

## A CASE FOR A LONGER TERM OF COPYRIGHT IN CANADA - IMPLICATIONS OF *ELDRED V. ASHCROFT*

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Article abstract

In 1993, a European Union ("EU") directive instructed EU members to extend their baseline term of copyright by 20 years, to 70 years subsequent to an author's death, and to deny the longer term of copyright to non-EU nation-states that do not provide the same extended term. This directive has spearheaded legislative change throughout the world. The United States ("US") Congress adopted the *Copyright Term Extension Act* in 1998, which extended the term of all existing and future copyrights by 20 years. The US Supreme Court affirmed the legality of the *Copyright Term Extension Act* in *Eldred v. Ashcroft* in 2003. A life plus 70 year copyright term in the EU and US has marked repercussions for Canada, whose *Copyright Act* still prescribes a life plus 50 year term. This paper argues that Parliament must not ignore copyright law developments in the EU and US, and should amend the Canadian Copyright Act to extend the term of copyright to a life plus 70 term. In its deliberations, Parliament must consider protecting the interests of Canadian copyright holders who commercially exploit their works internationally. The potential cost savings resulting from the harmonization of Canada's copyright laws to that of its trading partners, the likely chilling effect on innovation in Canada given the longer terms of copyright in other nation-states, in addition to demographics and technology are all compelling factors supporting a longer term of copyright.

## **A CASE FOR A LONGER TERM OF COPYRIGHT IN CANADA - IMPLICATIONS OF ELDRED V. ASHCROFT**

par Kamil Gérard AHMED<sup>\*</sup>

*En 1993, une directive de l'Union européenne a obligé les États membres à prolonger dans leur droit interne la durée minimale du droit d'auteur de vingt ans, la portant ainsi à soixante-dix ans après le décès de l'auteur, et exclut cette prolongation ne s'appliquant pas aux États non membres qui n'offrent pas la même durée de protection. Cette directive a été le fer de lance de changements législatifs à l'échelle internationale. En 1998, le Congrès américain a adopté le Copyright Term Extension Act, qui prolonge de vingt ans la durée de la protection des droits d'auteur existants et futurs. En 2003, l'arrêt de la Cour suprême des États-Unis Eldred c. Ashcroft, a confirmé la légalité du Copyright Term Extension Act. La protection couvrant la vie de l'auteur et les soixante-dix années suivant son décès dans l'Union européenne et aux États-Unis a eu des répercussions au Canada, où le régime de protection dans la Loi sur le droit d'auteur couvre à ce jour la durée de vie de l'auteur plus cinquante ans. Le présent exposé soutient la position que le Parlement canadien ne doit pas ignorer les développements à l'égard du droit d'auteur dans l'Union européenne et aux États-Unis et qu'il devrait modifier la Loi sur le droit d'auteur du Canada afin de prolonger la durée du droit d'auteur à soixante-dix ans après le décès de celui-ci. Dans le cadre de ses délibérations, le Parlement devrait tenir compte de la protection des intérêts des Canadiens titulaires de droits d'auteur dont les œuvres sont commercialement utilisées à l'échelle internationale, des réductions de coûts résultant de l'harmonisation de la loi canadienne sur le droit d'auteur avec celles de ses partenaires commerciaux, du risque de ralentissement de l'innovation au Canada du fait que la durée de protection du droit d'auteur est supérieure dans d'autres États, ainsi que les facteurs socio-économiques et les avancées technologiques qui démontrent la nécessité de prolonger la durée de protection du droit d'auteur.*

