economists Landes and Posner have also voiced approval for the benefits of a registration system.[85] In their oft-cited article about indefinitely renewable copyright, they note that a registration system could "enable society to have its cake and eat it too."[86] In their view, it would be only the few profitable works that would be renewed. The less profitable works would easily enter the public domain. Such a system would allow the profitable works to maintain their economic advantages and the public would benefit from the vast, vast majority of works that would enter the public domain.[87]

The European Union has also considered the power of a registration system.[88] A EU registration system would provide legal certainty when dealing with authorship in infringement cases and contribute to innovation by eliminating concerns over existing issues such as Orphan Works.[89] Although a different underlying purpose, the legal analysis of the EU's Intellectual property office remains illustrative of the practical feasibility that a registration system for post-*Berne* exclusivity can withstand legal scrutiny. Specifically, the report reiterated similar views to former Registrar Pallante. Article 5(2) of the *Berne Convention*

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[81] *Industry Report*, *supra* note 6 at 38.
[82] Maria A Pallante, "The Next Great Copyright Act" (2013) 36:3 Columbia J L & Arts 315.
[83] *Ibid* at 337 n 108.
[84] *Ibid*.
[85] William M Landes & Richard A Posner, "Indefinitely Renewable Copyright" (2003) 70:2 U Chi L Rev 471.
[86] *Ibid* at 518.
[87] *Ibid*.
[88] See European Union Intellectual Property Office, "Feasibility Analysis for an EU Digital Deposit System" (18 June 2018), online (pdf): *Publications Office of the European Union* <op.europa.eu/en/publication-detail/-/publication/878e1db0-736c-11e8-9483-01aa75ed71a1/language-en/format-PDF/source-196539328> as well as European Union Intellectual Property Office, "Study on Voluntary Registration and Deposit Systems: United States and China" (18 June 2018), online (pdf): *Publications Office of the European Union* <op.europa.eu/en/publication-detail/-/publication/c2dda34d-736b-11e8-9483-01aa75ed71a1/language-en/format-PDF/source-196539574>.
[89] European Union Intellectual Property Office, "Feasibility Analysis for an EU Digital Deposit System" (18 June 2018) at 4, online (pdf): *Publications Office of the European Union* <op.europa.eu/en/publication-detail/-/publication/878e1db0-736c-11e8-9483-01aa75ed71a1/language-en/format-PDF/source-196539328>

prevents imposition of formalities; however a voluntary system can have legal effect.[90] Thus, a made-in-Canada approach with a registration system for an additional 20 years of protection must be voluntary. As Landes and Posner suggested, owners of the small segment works still-profitable fifty years after the death of their author would register for the additional 20 years while the non-profitable works would not. Such a system would not only balance economic efficiency but minimize the harm to stakeholders who are not the copyright holders. The registration system would also create a valuable database of economically significant works– something that, unlike patent law and trademarks law, our current system does not generate. Such a database would prove a treasure trove of data for cultural historians, economists, and innovation theorists.

[90] *Ibid* at 36.

# 5. Obligations Under International Law: Minimum Standards, not maximums

A registration system for post-Berne exclusivity is seen by some as untenable in light of Canada's international obligations. However, an analysis of the governing treaties shows otherwise. Both the *Berne Convention* and the *TRIPS Agreement* only impose a *minimum* standard of treatment. A registration system focused on an *additional* 20 years beyond *Berne* requirements applied to *all* copyrights in Canada would not be a formality to meet the *minimum* requirement of *Berne*, nor would it violate obligations of national treatment.

## a. Trade Obligations at the World Trade Organization Would be Respected

Today's international trade law includes obligations on most products and services, including intellectual property. Through the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (*TRIPS*) of the WTO, WTO members must comply with articles 1 through 21 of the *Berne Convention* except for article 6*bis*.[91] These obligations impose an established minimum standard of treatment; countries are free to implement greater measures.[92]

National treatment remains a central obligation of *TRIPS*. The foreign national must not be treated differently than the nationals of the country.[93] Specifically, one must consider the effective equality of opportunities between the host country's nationals and those of the other member states.[94] In the leading case where the United States disputed a regulation undertaken by the European Communities, the panel concluded that since the EC delegated an application revision process to national governments, the EC failed to provide no less favourable treatment itself to the nationals of other WTO members.[95]

The national treatment analysis under *TRIPS* outlines the major boundary of the registration system. *All* copyright holders in Canada must be offered the *possibility* of 20 years of additional protection. This would ensure that all copyright holders would have the same effective opportunity to gain an extra 20 years of protection; the minimum obligations under *TRIPS* would be respected. All copyright holders would be able to benefit from the additional protections if they so chose.

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[91] *Marrakesh Agreement establishing the World Trade Organization*, 15 April 1994, 1869 UNTS 299, annex 1C, art 9.
[92] Peter Van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, 4th ed (Cambridge: Cambridge University Press, 2017) at 1001.
[93] *European Communities – Trademarks and Geographical Indications (Complaint by the United States)* (2005), WTO Doc WT/DS174/R at para 7.148 (Panel Report), online: *WTO* <docs.wto.org>.
[94] *Ibid* at para 7.133-7.134.
[95] *Ibid* at para 7.275.

