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June 3, 2015

Standing Committee on Finance  
Ottawa, ON

My name is Michael Geist. I am a law professor at the University of Ottawa, where I hold the Canada Research Chair in Internet and E-commerce Law. While I was not invited to appear before your committee on Bill C-59, I offer this submission to provide a broader perspective on the inclusion of a copyright extension for sound recordings from the current 50 years to 70 years. I have read the Music Canada submission along with the comments at committee of its president Graham Henderson on June 2, 2015.

### **Introduction**

The decision to extend the term of copyright without public consultation or further study stands in stark contrast to other countries that have engaged in detailed reviews of the implications of the policy change. Indeed, given the increase in consumer costs, the limited benefits to many artists, the competitive implications, and the harm to Canadian cultural heritage, it is troubling that the government has proceeded with a major copyright change in this manner.

While Music Canada praises the term extension, the decision is unexpected and unnecessary. The music industry did not raise term extension as a key concern during either the 2012 copyright reform bill or the 2014 Canadian Heritage committee study on the industry. Experience elsewhere suggests that the extension is a windfall for record companies, with little benefit to artists or the public. In fact, many countries that have implemented the extension have been forced to do so through trade or political agreements, while signaling their opposition along the way.

Canada will extend term without any public discussion or consultation, yet other studies have found that retroactive extension does not lead to increased creation and that the optimal term length should enable performers and record labels to recoup their investment, not extend into near-unlimited terms to the detriment of the public. For Canadian consumers, the extension could cost millions of dollars as works that were scheduled to come into the public domain will now remain locked down for decades.

For example, the 2006 Gowers Reports on Intellectual Property, a wide ranging and well respected government-sponsored review in the UK, came out against term extension for sound recordings and performances:

*In conclusion, the Review finds the arguments in favour of term extension unconvincing. The evidence suggests that extending the term of protection for sound recordings or performers' rights prospectively would not increase the incentives to invest, would not increase the number of works created or made available, and would negatively impact upon consumers and industry. Furthermore, by increasing the period of protection, future creators would have to wait an additional length of time to build upon past works to create new products and those wishing to revive protected but forgotten material would be unable to do so for a longer period of time. The CIPIL report indicates that the overall impact of term extension on welfare would be a net loss in present value terms of 7.8 per cent of current revenue, approximately £155 million.<sup>1</sup>*

A Dutch study on intellectual property reached the same conclusion, noting that the arguments in favour of extension were unconvincing and that the extension would create significant costs for consumers and society as a whole. It concluded:

*To conclude, the arguments made in favour of a term extension are not convincing. Many arguments already fall outside the objectives of related rights protection for phonograms. The fact that some recordings still have economic value as rights therein expire, cannot in itself provide a justification for extending the term of protection. Related rights were designed as incentives to invest, without unduly restricting competition, not as full-fledged property rights aimed at preserving 'value' in perpetuity. Other arguments do not convince because a term extension would either be ineffective in addressing the concerns in question, because there are other, better remedies available or advisable, or because the costs of an extension would outweigh its eventual benefits. The term of related rights must reflect a balance between incentives, market freedom and costs for society. This balance will be upset when terms are extended for the mere reason that content subject to expiration still has market value. The public domain is not merely a graveyard of recordings that have lost all value in the market place. It is also an essential source of inspiration to subsequent creators, innovators and distributors.<sup>2</sup>*

The European Union ultimately passed an extension from 50 to 70 years in 2011, but not without significant opposition from member states. Eight countries – Belgium, Czech Republic, Luxembourg, Netherlands, Romania, Slovakia, Slovenia and Sweden – all voted against, while Austria and Estonia abstained. Sweden argued that the extension was “neither fair nor balanced”, while Belgium argued that it would mainly benefit record producers and negatively affect access to cultural materials in libraries and archives.

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<sup>1</sup> *Gowers Review of Intellectual Property*, London, Her Majesty's Treasury, 2006, available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/228849/0118404830.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228849/0118404830.pdf)

<sup>2</sup> IVIR, *The Recasting of Copyright & Related Rights for the Knowledge Economy*, November 2006, online at: [http://ec.europa.eu/internal\\_market/copyright/docs/studies/etd2005imd195recast\\_report\\_2006.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf)

Belgium's concern regarding the lack of benefit for artists was also reflected in the Gowers report, which noted:

*If the purpose of extension is to increase revenue to artists, given the low number of recordings still making money 50 years after release, it seems that a more sensible starting point would be to review the contractual arrangements for the percentages artists receive.<sup>3</sup>*

While the European experience on term extension for sound recordings and performances is instructive, there have been Canadian studies that have reached similar conclusions. Industry Canada commissioned University of Montreal economist Abraham Hollander to examine the issue in 2005. Hollander's study found that the economic value of a term extension to the recording industry was very small:

*[Sound recordings] are protected for a period of 50 years from fixation. Adding 20 years of protection would contribute 2.3% to the present value of royalties under a 7% discount rate, assuming that the flow of royalties remains unchanged during the whole period. Under identical assumptions, extending the protection period to 100 years would contribute a mere 3.0% to the present value. This, however, is true only if the royalty flow remains constant over time. When the annual royalties decline rapidly over time, as is typical, the increase in present value would be considerably smaller.<sup>4</sup>*

Not only have the studies come out against term extension, but copyright stakeholders have not publicly emphasized the issue. Term extension for sound recordings and performances was nowhere to be found among the thousands of submissions to the 2010 copyright consultation, it was not discussed in the 2002 Canadian roadmap for copyright reform, and groups like the Canadian Independent Record Production Association and the American Federation of Musicians of the United States and Canada did not raise it in their submissions on copyright reform. The music industry's form letter did not discuss term extension and it was not an issue that was prominently raised in the 2012 copyright reforms. In fact, just last year the Standing Committee on Canadian Heritage conducted a major review of the music industry in Canada with dozens of witnesses taking the time to appear or submit briefs. The final report and the government's response never raise the term of protection for sound recordings and performances as a concern.

The government committed to a review of copyright in 2017 as part of its 2012 Copyright Modernization Act. There is no emergency on this issue and the extension should be studied as part of the broader examination of copyright law at that time, rather than including it within a budget bill without public debate and analysis.

### **The Public Domain**

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<sup>3</sup> Gowers, *supra*, note 1.

<sup>4</sup> Abraham Hollander, *Assessing Economic Impacts of Copyright Reform on Selected users and Consumers*, online at: <https://www.ic.gc.ca/eic/site/ipdp-dppi.nsf/eng/ip01187.html>

Music Canada has argued that works entering the public domain harms artists and the broader public interest, noting the loss of control for artists such as Buffy Sainte-Marie. Yet Sainte-Marie still holds copyright in the songs she wrote and will do so for her entire lifetime plus an additional 50 years.

What is at stake with the government's proposed copyright term extension is not copyright in the song, but rather in the sound recording or performance. Those rights are often held by recording companies, not the artists. They are not authors rights, but rather "related rights" that are found in particular recordings.

Numerous studies on the economic impact of the public domain find that an enhanced public domain benefits the economy. For example, Rufus Pollock's work has examined the value of the public domain<sup>5</sup> and Paul Heald has written several important articles on the economic importance of the public domain.<sup>6</sup> Most recently, Heald found that Kickstarter projects based on public domain works were more likely to succeed and that commercial firms often use public domain works to create new commercial products.<sup>7</sup> The expert analysis demonstrates that copyright term extension hurts the economy and the government's decision to extend the term of copyright in sound recordings in Budget 2015 is likely to both harm the Canadian economy and, as discussed further below, undermine Canadians' access to their cultural heritage.

### **Increased Consumer Costs and Decreased Competition**

The question of competition and consumer costs was addressed in several leading European reports on intellectual property and term extension. The University of Cambridge's Centre for Intellectual Property and Information Law reviewed the economic evidence related to term extension for sound recordings, stating:

*When a music company or artist earns more because of a term extension that money must come from somewhere. Crudely, there are only two possibilities. On the one hand, the money came from some other firm, perhaps the "public domain specialist", who, in the absence of a term extension, would have been able to enter the market for as a seller of the recording. On the other hand, the money came from end-users who without a term extension would have been the recipients of lower prices. Theory inclines us towards the second possibility: greater competition to supply a recording once it enters the public domain should operate to drive down prices, transferring value from producers to consumers.<sup>8</sup>*

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<sup>5</sup> Rufus Pollock, The Value of the Public Domain, online at: [http://rufuspollock.org/papers/value\\_of\\_public\\_domain.ippr.pdf](http://rufuspollock.org/papers/value_of_public_domain.ippr.pdf)

<sup>6</sup> Paul J. Heald et al, Copyright and the Value of the Public Domain, online at: <https://zenodo.org/record/14975/files/CREATE-Working-Paper-2015-01.pdf>

<sup>7</sup> Paul J. Heald, The Public Domain, Illinois Public Law Research Paper No. 14-21, online at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2362983](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2362983)

<sup>8</sup> Centre for Intellectual Property and Information Law, University of Cambridge, Review of the Economic Evidence Relating to an Extension of the Term of Copyright in Sound Recordings, online at: [http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/gowers\\_cipilreport.pdf](http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/gowers_cipilreport.pdf)

The Gowers review comes to much the same conclusion:

*As sound recordings of enduring popularity enter the public domain, economic theory suggests that competition between many release companies will drive down the price, just as has occurred in the public domain book market for classic literature. Therefore, the review believes that most of the increased revenue from term extension would come directly from consumers who would pay higher (i.e. monopoly) prices for longer.<sup>9</sup>*

So did a report for the European Commission conducted by the Institute for Information Law at the University of Amsterdam, which noted:

*when the exclusive reproduction right for phonograms expires, any competing record company can make use of it and release the same recording potentially at lower prices. An extended protection would prolong the temporary monopoly of the original phonogram producers, preventing the downward pressure of competition on prices. As a result, consumers would continue to pay higher prices for certain sound recordings for several years.<sup>10</sup>*

Canadian consumers are seeing this issue unfold right now at Walmart Canada, where cheaper public domain records offer consumers better value and pay composers in full for their work.

