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The Tensions Between Copyright and the Public Domain: How Canada Can Combat the Effects of CUSMA

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THE TENSION BETWEEN COPYRIGHT AND THE PUBLIC DOMAIN: HOW CANADA CAN COMBAT THE EFFECTS OF CUSMA

Jane MacMillan[*]

ABSTRACT: This article explores the tensions between copyright and the public domain in the context of Canada's compliance with the Canada-United States-Mexico Agreement (CUSMA). With the shift from the life-plus-50 years rule to life-plus-70 years for copyright duration, the paper considers how this extension affects the public domain, creativity, and societal function. It argues that while such extensions aim to align Canadian law with international norms and protect creators, they mainly benefit a narrow group of copyright holders and impose significant economic burdens on the general public. The discussion is framed around the competing interests in preserving the public domain as a resource for new creations against the desire to extend copyright for economic gain. Ultimately, the paper advocates for expanding Canada's fair dealing doctrine as a countermeasure to mitigate the adverse effects of extended copyright terms, suggesting a balanced approach that fosters both protection for creators and public access to cultural materials.

TABLE OF CONTENTS

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I. INTRODUCTION

Over the past several decades, Canadian lawmakers have been hesitant to extend the length of copyright protection. Despite Canada's major trade partners like the United States of America (the "United States") extending copyright protection in 1998,[1] Canada kept the life-plus-50 rule in place until recently. Under the Canada-United States-Mexico Agreement ("CUSMA") that was signed in 2018, Canada agreed to extend the length of copyright protection to the life of the author plus 70 years. Copyright extension has been widely debated among academics, policymakers, owners, and the public. This paper will begin with a discussion about the changing landscape of the law and address two tensions, the public domain and copyright, which form the foundation for the issues this paper aims to address. This paper will then discuss the two opposing positions regarding this issue, namely, pro-copyright extension and anti-copyright extension. This paper argues that extending copyright protection is detrimental to society, creation, and the function and purpose of the public domain, however, broadening the fair dealing doctrine is an effective way to balance the negative impacts of extending copyright protection.

II. THE LAW AND CUSMA

Prior to the change enacted in 2022, Canadian copyright protection lasted for the life of the author plus 50 years following their death.[2] Often called the "life-plus-50" rule, protection lasts for the duration of the life of the author and then can be transferred to assignees or heirs for 50 years following the author's death.[3] Many other countries have protection periods similar to the life-plus-50 rule,[4] but this rule has been widely debated by copyright owners, legal scholars, and policymakers.

In 2018, Canada, Mexico, and the United States signed CUSMA, which replaced the North American Free Trade Agreement ("NAFTA").[5] Under

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[1] ARL Staff, *Copyright Timeline: A History of Copyright in the United States*, ASSOCIATION OF RESEARCH LIBRARIES, https://www.arl.org/copyright-timeline (last visited 29 November 2022).

[2] Copyright Act, RSC 1985, c C-42, s 6.

[3] Kristel Kriel, *Canada Extends Copyright protection by 20 Years*, MLT AIKINS (Aug. 31, 2022), https://www.mltaikins.com/innovation-data-technology/patents-copyright-industrial-designs/canada-extends-copyright-protection-by-20-years/.

[4] *2.2 Global Aspects of Copyright*, CREATIVE COMMONS, https://certificates.creativecommons.org/cccertedu/chapter/2-2-global-aspects-of-copyright/ (last visited Nov. 29, 2022.

[5] *Consultation on how to implement Canada's CUSMA Commitment to Extend the General Term of Copyright Protection*, GOVERNMENT OF CANADA, https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/copyright-policy/consultation-how-implement-canadas-cusma-commitment-extend-general-term-copyright-protection (last modified April 28,2021).

CUSMA, Canada pledged to extend the life-plus-50 rule to the life of the author plus 70 years ("life-plus-70") after the death of the author.[6] Canada committed to implementing this change to the *Copyright Act*[7] (the "*CCA*") by the end of 2022.[8] The Canadian Government stated that this change will align Canada's length of protection with its major trading partners, specifically, the United States and Mexico.[9]

III. CUSMA: STRENGTHENING THE CANADA-U.S. TRADE RELATIONSHIP

Prior to the ratification of CUSMA, the Berne Convention for the Protection of Literary and Artistic Works[10] set the international standard for copyright protection as the life-plus-50 rule.[11] While Canada did implement and maintain usage of the life-plus-50 rule, many of its major trading partners, namely the USA, had already implemented the life-plus-70 rule domestically.[12] Thus, it is not surprising that Canada pledged to extend the length of copyright protection as part of its commitment to CUSMA.

CUSMA is said to "reinforce the strong economic ties" between Canada, the United States, and Mexico and address current challenges to trade.[13] Intellectual property ("IP") plays a key role in international trade and the economy, especially in the United States. In a 2016 study conducted by the US Department of Commerce, IP-related exports of goods totaled $842 billion and IP-related exports of services reached $81 billion.[14] It is clear that IP and copyright are important to trade between the United States and other countries, which is why Canada has implemented the life-plus-70 rule as per CUSMA. It is evident that granting the same length of protection to copyright works will enhance trade and relations between Canada and the United States. Despite opportunities for enhanced trade relations, this paper will argue that extending copyright protection is detrimental for reasons mentioned previously, but broadening the fair dealing doctrine is an effective way to balance the negative impacts that CUSMA has on copyright law.