## b. The *Berne Convention* is Concerned Only with Minimums

The foundational agreement on copyright remains the *Berne Convention*. Some might read the *Berne Convention* and suggest that a registration requirement for 20 years of additional protection would be antithetical. They forget that *Berne* establishes a *minimum* threshold of treatment, not a maximum.[96]

Resistance to a registration-based system for post-Berne term extension stems from a narrow and restrictive reading of article 5(2) of the convention: "[t]he enjoyment and the exercise of these rights shall not be subject to any formality[…]."[97] Article 32 of the *Vienna Convention on the Law of Treaties* outlines tools to aide in treaty interpretation, including preparatory work.[98] The development of what is now article 5(2) shows that the discussions behind the provision did consider "formality" to consider any system of registration.[99] Cases before the courts have also considered questions about registration and "formalities" in *obiter*. They have generally concluded that "a requirement for registration of copyrights would be contrary to international law."[100] This interpretation ignores two essential features of the *Berne Convention*: first, the Convention focuses on minimums, not maximums; second, the Convention does not purport to define the whole of copyright, just that aspect of copyright within the four corners of the Convention.

Scholarship has maintained that a registration requirement in addition to the minimum requirement of the convention would be upheld.[101] The most impactful voice in favour of a registration system is former Register Pallante:

> 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 […] 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.[102]

Former Register Pallante's comments shed new light on the observation of the United States Supreme Court in *Golan v Holder*; in that case, Justice Ginsburg noted the minimum requirements under *Berne* are a protection for the life of the author plus 50 years, whether or not the author has complied with the formalities of a foreign state.[103] Alongside Pallante's

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[96] Ricketson, *supra* note 2, at 318-355.
[97] World Intellectual Property Organization, "Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979) (Authentic text)" at 6, online (pdf): *WIPO* <wipolex.wipo.int/en/text/283693.
[98] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, art 32 (entered into force 27 January 1980).
[99] Ricketson, *supra* note 2, at 220-224.
[100] *R Griggs Group Ltd v Evans (No. 2)* [2004] EWHC 1088 (Ch) at para 34. See also *Lucasfilm Ltd v Ainsworth* [2009] EWCA Civ 1328 at para 181; Cass civ 1re, 17 December 2009, No 07-21.115; as well as *La Resolana Architects, PA v Clay Realtors Angel Fire*, 416 F (3d) 1195 at 1205-1207, abrogated by *Reed Elsevier Inc v Muchnick* 559 US 154.
[101] Christopher Jon Sprigman, "Berne's Vanishing Ban on Formalities" (2013) 28 Berkley LJ 1565.
[102] Pallante, *supra* note 82 n 108.
[103] *Golan v Holder*, 132 S Ct 873 at 878.

comments, Justice Ginsburg's observation confirms that *Berne* outlines a minimum requirement, not a maximum.

Berne does not purport to exhaustively define copyright law. Copyright under the umbrella of Berne must comply with its provisions. Copyrights outside of the four corners of the Convention need not. Indeed, as copyrighted subject matter expands, Berne governs an increasingly narrow sliver of copyright. Canada need not tie its hands unnecessarily in selecting options to gift copyright owners with a post-Berne twenty-year term of monopoly.

Harm to the public domain must be minimized, not self-inflicted.

# 6. Conclusion: Copyright Exists in Complex Ecosystem

For as long as copyright has existed, there have been forces pushing for an ever expanding term of protection.[104] In today's world, the impact of term extension is not limited to users or creators. Modern day copyright exists in a dynamic and complex ecosystem with the public domain and multiple stakeholders who look to the public interest. Extending the term of copyright protection without appropriate accompanying measures harms this delicate relationship. Any effective term extension must include measures that preserve the integrity of the public domain.

Those advocating for term extension often suggest that the public domain will not be harmed by term extension; they are wrong. Numerous studies have cast serious doubt on the arguments advanced by those groups. Works are not under exploited in the public domain, nor are they over utilized.[105] More importantly, works in the public domain are more accessible to consumers than works that are under copyright.[106]

On a broader level, term extension is harmful both for policy and economically. Term extension undermines copyright policy by upsetting the foundational objective of Canadian copyright law: balancing a just reward for creators with the public interest.[107] It is not the creator who benefits from term extension but distant relatives. The public pays a heavy price by losing the possibility of accessing the work from the public domain. Such a barrier has a notable impact on potential new creative works.[108] Similarly, recent data sheds new light on those proponents of term extension who use economic benefit as justification. Economic justification for term extension often relies on the idea of accounting for lost revenue or incentivizing the creation of new works according to models. Recent studies looking at the economics of copyright have cast serious doubt on the strength of these works. Notably, piracy in the 21st century is not the demon of the new millennium[109], and creators occupy a specific position in society where they are at a disadvantage to more powerful record companies.[110]

The experiences of other countries shows the importance of appropriate accompanying measures to term extension. While those methods appeared promising on paper, they had a limited impact. Sector specific exceptions such as those that were adopted by the US can be useful, although their impact would be restricted unless delineated into a clear safe harbour.

Copyright term extension comes with substantial costs. Accompanying measures to term extension should consider the entire copyright ecosystem to reduce the costs that will be borne by those in no position to bear them. The only method that adequately reduces the harms of term extension remains a registration system as was recommended by the Standing Committee on Industry, Science and Technology in its statutory review of the *Copyright Act*.[111]

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[104] Rose, *supra* note 1.
[105] E.g. Buccafusco & Heald, *supra* note 13.
[106] E.g. Flynn, Giblin & Petitjean, *supra* note 21.
[107] *Théberge v Galerie d'Art du Petit Champlain inc*, *supra* note 23.
[108] Flood, *supra* note 56.
[109] 2017 Displacement Report, *supra* note 37.
[110] Directive Implementation Report, *supra* note 47.
[111] Industry Report, *supra* note 6 at 38.

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