As the Gowers review predicted, public domain recordings encourage competition between release companies and drive down the price for consumers. The songwriters are paid either way, but the consumers win with more choice and lower priced music. Increased competition is good for consumers and for the creators of the songs, yet the government's decision to extend the term of copyright for sound recordings effectively reduces choice and eliminates competitors.

### **Access to Canadian Heritage**

The government's unexpected decision to extend the term of copyright for sound recordings and performances will not only cost consumers by reducing competition and stop cheaper, legal music alternatives from coming to the market – but it will also reduce access to Canada's music heritage.

This is the inescapable conclusion based on studies elsewhere, which find that longer copyright terms discourage re-issuing older releases, which often means that the musical heritage is lost. For example, Tim Brooks conducted a detailed study in 2005 on how copyright law affects reissues of historic recordings. He concluded that longer copyright terms significantly reduce public access. First, he examined the data in the United States, which at the time had the longest term of protection:

*our analysis shows that rights-holders have reissued – or as a practical matter allowed*

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<sup>9</sup> Gowers, supra, note 1.

<sup>10</sup> IVIR, supra, note 2.

*legal access to – only a small fraction of the historic recordings they control. Overall, 14 percent of listed pre-1964 recordings were found to be available from rights holders, mostly from the 1940s, 1950s and early 1960s. The figure drops to ten percent or less for most periods prior to World War II, and approaches zero for periods before 1920. This study focused on recordings in which there is demonstrated interest; it is likely that the percent of all recordings that have been reissued is even less.<sup>11</sup>*

Where copyright laws are less restrictive, the percentage of re-issues are higher:

*Despite laws discouraging unauthorized reissue activity in the U.S. or the importation of reissues of U.S. recordings from other countries (parallel import laws), foreign labels and small entities in the U.S. have made available a considerable amount. The study found that other entities have exclusively reissued 22 percent of the sample recordings compared to 14 percent by rights holders. To the extent rights-holders do reissue older recordings, they concentrate on recent periods with larger potential markets, while third-party distributors serve all periods more or less equally. **As a result, non- rights holders have reissued more than rights-holders for every period prior to 1945.**<sup>12</sup>*

None of this should surprise. Many works have limited commercial value, though there remains some interest in them. Record labels will only re-issue a small number of works that offer the greatest commercial potential. For the remainder, they are largely lost as copyright locks out the prospect of anyone other than the record label re-issuing them or making them publicly available. Under those circumstances, everyone loses. Songwriters do not get the royalties that might come from a re-issue, the public does not gain access, and an important part of Canada's musical heritage is effectively lost.

This point was made in a 2006 report conducted by the Institute for Information Law for the European Commission:

*only a small share of sound recordings still continues to generate a commercial value for phonogram producers after 50 years. A term extension of related rights beyond 50 years would therefore only have a positive effect on the revenues from that small share of recordings that are still popular after this time. From the remaining part of the back catalogue repertoire, phonogram producers typically do not derive revenues anymore. Repertoire that does not sell well or that does not generate sufficient royalty payments and older niche productions are usually not disseminated after a certain time. These recordings will disappear from the market, leaving them inaccessible to the general public. 'Many works do not stay in the commercial chain and a majority of sound recordings are locked in vaults.' A term extension would keep these recordings from being free to use by the public for an additional period of time.<sup>13</sup>*

Of course, the loss is not limited to commercial re-issues. The U.S. Library of Congress

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<sup>11</sup> Tim Brooks, How Copyright Law Affects Reissues of Historic Recordings: A New Study, ARSC Journal, online at: [http://www.arsc-audio.org/pdf/Brooks47872\\_ARSC\\_Fall05.pdf](http://www.arsc-audio.org/pdf/Brooks47872_ARSC_Fall05.pdf)

<sup>12</sup> Id.

<sup>13</sup> IVIR, supra, note 2.

conducted an extensive examination of the state of recorded sound preservation in the United States in 2010. The impact of longer copyright terms for sound recordings has a devastating impact on preservation as the report notes that “were copyright law followed to the letter, little audio preservation would be undertaken. Were the law strictly enforced, it would brand virtually all audio preservation as illegal.”<sup>14</sup> Library and Archives Canada once invested in sound preservation with the Virtual Gramophone. The project was suspended in 2006 and will have little hope of revival for more recent works if the copyright term extension is passed.

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<sup>14</sup> Council of Library and Information Resources and Library of Congress, *The State of Recorded Sound Preservation in the United States: A National Legacy at Risk in the Digital Age*, August 2010, online at: <http://www.clir.org/pubs/reports/pub148/pub148.pdf>