

April 13, 2022

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Dear Ministers,

**Re: Budget 2022—Copyright Law Amendments**

As a group of Canadian Intellectual Property Law scholars, we write to express our deep concern regarding the reference in the 2022 Federal Budget to amendments to the *Copyright Act*. We strongly urge you to exclude the contemplated amendments to the *Copyright Act* from any Budget Implementation Bill and ensure that their enactment would follow the ordinary legislative process.

The Budget 2022 announcement indicates two areas of legislative changes: term extension, and educational uses. It states:

[T]he government proposes to introduce amendments to the *Copyright Act* to extend the general term of copyright protection from 50 to 70 years after the life of the author as agreed under the Canada-United States-Mexico Agreement. The government is committed to ensuring that the *Copyright Act* protects all creators and copyright holders. As such, the government will also work to ensure a sustainable educational publishing industry, including fair remuneration for creators and copyright holders, as well as a modern and innovative marketplace that can efficiently serve copyright users.

## *Term Extension*

The issue of term extension was subject to consultation last year. However insufficient that consultation was,<sup>1</sup> it demonstrated the complex issues involved in deciding whether to implement copyright term extension, along with the many ways through which such an extension could be implemented. These issues cannot possibly receive the careful attention and deliberation they deserve when incorporated into a budget bill. Choosing this legislative method thus risks upsetting years of careful policy-making in the context of copyright.

In addition to imposing an additional and superfluous “tax on readers”,<sup>2</sup> extending the term of copyright will also have a profound impact on Canadians’ freedom of expression—their ability to access and use expressive works created by others, and their ability to incorporate and build on those works in their own expressive activities. Such negative impacts are not merely hypothetical, but are well theorized and empirically proven.<sup>3</sup> Therefore, if the contemplated term extension can be at all consistent with the *Canadian Charter of Rights and Freedoms*, the proposed legislation must ensure minimal impairment of free expression and must include mitigating measures to minimize its detrimental impact. It will be more difficult to demonstrate that the proposed legislation meets these constitutional thresholds in the absence of fulsome debate in which the various options for implementation have been canvassed.

At the very least, establishing a registration requirement for the additional term—which would allow right holders that want the extension to get it, while ensuring that many other works enter the public domain at the internationally-recognized standard of life plus 50 years—is essential. Even if the budget announcement had indicated that such a registration requirement would be included in the legislative amendment—which it did not—it would still be inappropriate to include such a measure in a budget implementation bill; the devil may lie in the details and a proper consultative and deliberative process is essential for ensuring an effective and operative registration system.

Moreover, as you will know, Canada has consistently resisted previous proposals and demands in trade negotiations to extend the term of copyright, including most recently in the CETA and CPTPP negotiations conducted under the Trudeau government. There has never been a policy

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<sup>1</sup> See Canadian IP Scholars (joint submission), Consultation on how to implement Canada's CUSMA commitment to extend the general term of copyright protection, March 31, 2021, online: <https://www.ic.gc.ca/eic/site/693.nsf/eng/00279.html>; Michael Geist, “Afraid to Lead: Canadian Government Launches Timid Consultation on Implementing Copyright Term Extension”, February 12, 2021, online: <https://www.michaelgeist.ca/2021/02/afraid-to-lead/>.

<sup>2</sup> Thomas Babington Macaulay, *The works of Lord Macaulay* (London Longmans, Green, 1906) at 667, online: <http://archive.org/details/worksoflordmacaul1macauloft>. See also Glynn S Jr Lunney, “The Copyright Tax” (2020) 68 J Copyr Soc USA 117.

<sup>3</sup> See Canadian IP Scholars, *supra* note 1. See also, Paul J Heald, “The Impact of Implementing a 25-Year Reversion/Termination Right in Canada” (2021) 28:1 J Intellect Prop Law 63; Paul J Heald, *Copy This Book!: What Data Tells Us about Copyright and the Public Good* (Stanford, CA: Stanford University Press, 2020); 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 Univ New South Wales Law J 1215–1253; Paul J Heald, “How Copyright Keeps Works Disappeared” (2014) 11:4 J Empir Leg Stud 829–866.

discussion or debate to explain or justify Canada’s concessions on this point in the CUSMA negotiations. This raises significant questions around the democratic legitimacy of the term extension commitment, which will only be exacerbated by a legislative move that continues to avoid such debate.

### *Copyright and Education*

We were also surprised to find in the budget announcement language concerning “a sustainable educational publishing industry, including fair remuneration for creators and copyright holders, as well as a modern and innovative marketplace that can efficiently serve copyright users.” We are concerned that amendments here might throw off the balance between copyright holders and user rights, particularly in education. We note that the language here does not specifically mention introducing legislative amendments and only expresses a commitment that the government “will work to ensure” the identified goals. We sincerely hope that this language indicates that no amendments will be introduced in the upcoming budget bill. As well, we trust that no amendment will be proposed without proper public consultation.

We are mindful of the intense lobbying by publishers, some author organizations, and collective societies and their decade-long assertion of a crisis in educational publishing. We counsel, however, against accepting those claims at face value. We urge you to follow the recommendation of Parliament’s INDU Committee from 2019 to “resume [the] review of the implementation of educational fair dealing in the Canadian educational sector within three years, based on **new and authoritative information** as well as new legal developments”.<sup>4</sup> We trust that any government action in this important area will be based not on “lobbynomics” but on compelling evidence.<sup>5</sup>

Moreover, hurried legislative action may risk constitutional incompatibility. A legislative amendment that establishes different and more onerous copyright rules for educational institutions may exceed Parliament’s legislative authority over copyright law and impermissibly intrude into education, which is a matter of provincial legislative competence.<sup>6</sup>

Finally, we wish to remind you of the Prime Minister’s [pledge](#) not to use the budget to slip through legislation and effectively shield it from proper review and democratic debate. The contemplated amendments to the *Copyright Act* involve complex matters with significant consequences for Canadians; they should be thoroughly studied and debated in a full, open, and participatory legislative process—not treated as an afterthought or a *fait accompli* and lumped into an omnibus budget implementation bill.

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<sup>4</sup> Statutory Review of the Copyright Act: Report of the Standing Committee on Industry, Science and Technology, (June 2019), Recommendation 17 (emphasis added).

<sup>5</sup> Jeremy de Beer, “Evidence-Based Intellectual Property Policymaking: An Integrated Review of Methods and Conclusions” (2016) 19:5–6 *J World Intellect Prop* 150–177.

<sup>6</sup> As the INDU Committee noted in its analysis of educational fair dealing “it is not the role of Parliament to compel provincial institutions into a specific licensing relationship.” INDU Report, *supra* note 4 at 64–65. See also Ariel Katz, “Spectre: Canadian Copyright and the Mandatory Tariff - Part II” (2015) 28:1 *Intellect Prop J* 39 at 92–93, online: <https://canlii.ca/t/t2br>.

We trust you will give our letter full consideration.

Best regards,

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