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*In 1993, a European Union («EU») directive instructed EU members to extend their baseline term of copyright by 20 years, to 70 years subsequent to an author's death, and to deny the longer term of copyright to non-EU nation-states that do not provide the same extended term. This directive has spearheaded legislative change throughout the world. The United States («US») Congress adopted the Copyright Term Extension Act in 1998, which extended the term of all existing and future copyrights by 20 years. The US Supreme Court affirmed the legality of the Copyright Term Extension Act in Eldred v. Ashcroft in 2003. A life plus 70 year copyright term in the EU and US has marked repercussions for Canada, whose Copyright Act still prescribes a life plus 50 year term. This paper argues that Parliament must not ignore copyright law developments in the EU and US, and should amend the Canadian Copyright Act to extend the term of copyright to a life plus 70 term. In its deliberations, Parliament must consider protecting the interests of Canadian copyright holders who commercially exploit their works internationally. The potential cost savings resulting from the harmonization of Canada's copyright laws to that of its trading partners, the likely chilling effect on innovation in Canada given the longer terms of copyright in other nation-states, in addition to demographics and technology are all compelling factors supporting a longer term of copyright.*

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## INTRODUCTION

A copyright is a proprietary right in a unique work of authorship potentially having significant pecuniary value. The party having title to a copyright is entitled to exclusively earn royalties during its term, which explains the economic significance of the term of copyright. This is particularly true in light of globalization. In 1993, a European Union («EU») directive instructed EU members to extend their baseline term of copyright by 20 years, to 70 years subsequent to an author's death, and to deny the longer term of copyright to non-EU nation-states that do not provide the same extended term. This directive has spearheaded legislative change throughout the world. In January 2003, the United States (the «US») Supreme Court affirmed the legality of the *Copyright Term Extension Act*<sup>1</sup> («CTEA») in *Eldred v. Ashcroft*<sup>2</sup> («*Eldred*»), where all existing and future US copyrights are extended by 20 years. The copyright term in the US thus extends to 70 years subsequent to an author's death and makes American and European law concordant. Without doubt, one fundamental purpose of copyright is to create incentives for authors to create works of authorship – this is a classic Lockean, fruit of one's labour story. One issue requiring analysis, however, is the incremental economic benefit ensuing from copyright term extension. Copyright law is indeed a fruitful area of law and economics literature<sup>3</sup>. One of the *amicus curiae* briefs filed in *Eldred* was authored by the most prominent economists of our generation<sup>4</sup>. Their analysis indicates that

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1. 17 U.S.C.A. § 302(a) modifying *Copyright Act*, 17 U.S.C.A. §§101-1332.
  2. 123 S.Ct. 769.
  3. William M. Landes & Richard A. Posner, «An Economic Analysis of Copyright Law» (1989) 18 J. Legal Stud. 325 at 325 [Landes & Posner].
  4. These authors are : (1) George A. Akerlof, Goldman Professor of Economics, University of California, Berkeley. Nobel Memorial Prize in Economics Sciences, 2001; (2) Kenneth J. Arrow, Joan Kenney Professor of Economics (emeritus), Stanford University. Nobel Memorial Prize in Economic Sciences, 1972; (3) Timothy F. Bresnahan, Professor of Economics, Stanford University & Co-Director, Center for Research on Employment and Economic Growth, Stanford University; (4) James M. Buchanan, Advisory General Director, Center for Study of Public Choice, George Mason University. Nobel Memorial Prize in Economic Sciences, 1986; (5) Ronald H. Coase, Clifton R. Musser Professor of Economics (emeritus), University of Chicago Law School. Nobel Memorial Prize in Economic Sciences, 1991; (6) Linda R. Cohen, Professor of Economics, University of California, Irvine & Professor of Social Science and Law, University of Southern California Law School; (7) Milton Friedman, Senior Research Fellow, Hoover Institution. Nobel Memorial Prize in Economic Sciences, 1976; (8) Jerry R. Green, John Leverett Professor in the University and David A. Wells Professor of Political Economy, Harvard University; (9) Robert W. Hahn,

incremental benefits of extension are modest and outweighed by corollary costs. The US Congress nevertheless opted to extend the term of copyright.

