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Mr. Dan Ruimy MP,
Chair, Standing Committee on Industry, Science, and Technology
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, Ontario K1A 0A6
Canada

Via Electronic Submission

RE: Statutory Review of the Copyright Act of Canada

Dear Chairman Ruimy:

Authors Alliance appreciates the opportunity to submit this brief to the Standing Committee on Industry, Science, and Technology as it undertakes review of the Copyright Act of Canada. Authors Alliance is a nonprofit organization representing the interests of authors who want to take advantage of opportunities of the digital age to share their creations with readers, promote the ongoing progress of knowledge, and advance the public good. Alongside other educational efforts, Authors Alliance provides resources and tools to help authors understand and exercise termination of transfer rights under U.S. law,¹ as well as reversions of rights through contractual provisions and negotiation.² We write to offer comments on Section 14(1), the reversionary right provision of the Copyright Act of Canada.³

Creators are routinely asked to transfer the rights to their works by, for example, signing publication contracts that assign copyrights to their publishers “for the life of copyright.” If they acquiesce, they may come to regret the decision. Several countries provide statutory “reversionary” or “termination” rights that allow creators or their heirs to reacquire copyrights previously transferred to a publisher.⁴ In Canada, any grant of interest in a copyrighted work

¹ Authors Alliance/Creative Commons Termination of Transfer Tool, <https://rightsback.org> (last visited Dec. 1, 2018); see also *Termination of Transfer*, Authors Alliance, <https://www.authorsalliance.org/resources/termination-of-transfer/> (last visited Dec. 1, 2018).

² *Rights Reversion*, Authors Alliance, <https://www.authorsalliance.org/resources/rights-reversion-portal/> (last visited Dec. 1, 2018).

³ Copyright Act of Canada, R.S.C., 1985, c. C-42, Section 14(1).

⁴ See Paul J. Heald, *Copyright Reversion to Authors (and the Rosetta Effect): An Empirical Study of Reappearing Books* (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3084920 (see Appendix A for laws of

made by an author (except for a grant made in a will) after June 4, 1921 automatically reverts to an author's estate twenty-five years after an author's death.⁵ United States' law allows authors to terminate transfers made on or after January 1, 1978 thirty-five years from the date of the grant,⁶ notwithstanding any agreement to the contrary.⁷ Other countries provide "use it or lose it" provisions, which enable authors to reclaim rights that are not being exploited by the assignee.⁸ These reversionary rights allow creators to revisit decisions to transfer their copyrights, with attendant benefits flowing to authors and to the public.

Many creators, particularly those at the start of their careers, sell or license their copyrights for less than they are ultimately worth. If a work is tremendously successful, the commercial windfall is often enjoyed by the entity that exploits those rights, not the original creator. In these cases, the creator or the creator's heirs may want to recapture rights to enjoy more of their work's financial success. Reversionary rights provisions were enacted to address just this situation. In Canada, the reversion mechanism is intended to address "a situation where a work, following the author's death, had become more valuable over time," giving the author's heirs "the opportunity to re-negotiate the royalty terms to reflect the increased value of the work."⁹ Likewise, termination of transfer provisions were enacted in the United States to "safeguard authors against unremunerative transfers," which is necessary "because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited."¹⁰

The opportunity to realize monetary rewards is not the only benefit of reversionary provisions. Termination rights also give creators the ability to give new life to works that have outlived their commercial lives but are nonetheless historically and culturally valuable. As time passes, many creators find that their works are no longer as available as they might wish.¹¹ Their books might be out of print, or their songs might not be digitized or available online. For creators who want

various jurisdictions). See also CC Rights Back Resource (Beta), <https://labs.creativecommons.org/reversionary-rights/> (last visited Dec. 1, 2018) (repository of resources about termination laws around the world).

⁵ Copyright Act of Canada, R.S.C., 1985, c. C-42, Section 14(1). See also United Kingdom Copyright Act of 1911, section 5(2) (providing that transfers between July 1912 and June 1967 automatically revert to the author's estate 25 years after the author's death).

⁶ Or, if the grant includes publication rights, 35 years from the date publication or 40 years from the date of the grant, whichever term ends earlier. 17 U.S.C. § 203.

⁷ 17 U.S.C. § 203. For works where the copyright was in either its first or renewal term on January 1, 1978, see 17 U.S.C. § 304(c).

⁸ For example, "[i]n Denmark, Finland, and Sweden, the author may cancel the agreement if the assignee has not exploited the work within a reasonable time or at the latest five years after the date when the agreement was performed by the author." Pascal Kamina, *FILM COPYRIGHT IN THE EUROPEAN UNION* 212 (Cambridge Univ. Press, 2d ed., 2016).

⁹ A.A. Keyes, *COPYRIGHT IN CANADA PROPOSALS FOR A REVISION OF THE LAW* 76 (Apr. 1977).

