A score for "life plus 70": Canada now one step closer to extending the term of copyright

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On June 23, 2022, Royal Assent was granted to legislation that will extend the basic term of protection for copyright works in Canada under the *Copyright Act* from the life of the author plus 50 years (calculated from the end of the calendar year of their death), to life plus 70. The term extension was prompted by Canada's commitment under the Canada-United States-Mexico Agreement (CUSMA), and the change will bring Canada in line with the term of protection granted to works by major trading partners, including the United States and European Union.

The change is not yet in force. It will be implemented on a date set by an order from the governor in council. No such date is yet set, although in its 2021 consultation on extending the term of protection, the government indicated implementation would be by the end of 2022. Under CUSMA, implementation must be "no later than the expiration" of 2.5 years, beginning on the date CUSMA comes into force. In Canada, CUSMA came into force on July 1, 2020. As such, the latest possible implementation date for the copyright term extension could be interpreted as January 1, 2023. Whether the government chooses December 31, 2022 or January 1, 2023 as the end of the implementation period will have serious implications—the amendments provide for no "revival" of copyright. Works that have already entered the public domain prior to coming into force will remain so, while those still under protection will gain the benefit of the additional 20 years. Implementation by the end of 2022 would thus have the effect of granting an extended term of protection to an additional set of works that would otherwise become part of the public domain if implementation is on the first day of the new year.

A longer copyright term will also no doubt affect other areas of copyright law not addressed by the amendments. Three areas of particular interest are the reversionary right, Crown copyright, and fair dealing.

The reversionary interest, set out in section 14 of the *Copyright Act*, provides that all interest in any work assigned by the author of that work during their lifetime automatically reverts to that author's estate 25 years after the death of the author. A longer discussion of the revisionary right and its attendant issues for assignee rights holders can be found here. The policy rationale underlying Canada's automatic reversion interest is to allow the author's estate to revisit prior assignments and exclusive licenses and enter into new or better arrangements for the remaining years the work is protected by copyright (i.e., before it falls into the public domain). By making it automatic and not subject to agreement, the regime recognizes the reality that authors often grant an interest in their copyright for the entirety of its term before its full potential value is understood. There is some logic to the 25-year trigger—it is halfway through the term of protection following the author's death. However, with a shift to a 70-year term, the time for the author's estate to capitalize on their reversionary interest will be much longer—45 years, or close to two-thirds of the term of protection following the author's death.

The term of Crown copyright also remains unchanged. Under section 12 of the *Act*, works prepared or published by, or under the direction or control of, the Crown (including any government department) are subject to a 50-year term of protection from the date of publication. The Supreme Court's recent decision in *Keatly Surveying Ltd. v. Teranet Inc.*, 2019 SCC 43 (discussed here) confirmed that Crown copyright does not necessarily arise at the time of production—rather, it can be triggered where a work is independently created, but then later published under the direction or control of the

government. It remains an open question after *Keatly* whether in such cases the basic term of protection would run parallel to, or be extinguished by the triggering of, Crown copyright (and some of the Court's comments in *obiter* suggest they viewed Crown copyright as "expropriating" the copyright in the underlying work). In either case, without amendment to better harmonize the Crown copyright term and the basic term of protection, there is a real possibility that works that become subject to Crown copyright will enter the public domain far earlier than if the same work were privately created and controlled.

Last, a longer term of protection will also no doubt impact how future courts approach the fair dealing analysis. The current line of jurisprudence from the Supreme Court, starting with the 2004 decision in *CCH Canadian Ltd. v. Law Society of Upper Canada* (2004 SCC 13), is to treat fair dealing as a "user's right", and a critical part of the "copyright balance" between incentivizing the creation of works by artists and facilitating their dissemination to and use by the public. The Supreme Court has repeatedly emphasized the need to give a "large and liberal" interpretation to the various categories of fair dealing. For the most part, lower courts have followed suit (an arguable outlier being a 2017 decision from the Federal Court relating to the application of the (relatively) new fair dealing categories of "parody" and "satire"). There is thus a real possibility of future courts viewing the extensions to the terms of copyright implemented to comply with CUSMA as tipping the copyright balance in favour of owners, such that an even broader approach to fair dealing (and other exceptions under the *Act*) is necessary to respect and preserve the owner-user balance.