A life plus 70 copyright term potentially has marked repercussions for Canada, whose *Copyright Act*<sup>5</sup> still prescribes a life plus 50 term. This paper will argue that Parliament must not ignore EU and US copyright law developments and should amend the Canadian *Copyright Act* by extending the term of copyright to 70 years after the author's death, for the benefit of Canadian copyright title holders. While the *Expert Economists'* analysis indicates the lack of real benefit to a longer term of copyright, their analysis is premised on the assumption of a closed economy and requires adaptation to an open economy setting. They do not consider the financial benefits of a longer term of copyright, the advantage of being at equal competitive footing, *ceteris paribus*, to one's competitors, cost savings resulting from the harmonization of a nation-state's term of copyright to that of its main trading partners, the potential chilling effect on innovation given longer terms of copyright in other nation-states, demographics and technology as compelling factors supporting a longer term of copyright. While it is ultimately a question of empirical evidence weighing the costs and benefits of extending Canada's term of copyright, a number of intuitive arguments exist in its support. Section 1 of this paper will analyze the economics

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Director, AEI-Brookings Joint Center for Regulatory Studies; (10) Thomas W. Hazlett, Senior Fellow, Manhattan Institute for Policy Research; (11) C. Scott Hemphill, Kapnick Fellow in Economics, Stanford University; (12) Robert E. Litan, Vice President and Director of Economic Studies, Brookings Institution & Co-Director, AEI-Brookings Joint Center for Regulatory Studies; (13) Roger G. Noll, Morris M. Doyle Centennial Professor of Public Policy, Stanford University; (14) Richard Schmalensee, John C. Head III Dean, Sloan School of Management, Massachusetts Institute of Technology; (15) Steven Shavell, Professor of Law and Economics, Harvard Law School & Director, John M. Olin Center for Law, Economics, and Business, Harvard Law School; (16) Hal R. Varian, Dean, School of Information Management and Systems, University of California, Berkeley & Class of 1944 Professorship, Department of Economics, University of California, Berkeley; and (17) Richard J. Zeckhauser, Frank P. Ramsey Professor of Political Economy, John F. Kennedy School of Government, Harvard University at [*Expert Economists*]. See Amicus Brief in Support of George A. Akerlof et al. on Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit (20 May 2002), online : <<http://eldred.cc/legal/supremecourt.html>> at 1a-2a [*Expert Economists' Brief*]. (data accessed : 2 March 2005) The US Supreme Court accepted and referred to this brief extensively which is why we have decided to retain the interpretation of these eminent economists for purposes of this paper.

5. R.S.C. 1985, c. C-42, s.6 [*Copyright Act*].

of copyright and refers to the brief filed by the *Expert Economists*. Analysis of international arguments will then be undertaken in section 2, followed by a discussion of important factors in favour of extending the term of copyright pursuant to *Eldred* in section 3.

## 1. Economics of Copyright

The primary *raison d'être* of copyright is to provide incentives for society to innovate by creating works of authorship. Assuming the economic rationality of authors, they will make investments for work-creation purposes insofar as future economic benefits are greater than or equal to initial investment, adjusted for the time value of money. The *Expert Economists* aptly note that «[t]he economic value of a change in copyright policy depends upon the extent to which it increases incentives for creation»<sup>6</sup>. The extension of the term of copyright should thus be analyzed in this context. The economic value of new and existing works is different and will now be analyzed.

### 1.1 New Works

American and European copyright title holders benefit from a term of copyright 20 years longer than their Canadian counterparts. As long as market demand exists for their copyrighted works, title holders can thus earn additional revenue from the term extension<sup>7</sup>. This additional compensation can be measured in terms of net present value («NPV»). With appropriate discounting, incremental revenues from a longer term of copyright will be small because future cash flows are distant from present. The *Expert Economists* provide a cogent example of an author having title to a copyright for 30 years during his/her lifetime – the pre and post-extension rights therefore respectively total 80 and 100 years. They demonstrated how extending the term of copyright by 20 years amounts to near negligible compensation using different reasonable discount rates, ranging from a 0.04% to 1.28% incremental NPV which amounts to additional compensation of \$0.00 and \$0.25 respectively<sup>8</sup>. This increment, however, is likely less since

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6. *Expert Economists' Brief*, *supra* note 4 at 5.