¹⁰ H.R. Rep. No. 94-1476, at 124.

¹¹ See Paul J. Heald, *How Copyright Keeps Works Disappeared*, 11 J. of Empirical Legal Stud., 829 (2014).

their works to be widely shared and enjoyed, reversion is a powerful option for getting their works back out in front of audiences. These creators might choose to, for example, make their reverted works available to the public on open terms. Other authors may opt to re-release their works with commercial publishers. In fact, a recent empirical study reveals that the termination provisions in U.S. law, together with a legal decision establishing that some authors retained e-book rights under standard publication terms in the pre-digital era, have significantly increased the availability of books to consumers.¹²

Authors Alliance highlights the experiences of authors who have regained the copyrights to their works on our website.¹³ With rights back in hand, these authors have made their works newly available as, for example, free downloads or low-cost print versions. Others have updated their reverted works and self-published a repackaged version, and some have even placed their works with new publishers. These authors share that reverting rights has helped them reach more readers, continue to contribute to scholarly discourse, and ensure that their works' continuing impact and relevance are not limited by their commercial lives. In turn, the public benefits from ongoing access to knowledge and culture.

Because of the tremendous benefits of reversionary rights for authors and the public, Authors Alliance recommends retaining a reversionary right provision in the Copyright Act of Canada. To further maximize the benefits of the current provision, we recommend the following changes to Section 14(1):

- Under Section 14(1), reversionary interests do not vest until twenty-five years after the death of the author. Canadian musician Bryan Adams recently presented evidence to the Standing Committee on Canadian Heritage in support of changing the reversionary right provision to apply twenty-five years after the *assignment of rights*, rather than twenty-five years after the *death of the creator*.¹⁴ We agree that the timing of the reversionary right needs to be revisited in order to balance the business needs of publishers with the reality that the productive commercial life of works is often significantly less than the term of copyright.¹⁵ Allowing authors to revert rights sooner would mean that works with a limited commercial life could avoid decades of dormancy. And in the case of works that are runaway hits, the opportunity to revert would give the creator an opportunity to

¹² Heald, *supra* note 3.

¹³ *Rights Reversion Success Stories*, Authors Alliance, <https://www.authorsalliance.org/category/resources/rights-reversions/rr-successes/> (last visited Dec. 1, 2018). To date, the reversion successes we have featured are the result of authors exercising contractual provisions or negotiating with publishers. Our termination of transfer resources are relatively new, and we expect in time to feature similar results from authors making their works newly available as a result of exercising their statutory termination rights.

¹⁴ See Evidence presented by Bryan Adams, CHPC Committee Meeting (Sept. 18, 2018), *available at* <https://www.ourcommons.ca/DocumentViewer/en/42-1/CHPC/meeting-118/evidence>.

¹⁵ A study by the Australian Bureau of Statistics estimates the average commercial life of music is between 2 and 5 years, a film between 3.3 and 6 years, and a literary work between 1.4 and 5 years. See Australian Government Productivity Commission, INTELLECTUAL PROPERTY ARRANGEMENTS: PRODUCTIVITY COMMISSION INQUIRY REPORT 130 (2016).

renegotiate favorable terms and share in the commercial windfall. We urge the Committee to consider amending Section 14(1) to allow authors to terminate transfers of copyright a set number of years after the transfer of those rights. This would increase the likelihood that authors could reap the benefits of reversionary rights in their lifetimes.

- Reversion under Section 14(1) is automatic and does not require updates to the Copyright Office’s ownership records. Unless they are carefully drafted, reversionary rights provisions can result in more works becoming “orphan works” (i.e. works for which copyright owners cannot be identified or located) because these provisions change the identity of the copyright owner from whom permission must be obtained to make uses that are within copyright owner’s exclusive rights. We recommend alleviating this issue by requiring triggering conditions and/or recordation of ownership information if rights are reverted exclusively to the author.¹⁶ At the same time, we recommend that reversion of *non-exclusive* rights to the author remain automatic, allowing authors to exploit their works without onerous formalities.
- Section 14(1) appears to apply the reversionary right to non-exclusive licenses. Reversionary rights are best applied only to exclusive licenses or assignments, as authors whose works are subject only to non-exclusive licenses are still able to exploit their works. We recommend amending Section 14(1) to make it clear that reversionary rights do not apply to non-exclusive licenses.

In sum, allowing creators to terminate prior transfers of copyrights benefits authors and their audiences. Authors Alliance supports the retention of reversionary rights provision in Canada’s Copyright Act, while recommending amendments to the provision that will enhance the utility of reversionary rights. We hope that this brief is helpful as the Committee considers reversionary rights provisions as a part of its review of the Copyright Act of Canada.

Respectfully,



Brianna Schofield
Executive Director, Authors Alliance

¹⁶ The United States, for example, requires the party terminating the transfer to notify the assignee in advance of the termination and record a copy of a notice of termination with the United States Copyright Office.