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[6] *Id*.

[7] *Supra* note 2.

[8] *Supra* note 5.

[9] *Id*.

[10] *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, UNTS 828 at 221 (entered into force 29 January 1970)

[11] *Id*.

[12] Copyright Act, 90 Stat 2541 (1976).

[13] *Canada-United States-Mexico Agreement (CUSMA) – Summary of Outcomes*, GOVERNMENT OF CANADA, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/summary-sommaire.aspx?lang=eng (last modified Jan. 28,2020).

[14] Shayerah Ilias Akhtar, Liana Wong & Ian F. Fergusson, *Intellectual Property Rights and International Trade*21 IP RTS AND IINTL TRADE at 6 (2020).

IV. THE TWO INTERESTS AT STAKE

The two integral interests at stake in discussions of copyright extension are: (1) the public domain; and (2) copyright law. It is difficult to find harmony between these competing interests. There is a general belief that protection of both authors and users is central to copyright and should promote the public interest.[15] This section will provide an overview of the public domain and copyright and discuss their purpose and role in the debate articulated in the subsequent sections.

1 – The Public Domain

The public domain can be understood as the realm of materials of authorship that are readily available to be used by others without permission.[16] For instance, Jessica Litman argues that the public domain is "a device that permits the rest of the system to work by leaving the raw material of authorship available for authors to use."[17] There is a fundamental assumption that there is positive value embedded in the public domain and that it is the equal and opposite "complement" to the domain of copyright.[18] There are several categories of works that exist in the public domain: (1) works that qualify for copyright protection but the term of protection has expired, (2) works which fail to meet the standards for copyright protection, (3) works in which use has been permitted by the author, (4) parts of works that do not qualify for protection because they are closer to ideas, rather than expression, and (5) works that are commonly owned, such as news.[19]

The public domain consists of two main values: (1) creation; and (2) a function as an existing institution.[20] First, the concept of creation has been described as a process that is both creative and giving.[21] This means that authors must borrow the thoughts and ideas of creators before them, for any type of creation.[22] Academics have argued that any claims that creation can exist without drawing on other's ideas are incorrect and unrealistic.[23] Creation is a process of transforming

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[15] Graham Greenleaf & David Lindsay, *Public Rights: Copyright's Public Domains*, CAMBRIDGE UNIVERSITY PRESS, at s 1.6.1 (2018).

[16] Phillip Johnson, *Dedicating Copyright to the Public Domain* 71 MOD L REV at 587-8 (2008).

[17] *Id.* at 587-8. See Jessica Litman, *The Public Domain*, 39 EMORY L. J. 965, 966 (1990).

[18] Greenleaf, supra note 15, at 1.5.1.

[19] Rich Stim, *Welcome to the Public Domain*, STANFORD LIBRARIES (October 2019), https://fairuse.stanford.edu/overview/public-domain/welcome/.

[20] *Boston Prof. Hockey Assn. v. Dallas Cap & Emblem Mfg.*, 510 F.2d 1004, 1014 (5th Cir. 1975) ("In the case of a copyright, an individual creates a unique design and, [then] he can secure a copyright for his creation for a [short] period . . . After the expiration of the copyright, his creation becomes part of
the public domain.").

[21] Hui Huang, *On Public Domain in Copyright Law*, 4 FRONTIERS L CHINA 178, 188-9 (2009).

[22] *Id*. at 189.

[23] *Id.*

information that already exists.[24] Thus, this idea of creation and borrowing ideas is central to the purpose and function of the public domain. It has been argued that in the absence of a public domain, or one that is too restrictive, creation will be negatively impacted or impossible.[25] Second, the notion that the public domain is an existing institution is evident in the fact that it is dynamic and constantly expanding.[26] This evolving realm of materials rests on what Hui Huang has coined the "network effect," which means, the more works that go into the public domain, results in more use of those works, which increases the value of the public domain, making expansion more probable.[27] This is the way in which cultural innovation and creation becomes achievable.

In addition to its values, the public domain has three primary theoretical functions: (1) recognizing copyright, (2) halting improper expansion of copyright, and (3) defining the value of copyright.[28] The first function recognizes that copyright in the public domain operates like an exception to copyright law. Huang describes the public domain as the "spine" and copyright as the "body," meaning the spine supports the body, and if the body becomes too robust, the spine will collapse.[29] Essentially, understanding and recognizing the public domain aids in understanding the relationship between it and copyright. Second, the public domain functions in a way that restricts improper expansion of copyright. The public domain's recognition and acceptance enable it to be balanced and considered against the pressure of expansive copyright protections.[30] Third, the public domain defines the value of copyright. As a result, when discussing any changes to copyright law, it should be evaluated based on "whether it helps the unlimited opening up of the public domain."[31] This alludes to the interconnected nature of the public domain and copyright, suggesting that the public domain must always be considered.