7. *Ibid.*

8. *Ibid.* at 3a. Please note, as the *Expert Economists* mention, that «[c]alculations assume a constant annual revenue stream. For ease of exposition, annual payments are assumed to be \$1, but the percentage increases are unchanged for larger or smaller constant annual streams.



copyrights generally have diminishing returns. With full awareness of these data, the *Expert Economists* do not believe it can be seriously argued that an extended term of copyright provides additional incentive to innovate. However, most people arguably do not solely make their decisions based on NPV and the fact that a longer term of copyright has a small NPV may indeed ring on deaf ears.

## **1.2 Existing Works**

Any incremental benefit for authors of existing works, no matter how modest, constitutes a windfall. It does not provide additional incentive to create new works of authorship, because, to state the most obvious, these works have already been created. The *Expert Economists* argue that the copyright term extension of existing works may create expectations of future extensions, but again, incremental revenues resulting from an extension are extremely modest. A perpetual copyright, for example, at a 7% interest rate would at most provide additional compensation of 0.12%, and likely far less when accounting for declining revenues<sup>9</sup>. On the same token, it is highly unlikely that the windfall generates greater wealth for innovation or for re-investment into existing works in any statistically significant manner.

## **1.3 Costs Resulting from Copyright Term Extension**

Incremental benefits from a longer term of copyright are modest. Costs should therefore be of similar magnitude to justify the policy measure. The *Expert Economists* opine that costs outweigh the benefits based on the social costs of monopoly and reduced innovation.

### **1.3.1 Social Costs of Monopoly**

The social costs of monopoly to the economy are well known. Competitive pricing creates price competition, ultimately leading to marginal price equating to marginal cost. A copyright generally confers a monopoly to its title holder until it reverts to the public domain. Products are sold above marginal cost during the term of copyright and consumers are thus priced out of the market

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9. *Ibid.* at 8. For further discussion, see Linda R. Cohen & Roger G. Noll, *Intellectual Property, Antitrust and the New Economy* (2001) 62 U. Pitt. L. Rev. 453 at 471.

leading to deadweight loss to the economy. Extending the term of copyright by an additional 20 years further aggravates this deadweight loss with apparently minimal incremental NPV to copyright title holders. Most of monopoly's social costs arise from existing works – just as incremental compensation for new works is small, so too is the present value («PV») of deadweight loss to the economy. This PV is highest for works closest to copyright expiration whose terms are then extended. «[A] deadweight loss experienced today is 224 times as large in present value ... as a deadweight loss eighty years from now (at a 7% interest rate)»<sup>10</sup>. This cost is not counterbalanced by benefits ensuing from further innovation, which can make it significant<sup>11</sup>.

### 1.3.2 Reduced Innovation

A longer term of copyright reduces innovation by making it more difficult to create derivative works of authorship from copyrighted works<sup>12</sup> and creates inefficiency in two ways. First, costs to prospective authors to create derivative works will increase because royalties must be paid to copyright title holders. Second, a number of transaction costs exist. Authors will incur expenses in locating and negotiating with copyright title holders. Identifying copyright title holders can be difficult – certain works of authorship by their very nature have many. Negotiating with multiple copyright title holders makes it more costly and difficult to achieve consensus. This is known as the «tragedy of the anti-commons» and leads to the underproduction of an artistic work<sup>13</sup>. Extending the term of copyright by 20 years, according to the *Expert Economists*, is not economically justifiable because of costs created to society. The US Congress and EU nevertheless made the policy decision to extend the term of copyright and so too should the Canadian Parliament.

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10. *Ibid.* at 11.