2 – Copyright

Copyright grants the exclusive right to produce, publish, reproduce, or perform an original dramatic, literary, musical, or artistic work.[32] Copyright is justified as "the appropriate reward for an author's creative labor."[33] Additionally, it is justified as "a way that we acknowledge the author's strong interest in a

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[24] *Id.*
[25] *Id.* at 190.
[26] *Id*.
[27] *Id* at 191.
[28] *Id.*at 192.
[29] *Id.* at 191.
[30] *Id.* at 192.
[31] *Id*.
[32] *What Copyright Is*, GOVERNMENT OF CANADA, https://ised-isde.canada.ca/site/canadian-intellectual-property-office/en/what-intellectual-property/what-copyright (last modified July 7, 2022).
[33] Christopher Sprigman, *Copyright and the Rule of Reason*,7 J TELECOMMUNICATIONS & HIGH TECH L 317 (2009).

creation that reflects and embodies his or her personality."[34] This is evidenced by the rights granted through copyright, namely economic and moral rights.[35] Copyright is also justified through the utilitarian argument, which focuses on providing incentives.[36] Accordingly:

1. "[P]romoting the creation of valuable intellectual works requires that intellectual laborers be granted property right in those works. Without copyright, . . . adequate incentives for the creation of a socially optimal output of intellectual products would not exist. If competitors could simply copy books, movies, and records . . . there would be no inventive to spend the vast amounts of time, energy, and money necessary to develop these products."[37]
2. "Copyright protection must be granted to encourage individuals to engage in original creation."[38] "Without copyright protection, it is possible that nothing new would be created."[39] "Copyright is limited in duration because it must be balanced with the public domain."[40]

V. THE DEBATE

There has been a longstanding debate between two main groups, those who believe copyright should be extended for a longer period, and those who do not.[41] This section discusses both sides of the debate and then provides an analysis that will assess the strength and validity of both arguments.

Pro-Copyright Extension

There are many arguments that have been asserted in favor of extending copyright protection. The arguments in favor are: (1) extended copyright protection bolsters better access to works for the public, (2) when works enter the public domain they become either overused, underused, or tarnished in ways that undermine the value of the work, and (3) extended copyright protection that aligns

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[34] *Id*.

[35] Edwin C. Hettinger, *Justifying Intellectual Property*, 18 PHILOSOPHY & PUBLIC AFFAIRS 31, 47 (1989).

[36] *Id*.

[37] *Id.* at 47-8.

[38] Springman, *supra* note 33, at 318.

[39] *Id*.

[40] Brendan Conley, *Why do copyrights expire?*, PHOTO COPYRIGHT LAW, https://photocopyrightlaw.com/why-do-copyrights-expire/ (last visited November 30, 2022).

[41] *Compare*, Christopher Buccafusco & Paul Heald, *Do Bad Things Happen When Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension*, 28 BERK. TECH. L.J. 1, 12-17 (2013), *with* Stan J. Liebowitz & Stephen Margolis, *Seventeen Famous Economists Weigh in on Copyright: The Role of Theory, Empirics, and Network Effects*, 18 HARV. J.L. & TECH. 435, 438 (2005).

with major trade partners allows for creators to effectively protect their works internationally.[42]

First, academics and prominent owners in the copyright industry have argued that extending copyright protection bolsters better access to works for the public.[43] Some argue that keeping works protected by copyright for longer aids users in finding works and the owner.[44] According to this argument, if it is easier to find works and contact owners, it is easier for users to obtain licenses, and consume works.[45]

Second, it has been argued that when works enter the public domain, they become either overused, underused, or tarnished in ways that undermine the value of the work.[46] The overuse rationale is based on the tragedy of the commons, which is the idea that a common resource will become depleted when there is common ownership by the public.[47] William Landes and Richard Posner apply this notion to copyright term extension, stating that:

> "A celebrity's name or likeness has public good characteristics as well, yet unlimited reproduction of the name or the likeness could prematurely exhaust the celebrity's commercial value, just as unlimited drilling from a common pool of oil or gas would deplete the pool prematurely. The same could be true of a novel or a movie or a comic book character or a piece of music or a painting, particularly with regard to copyrights on components of completed works rather than on the completed works themselves. If because copyright had expired anyone were free to incorporate the Mickey Mouse character in a book, movie, song, etc., the value of the character might plummet."[48]

In sum, others may overuse a work and cause detriment to its value in the absence of owners controlling the frequency of the work's use. Notably, this viewpoint is based on the belief that creative works have finite value.[49] If works enter the public domain, they will be overused and the value will be lost; whereas if they remain protected by copyright, owners can control the extent to which the work is used, to optimize and maintain its value.[50]

The underuse rationale asserts that when works enter the public domain, their accessibility to consumers is diminished.[51] In arguing for indefinite copyright protection, Landes and Posner assert that "an absence of copyright protection for intangible works may lead to inefficiencies because of congestion externalities and

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[42] Buccafusco & Heald, *supra* note 41, at 12-17.
[43] *Id*. at 13-4.
[44] *Id*. at 13.
[45] *Id*.
[46] *Id*. at 13.
[47] *Id.* at 15.
[48] William Landes & Richard Posner, *Indefinitely Renewable Copyright*, 70:2 U. CHI. L. REV. 471, 474-5 (2003).
[49] Buccafusco, *supra* note 41, at 16.
[50] *Id*.
[51] *Id.*at 13.

because of impaired incentives to invest in maintaining and exploiting these works."[52] Further, they argue that since copyright grants owners many rights, such as to make derivative works, these works will not be made unless copyright is extended.[53] This argument is based on incentivizing creation and is concerned with people becoming discouraged from financially investing in creating derivative works if they are not able to prevent others from copying their work.[54]

The tarnishment rationale asserts that copyright should be extended to prevent works from being tarnished or misused, effectively losing their value.[55] A large concern that underlies this argument is creative work being used in contexts that harm social welfare. Academics that support this view assert that companies like the Walt Disney Company ("Disney") are justified in being concerned about their creative works, such as characters, being used in contexts that are fundamentally altered from the original.[56] For example, if the main character Elsa from Disney's *Frozen* was depicted in a pornographic work, this could lead viewers to avoid the entire franchise, diminishing the value of the creative work.