11. *Ibid.*

12. Common examples are altering famous paintings for comical or advertising purposes, or re-mixing songs.

13. *Ibid.* at 13. See James M. Buchanan & Yong J. Yoon, «Symmetric Tragedies : Commons and Anti-Commons» (2000) 43 J.L. & Econ. 1.

## 2. International Arguments

Copyright law is undoubtedly affected by globalization. The EU's adoption of a life plus 70 copyright term explains US Congress' rationale in doing the same :

A key factor in the CTEA's passage was a 1993 European Union (EU) directive instructing EU members to establish a baseline copyright term of life plus 70 years and to deny this longer term to the works of any non-EU country whose laws did not secure the same extended term. By extending the baseline United States copyright term, Congress sought to ensure that American authors would receive the same copyright protection in Europe as their European counterparts.<sup>14</sup>

Many countries are now debating whether to extend their terms of copyright<sup>15</sup>. Canada, of course, should not jump on this proverbial «bandwagon» without just cause, but this paper will demonstrate the probative force of a number of reasons favouring the extension of the term of copyright in Canada by 20 years.

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14. *Eldred*, *supra* note 2 at 772.

15. A comparison of copyright terms in selected countries for literary, dramatical, musical and artistic works indicates that it varies from none to life to life plus 100 years. The different terms of copyright are as follows : (1) life plus 100 : Mexico, (2) life plus 99 : Ivory Coast, (3) life plus 80 : Columbia and Guinea, (4) life plus 75 : Guatemala and Honduras, (5) life plus 70 : Albania, Argentina, Austria, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Costa Rica, Croatia, Czech Republic, Denmark, Ecuador, Egypt, Finland, France, Germany, Ghana, Greece, Hungary, Iceland, Irish Republic, Israel, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Netherlands, New Caledonia, Nicaragua, Nigeria, Norway, Paraguay, Peru, Poland, Portugal, Romania, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom and United States, (5) life plus 60 : India and Venezuela, (6) life plus 50 : Angola, Australia, Bangladesh, Benin, Brunei Darussalam, Burkina Faso, Burundi, Canada, Chile, China, Egypt, El Salvador, Hong Kong, Indonesia, Japan, Malaysia, Morocco, Nepal, New Zealand, Pakistan, Papua New Guinea, Philippines, Qatar, Republic of Korea, Saudi Arabia, South Africa, Sri Lanka, Taiwan, Thailand and United Arab Emirates, (7) life plus 30 : Iran, (8) life plus 25 (total protection to be not more than 50 years) : Iraq, and (9) none (or minimal) Afghanistan, Central African Republic and Kuwait. Allen Consulting Group, «Copyright Term Extension – The Australian Benefits and Costs» (July 2003), online : <[www.allenconsult.com.au/resources/MPA\\_Draft\\_final.pdf](http://www.allenconsult.com.au/resources/MPA_Draft_final.pdf)> (date accessed : 27 February 2005) at 4 [ACG].

Justice Breyer's dissenting judgment in *Eldred* rejects the argument that EU law is a threat to American competitiveness. He rather believes that both copyright law regimes have long co-existed despite regulatory differences and that the EU's developments are internal and unrelated to US copyright law<sup>16</sup>. This argument is more readily acceptable relative to the relationship between Canada and its southern neighbour. Geography itself accounts for this, coupled with the fact that the US and Canada have historically been one another's largest trading partners. Applying Breyer J.'s reasoning to Canada, Canadian and US copyright law must be unrelated since the location at which investment goes into the creation of a work has little to do with where it is exploited – this extended reasoning cannot be correct. Presumably, works are exploited across nation-state boundaries, especially with the Internet increasingly serving as a popular distribution channel. Furthermore, copyright law has a number of international facets, notably further to the *Berne Convention for the Protection of Literary and Artistic Works*<sup>17</sup> (the «Berne Convention»). This is where true inequality arises to the detriment of Canadian copyright title holders – nation-states that prescribe a life plus 70 term of copyright are only required to protect Canadian copyrights for a life plus 50 term pursuant to the Berne Convention.