Third, it has been argued that extending copyright protection aligns with major trade partners by allowing creators to protect their works internationally.[57] This argument has been asserted by the Government of Canada in support of the changes to copyright protection duration that are being implemented by virtue of Canada's adherence to CUSMA.[58]

Anti-Copyright Extension

On the opposing end of the debate are proponents of the public domain who do not support the extension of copyright.[59] This position hinges on arguments that: (1) extending copyright negatively impacts the viability of the robust public domain, (2) copyright protection should be no longer than the period required to promote socially efficient incentives to generate new works, (3) only a small portion of copyright owners actually benefit from copyright extension, and (4) copyright extension places a large economic burden on the public.[60]

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[52] Landes & Posner, *supra* note 48, at 474-5.

[53] *Id*. at 487.

[54] Buccafusco, *supra* note 41, at 14.

[55] *Id.* at 16.

[56] Buccafusco, *supra* note 41, at 17.

[57] *See* Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'l L. 1 (2004).

[58] *See* Government of Canada, *Consultation on how to implement Canada's CUSMA commitment to extend the general term of copyright protection*. (2021), https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/copyright-policy/consultation-how-implement-canadas-cusma-commitment-extend-general-term-copyright-protection (Accessed: 07 March 2024).

[59] Dennis Karjala, *Opposing Copyright Extension* (Jan. 23, 2012), http://homepages.law.asu.edu/-dkaala/OpposingCopyrightExtension/ (collecting documents related to term extension efforts).

[60] NEED CITATION FOR THIS

First, it has been widely argued by many scholars that copyright extension negatively impacts the viability of a robust public domain.[61] An important aspect of this argument is that copyright law is a balancing act between owners of copyright and the public domain. It has been argued that the trend toward longer coverage periods threatens the public domain. Laura Gurak explains that this is especially dangerous for both industries and scholars because most creation is collaborative.[62] By collaborative, Gurak means that creation comes from interactions between people and the public domain's expansive sources of material.[63] Thus, the bank of public resources is essential to the creation and growth of new works. Since copyright is being extended by the end of 2022 as per CUSMA, no works will be *required* to enter the public domain for the next 20 years.[64] Based on this view, there is support for Gurak's argument.

Second, it has been argued that copyright protection should be no longer than the period required to promote socially efficient incentives to generate new works.[65] In support of this proposition, scholars have attempted to determine what the optimal copyright term is. This effort is based on a balance between incentive effects of a longer term, against access and administrative costs that arise from public goods, such as licensing costs.[66] William Landes and Richard Posner assert that this "optimal" copyright term is much shorter than the life-plus-70 rule, but they do not specify what such an "optimal" term is.[67]

Third, it has been argued that only a small portion of copyright owners benefit from copyright extension.[68] This argument is a response to advocates of copyright extension, who assert that extension provides economic benefits to owners, and thus, it should be extended.[69] Arlen Langvardt attempts to prove that this argument rests on a false statement.[70] Langvardt asserts that the only copyright owners who benefit from extension are those whose works carry "significant economic value in the marketplace for a large number of years."[71] According to a report referenced by Justice Breyer in *Eldred v Ashcroft*,[72] only 2% of works 50 years or older

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[61] Julie E. Cohen, *Copyright, Commodification, and Culture: Locating the Public Domain*, 2006 KLUWER L. INT. 121 (Feb. 7,2005).

[62] Laura Gurak, *Technical Communication, Copyright, and the Shrinking Public Domain*,14:3 COMPUTERS & COMPOSITION 329,336 (1997).

[63] *Id*.

[64] Stéphane Caron, "Canadian Copyright Protection Term Extended to 70 Years" (3 January 2023), online (blog): *Gowling WLG* <https://gowlingwlg.com/en/insights-resources/articles/2023/canadian-copyright-term-extended-to-70-years/#:~:text=For%20copyright%20protected%20works%20that,%2DMexico%20Agreement%20(CUSMA).>.

[65] Landes, *supra* note 48, at 476.

[66] *Id*.

[67] *Id*.

[68] Edward Rappaport, Congressional Research Service Report for Congress, *Copyright Term Extension: Estimating The Economic Values* 8, 12, 15 (1998).

[69] Arlen Langvardt, *The Beat Should Not Go On: Resisting Early Calls for Further Extensions of Copyright Duration*, 112:3 PENN ST. L. REV. 783, 795 (2008).

[70] *Id*. at 785-9.

[71] *Id*. at 794.

[72] *Eldred v. Ashcroft*, 537 U.S. 186, 254 (2003).

generate revenue from royalties or licensing fees.[73] This means that most works possess little to no value once they are 50 years old. Extending copyright protection only benefits major industry players such as Disney, who own works that retain substantial value as they age; this is not the case for the overwhelming majority of copyright owners.[74] Langvardt acknowledges that royalties and licensing fees can be generated on an intermittent basis, because works can rise to popularity many years later, but this is not the case for most copyright owners.[75]

Fourth, it has been argued that copyright extension places a large economic burden on the public.[76] The burden this argument refers to is licensing fees. In *Eldred*, Justice Breyer asserted that roughly $400 million per year in royalties would be generated from the mere two percent of works that remain valuable after they turn fifty years of age.[77] This data suggests that "in forcing the public to yield a use right it is entitled to have so that an exceedingly valuable economic benefit could be conferred [. . .] on a select circle of copyright owners, another duration extension should be seen as failing a cost-benefit test."[78] Another study examining copyright extension's impact on sound recordings in the United Kingdom found that it would "result in costs to consumers between 240 and 480 million pounds."[79] The data provided by the above sources indicates that copyright extension results in significant costs to consumers.

VI. DISCUSSION

After considering arguments that are pro-copyright extension and arguments that are anti-copyright extension, this paper argues that although there are benefits of extending copyright, extension is detrimental to society, creation, and the public domain for the following reasons: (1) the absence of works entering the public domain for the next 20 years threatens the public domain as a resource for new creation, (2) the proposed economic benefits of extending copyright only benefit big players in the industry, and (3) the arguments surrounding the overuse, underuse, and tarnishing of works are not justifications for imposing the increased costs on society.

1 – CUSMA and the Public Domain

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[73] Langvardt, *supra* note 68, at 794.
[74] *Id*. at 794-7.
[75] *Id*. at 795.
[76] *Id*.
[77] *Eldred*, 537 U.S. at 254.
[78] *Id.* at 798-9.
[79] *Review of the Economic Evidence Relating to an Extension of the Term of Copyright in Sound Recordings*, CENTRE FOR INTELLECTUAL PROPERTY AND INFORMATION LAW UNIVERSITY OF CAMBRIDGE, at 50, https://www.cipil.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.cipil.law.cam.ac.uk/legacy/File/policy_documents/gowers_cipilreport.pdf (last visited December 1, 2022).

The first reason why copyright is detrimental to society, creation, and the public domain is because the changes being implemented in accordance with CUSMA threaten the purpose and function of the public domain. This paper has discussed the importance of the public domain and its role in creation. Specifically, all creation stems from the vast and abundant bank of resources that is open to the public whereby people may utilize those materials, find inspiration, and ultimately create new works. Innovation and creation are vital to society and necessary to ensure a rich culture.[80] As per CUSMA, Canada has pledged to extend the life-plus-50 rule an additional twenty years, effectively making the life-plus-70 rule the new standard. This will result in copyright protection lasting for an additional 20 years after the death of the author. The immediate consequence of this change is that there will be no materials entering the public domain involuntarily for 20 years once the extension comes into effect. Since creation thrives on a robust public domain with a constant rotation of works coming into its jurisdiction, this change will undoubtedly impact creation.

2 – Economic Benefits are Minimal

Next, copyright extension is detrimental to society, creation, and the public domain because the proposed economic benefits of extending copyright only reach big players in the industry. This paper acknowledges that copyright protection is beneficial to owners because those rights can be a source of revenue and promote their livelihood. Since it can be a source of financial security for many owners, it is uncontested that extended copyright protection will generate revenue for some owners. While it may be argued that this is generally beneficial for society, scholars such as Langvardt have asserted that the perceived financial benefits of copyright extension are only applicable to significantly popular works, like those owned by large companies such as Disney. The reality is that only 2% of works 50 years or older generate revenue from royalties or licensing fees.[81] This means that the economic benefits of copyright extension are *very* minimal. It is difficult to argue that extending copyright is financially beneficial when it only benefits owners with copyright portfolios that have already garnered significant revenues. Thus, the economic argument for extending copyright extension is weak.

3 – The Overuse, Underuse, and Tarnishing Arguments

a. Overuse

Finally, copyright extension is detrimental to society, creation, and the public domain because arguments surrounding the overuse, underuse, and tarnishing of works are not sound justifications for imposing increased costs on society. It has been argued that copyright extension is justified because works become overused

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[80] Davide Bonazzi, *What are the Arguments For and Against Contemporary Copyright Regulation?*, COPYRIGHTUSER.COM, https://www.copyrightuser.org/educate/a-level-media-studies/prompt-2/ (last visited Dec. 1,2022).

[81] Langvardt, *supra* note 54, at 794.

and lose their value when they enter the public domain. This argument assumes that "copyright owners are incentivized to exploit their works at the socially optimal maximum, but if works fall into the public domain, others will overuse the works and diminish their value."[82]

The overuse argument is not sound. According to a study which tracked the use of songs in movies that were from the public domain, those songs were used at an equal rate to copyright protected songs.[83] In this study, the rate at which songs from 1908-1932 appeared in movies was measured and the number of people who attended each movie within the year of its release was recorded.[84] Based on this data, the study did not find a disparity in the rates at which people who went to the movies were exposed to copyright protected and public domain songs.[85] Additionally, the study found that "copyright owners were willing to license their songs for use in movies at a rate higher than public domain songs were used,"[86] meaning that ownership was not a restrictive force on the amount that a work was used. Just because a work is in the public domain does not mean it is guaranteed to be overused to the point that it has no value.

Shakespeare's play *Romeo and Juliet* was published in 1597 and has been in the public domain for many decades.[87] Since it has been a part of the vast bank of resources that people may use to create new works, there have been many books and films that have been inspired by Shakespeare's original play. Although this list is not exhaustive, there are at least seventeen books based on Shakespeare's play *Romeo and Juliet*. For example, Irving Shulman's *West Side Story*, Isaac Marion's *Warm Bodies*, and Chloe Gong's *These Violent Delights* are all books that have been based on Shakespeare's *Romeo and Juliet*. Additionally, there are at least twelve movies which are based on or are retellings of the original *Romeo and Juliet*. It is evident that Shakespeare's play *Romeo and Juliet* has been used *significantly* while in the public domain.

It is easy to make the argument that *Romeo and Juliet* has been overused. If it has been overused, it must be determined whether it has lost its value. According to a study conducted in the 1980s in United States high schools, of the 91% of schools that taught Shakespeare, 84% read the original *Romeo and Juliet*.[88] Although this data is approximately 40 years old, Shakespeare's *Romeo and Juliet* is just as prominent today.[89] Given that the overuse argument rests on the belief that works have finite value, the example of *Romeo and Juliet* seems to undermine

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[82] Buccafusco, *supra* note 41, at 17.

[83] Buccafusco, *supra* note 41, at 20.

[84] *Id*.

[85] *Id*.

[86] *Id*.

[87] *When Shakespeare Wrote Romeo and Juliet and the Stories Which Inspired the Play*, ROYAL SHAKESPEARE COMPANY, https://www.rsc.org.uk/romeo-and-juliet/about-the-play/dates-and-sources (last visited Dec. 1,2022).

[88] Marjorie Coeyman, *In Love with Shakespeare*, The Christian Science Monitor (May 28,2002), https://www.csmonitor.com/2002/0528/p13s02-lecl.html.

[89] Cindy Tumiel, *Why Do We Still Care About Shakespeare*, OVATIONS - THE UTSA COLLEGE OF LIBERAL AND FINE ARTS, https://www.utsa.edu/ovations/vol8/story/shakespeare.html.

this proposition. Shakespeare's *Romeo and Juliet* remains one of the most read pieces of literature worldwide.[90] It is a work that seems to withstand the test of time and generation after generation, it remains a valuable work, despite its age and the amount of new works that have been based on it. Using *Romeo and Juliet* as an example, it is evident that the overuse argument asserted by proponents of copyright extension is not sound because works will not always be overused. If they are, they do not necessarily have finite value, and the widespread use of a work in the public domain does not necessarily diminish the value of the original version.

b. Underuse

The underuse argument is not convincing. According to this assertion, when works enter the public domain, their accessibility to consumers is diminished. There has been a growing concern expressed by proponents of copyright extension, namely, that works will disappear when they are no longer protected by copyright, rendering these works unavailable to creators, users, and future consumers.[91] A study was conducted on audio books and original books to test this theory. The study found that "audio books were significantly more likely to be made from older bestselling public domain works than from bestselling copyrighted works from the same era . . . [From] the full sample, public domain works were twice as likely to be available, and for the sample of enduringly popular works, public domain titles were 20% more likely to be available."[92] Based on this sample data, copyright reduced availability, even for popular books.[93] The study concluded that the ability to exclude was not an incentive to produce audio books of public domain works, and the market thrives even though there is often competition.[94] Based on this assessment, it is evident that the underuse argument asserted by proponents of copyright extension is not substantiated (at least in regard to books), because accessibility is not necessarily depleted when works enter the public domain.

c. Tarnishing

The tarnishing argument is over presumptuous. According to this position forwarded by proponents of copyright extension, "once works enter the public domain and are free to be used by anyone, they will be subjected to a variety of inappropriate and poor-quality uses that will undermine the works' cultural and economic value."[95] A study was conducted to test this argument. Those who conducted the study acknowledged that it was possible for a horrible movie to

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[90] *Id*.
[91] Buccafusco, *supra* note 41, at 33.
[92] Buccafusco, *supra* note 41, at 33.
[93] *Id*.
[94] *Id*. at 30.
[95] *Id.* at 26.

impact sales of a book.[96] Thus, the study looked at recordings of audiobooks to see if they made consumers less likely to purchase the written version, effectively depreciating the original work's value.[97] The tarnishing argument relied on two factual assumptions: "[f]irst, readers of public domain audiobooks would have to be inferior to readers of copyrighted audiobooks, and second, the inferior versions on the audiobooks would have to negatively affect consumers' valuation of the underlying work."[98] The study found only a small amount of support for both assumptions, concluding that ownership does not prevent the tarnishing of a work.[99]

Additionally, proponents of the tarnishing argument expressed that companies like Disney are justified in being concerned about their creative works, such as characters being used in contexts that are *fundamentally* altered from the original. In 2022, Winnie the Pooh entered the public domain.[100] Subsequently, writer and director Rhys Frake-Waterfield announced his "horror" film re-telling of the legend of Winnie the Pooh, *Winnie the Pooh: Blood and Honey*. This horror film follows the characters Winnie the Pooh and Piglet as they go on a murderous rampage after they have been abandoned by Christopher Robin. It is evident that A. A. Milne's original version of Winnie the Pooh appears in Frake-Waterfield's film in a context which is *fundamentally different* from the original, as the original version of the character was focused on stories for children. Based on Frake-Waterfield's film, has Winnie the Pooh been misused to the point that the character has been tarnished, resulting in the original work losing its value?

According to a report from 2022, the Winnie the Pooh franchise has generated over U.S. $80 billion for Disney.[101] With the average annual revenue ranging from U.S. $3 - $6 billion.[102] It is evident that the Winnie the Pooh franchise is valuable. However, claiming that Frake-Waterfield's film has tarnished the original work to the point that it has lost its value is most likely false for several reasons. First, Disney's version of Winnie the Pooh is still protected. Only the original rendering, made by A. A. Milne, entered the public domain. After Disney purchased the rights to this version, they created their own versions, which have not entered the public domain.[103] Second, the film would have to have significant reach to influence how the greater public feels about the character Winnie the Pooh. According to data tracking the most popular movie genres in Canada and the United States from 1995-2022, "adventure" movies have remained the most popular genre, generating

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96 *Id.* at 37.

97 *Id.* at 38.

98 Buccafusco, *supra* note 41, at 38.

99 *Id.* at 40.

100 Matty Merritt, *How Disney Held onto 'Winne-the-Pooh' until 2022*, Morning Brew (Jan. 7, 2022), https://www.morningbrew.com/daily/stories/how-disney-held-onto-winnie-the-pooh-until-2022.

101 *Id*.

102 Danny Vena, *Winnie the Pooh and Tigger, too? Disney Risks Losing Copyright Protection on Some Characters*, USA TODAY (Dec. 31, 2021), https://www.usatoday.com/story/money/2021/12/31/disney-2022-copyright-winnie-the-pooh/49588867/.

103 Vena, *supra* note 80.

U.S. $65 billion[104] whereas "horror" movies have generated U.S. $13.5 billion.[105] Respectively, Disney's Winnie the Pooh franchise movies tend to fall under the "adventure" genre.[106] From this data, this paper assumes that fewer people will be exposed to *Winnie the Pooh: Blood and Honey* than films in the "adventure" genre.

Additionally, if Frake-Waterfield's film is viewed by many people, it is an unsubstantiated argument to claim that it could tarnish the character Winnie the Pooh to the point that it has lost all value. This paper acknowledges that the film could impact how *some* people feel toward the character Winnie the Pooh, surely impacting its value. However, the paper also acknowledges that the film could also have *no* negative impact on the character Winnie the Pooh and its value. Based on this assessment, it is evident that the tarnishing argument asserted by proponents of copyright extension cannot be substantiated because it cannot be proven nor disproven that the economic and cultural value of original works will be permanently ruined by "inappropriate" uses of works or characters once they enter the public domain.

d. Overuse, Underuse, and Tarnishing Arguments do not Justify Increased Costs Associated with Extension

Considering the three proposed arguments in favor of copyright extension, the imposition of increased costs to society cannot be outweighed. An assessment of the overuse, underuse, and tarnishing arguments reveals that they are not substantiated. Although this paper acknowledges that the data may have limitations, it can be weighed on a balance of probabilities that, more likely than not, the proponent's arguments are not as convincing as they have claimed them to be. Due to the lack of support for the overuse, underuse and tarnishing arguments, the estimated $400 million copyright extension is expected to cost consumers in licensing fees cannot be justified.[107]

VII. HOW TO FIND BALANCE IN RESPONSE TO CUSMA

This paper has demonstrated that extending copyright protection is detrimental to society, creation, and the function and purpose of the public domain. In response to the copyright extension that *will* be implemented through CUSMA, this paper argues that broadening Canada's fair dealing doctrine is an effective response to the challenges that the public will face because of copyright extension.

In Canada the Copyright Act sets out an exception known as "fair dealing." Under this exception, people are permitted to use copyright protected works

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[104] Jose Gabriel Navarro, *Top Movie Genres in the US & Canada 1995-2022, by Total Box Office Revenue*, STATISA (Mar. 14,2022), https://www.statista.com/statistics/188658/movie-genres-in-north-america-by-box-office-revenue-since-1995/.

[105] *Id*.

[106] *List of Adventure Disney Movies*, DISNEYMOVIELIST, https://disneymovieslist.com/list-of-adventure-disney-movies (last visited Dec. 2, 2022).

[107] Rappaport, *supra* note 67, at 10.

without permission or payment of royalties for the purposes of research, private study, criticism or review, satire, parody, or news reporting.[108] According to the language of the Act, the categories are exclusive and only the listed purposes can rely on the fair dealing exception. In *CCH Canadian Ltd v Law Society of Upper Canada,*[109] the Supreme Court of Canada (the "SCC") set out a two-part test to establish fair dealing under the Act. First, the defendant must prove that the dealing was for one of the enumerated purposes, and second, the dealing must be fair.[110] The SCC listed the following factors that can be considered when applying this test: (1) the purpose of the dealing, (2) the character of the dealing, (3) the amount of the dealing, (4) alternatives to the dealing, (5) the nature of the work, and (6) the effect of the dealing on the work.[111]

In the United States, the Copyright Act[112] (the "USCA") sets out their version of "fair dealing" known as "fair use". Under the USCA's fair use exception to copyright, "the use of a copyrighted work for the purposes *such as* criticism, comment, news, reporting, teaching (including multiple copies for classroom use), scholarship, or research is not an infringement of copyright."[113] Under USCA section 107, fair use is to be determined by: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and sustainability of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work."[114] Courts assess these factors to determine if a use is fair.

The main difference between the Canadian Act's fair dealing exception and the USCA's fair use exception is that fair dealing is limited in its application and offers a flexible approach. This is supported by the language used in the Canadian Act stating that fair dealing "*for the purpose of* . . . does not infringe copyright."[115] Conversely, the language used in the USCA uses the words "such as" in listing the permitted purposes, indicating that the list is not exhaustive and the exception could apply to other purposes that are not listed in the act, so long a court finds the use fair. Additionally, fair use is determined by the four factors mentioned in the previous paragraph. Furthermore, in *Campbell v Acuff-Rose,*[116] the Supreme Court of the United States held that in determining fair use, the most weight should be placed on the first factor: the purpose and character of the use.[117] This factor determines whether the new work merely supersedes the purpose of the original work or if it adds something new, with a different character or new purpose. U.S. courts have described this superseding as being whether the new work is

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108 Copyright Act, *supra* note 2, at s 29.
109 *CCH Canadian Ltd v. Law Society of Upper Canada*, 2004 SCC 13, 1 SCR 339 (2004).
110 *Id*.
111 *CCH*, *supra* note 85, at ¶53-61.
112 Copyright Act, *supra* note 12.
113 *Id.* at 107 (emphasis added).
114 *Id*.
115 Copyright Act, *supra* note 2, s 29 [emphasis added].
116 *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569 (1994).
117 *Id*.

"transformative."[118] While the work being transformative is not a requirement, it can offset elements that work against the client's claim of fair use, such as commercialism.[119] Generally, if the use of the work is commercial, it can counteract a fair use claim, but comercialization is not completely determinative.[120] This limitation is supported by court decisions. Barton Beebe asserted that "while a finding of transformativeness is not necessary to trigger an overall finding of fair use, it is sufficient to do so,"[121] reporting that in 27 out of 29 district court opinions that found a use to be transformative, fair use was also found.[122] Additionally, the fair use doctrine encourages creativity by often finding transformative works to be fair use, something which prioritizes the purpose of copyright law and the public domain, namely, creativity and the production of new works. Examples of works being transformative as to permit fair use include but are not limited to: cosmetic changes to a photograph,[123] a parody of a song,[124] and parts of a fashion photograph used in a new painting.[125] Generally, works that present identical material in a different form—for example, producing a book of television show abstracts—will not be deemed transformative.[126] It has been suggested that "the United States fair use doctrine allows judges to decide whether new activities relating to copyrighted works should lawfully fall within the ambit of copyright protection or not . . . [thereby] provid[ing] courts with a legal mechanism to accommodate new innovations and technological changes without enacting new legislation."[127] Additionally, the USCA allows for courts to be flexible in what uses are considered fair, instead of operating under an enumerated list like Canada.[128] This is indicative of a more balanced approach to copyright law and appears to give the public a way to use copyright protected works even in the face of longstanding and restrictive laws that protect copyrighted works.

Given that Canada has extended copyright protection an additional 20 years, there will be no new works entering the public domain on an involuntary basis for the 20 years following the implementation of this extension. This paper predicts that the absence of new work entering the public domain will hinder creativity and production. To balance the potential negative consequences of copyright extension, Canada should amend its fair dealing doctrine to emulate the fair use doctrine found in the United States. If Canada were to eliminate its enumerated list and focus on permitting transformative uses of copyrighted works, it could

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[118] *Id*.
[119] *Id.*
[120] *Id.*
[121] Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions*, 156 U. PA. L. REV. 549, 605 (2008).
[122] *Id*.
[123] *Cariou v. Prince*, 714 F.3d 694, 708 (2d Cir. 2013).
[124] *Supra* note 92.
[125] *Blanch v. Koons*, 467 F.2d 244, 253 (2d Cir. 2006).
[126] *Supra* note 99.
[127] Ammar Younas, *Should the UK Adopt Into its Domestic Law a Broad 'Fair Use' Defence Instead of the Current 'Fair Dealing*, 1:6 INT. J. DEV. & PUB. POL'Y 221, 223 (2021).
[128] *Ibid* at 222.

adequately balance the tension between the public domain and copyright law, preserving the values and purpose of the two.

VIII. CONCLUSION

For many decades, copyright extension has been a widely debated topic. Copyright laws attempt to strike a balance between copyright and owners, and the public domain. However, there has been a global shift in attitudes toward the appropriate term for copyright protection. With the signing of CUSMA, Canada has implemented the life-plus-70 rule, effectively extending copyright protection another 20 years. Although there are some benefits to this change, it is detrimental to society, creativity, and the function and purpose of the public domain. Specifically, the absence of works entering the public domain for the next 20 years threatens the public domain as a resource for new creation. And the proposed economic benefits of extending copyright only benefit big players in the industry. Ultimately, the arguments surrounding the overuse, underuse, and tarnishing of works are not justifications for increasing societal costs. Instead, altering Canada's fair dealing doctrine to emulate the United States fair use doctrine would aid in finding better balance between the public domain and copyright law. Adopting the language used in the fair use doctrine provides courts with more flexibility in determining what uses count as fair, and thus, encourages the creation of new works instead of stagnation in the market for creative expression of ideas.