## 2.1 Financial Benefits Resulting from Copyright Term Extension

The Berne Convention is founded on three basic principles : (1) national treatment, (2) automatic protection, and (3) independence of protection. The first and third principles are particularly important for this paper's purposes. The principle of national treatment establishes that a nation-state where works originate from or from which authors are nationals (also known as a «contracting state»), must provide the same copyright protection to foreign authors as the contracting state provides to its own nationals.

The principle of national treatment is subject to the principle of independent protection. The latter principle establishes the independence of protection in nation-states from where works of authorship originate. Where a contracting state provides for a term of copyright longer than the minimum

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16. *Eldred*, *supra* note 2 at 810.

17. Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (1986).

standard prescribed by the Berne Convention and the work has ceased to be protected in the originating nation-state, protection may be denied by other nation-states. Under the Berne Convention's independence of protection principle, Canada is therefore required to protect the rights of certain foreign copyright title holders even where Canadian copyright title holders may no longer receive protection in these foreign nation-states. This situation appears intuitively unfair for Canadian copyright title holders.

A longer term of copyright also places Canadian copyright title holders at a disadvantage relative to their competitors that originate from nation-states with longer terms of copyright on the basis that these competitors can earn revenue from their works of authorship for longer time periods. Whereas evidence from the *Expert Economists* again indicates that the incremental NPV from an extended term of copyright is small – between 0.04% and 1.28% – Canadian authors should not be *ab initio* disadvantaged relative to their competitors. Further to Breyer J.'s argument, Canadian and US copyright law might not directly compete. Nevertheless, copyright title holders in Canada and the U.S. undoubtedly compete with one another and the life plus 50 copyright term in Canada economically disadvantages Canadian authors relative to foreign competition in life plus 70 regimes. The US Congress passed the CTEA to redress this very injustice. Parliament, which exists to further the interests of all Canadians, must remedy the *ab initio* disadvantage faced by Canadian copyright title holders by extending the term of copyright in Canada by an additional 20 years.

«Annual royalties due to the CTEA's term extension are estimated at an aggregated \$53 million in 2002 to \$317 million in 2017»<sup>18</sup>. Based on data contained in the *AOL-Time Warner Brief* filed in *Eldred*, this paper's calculations indicate that the NPV of a 20 year copyright term extension in the US approximately ranges between \$1.67 billion using a 5% discount rate, \$1.44

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18. Kelly Slavitt, «The Copyright Term Extension Act : We May Know the Words, But Can We Find the Harmony?» (2002) 11 MSU-DCL J. Int'l L. 457 at 459. See Amicus Brief in Support of Respondent on Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit of AOL Time Warner Inc., Warner Music, Warner Bros., and DC Comics (5 August 2002), online : <<http://eldred.cc/legal/supremecourt.html>> (data accessed : 2 March 2005) at 16-17 [*AOL-Time Warner Brief*].

billion using a 7% discount rate, and \$1.17 billion using a 10% discount rate<sup>19</sup>. The economic impact of an extended term of copyright will also be significant in Canada – this paper projects an NPV of \$176 million using a discount rate of 5%, \$151 million using a discount rate of 7%, and \$123 million using a discount rate of 10%<sup>20</sup>. The incremental NPV of extending the term of copyright in Canada may be small per average Canadian copyright title holder, but is significant in the aggregate for the Canadian economy. The *Expert Economists* note that monopoly costs and reduced innovation are high when extending a term of copyright. However, monopoly costs will only be incurred in Canada insofar as the marginal price is greater than marginal cost in Canada. An extended copyright term in Canada will in fact provide authors with greater earning potential internationally. Canadian copyright title holders license their works of authorship throughout the world, a not insignificant ratio of which may be in the EU and US for obvious economic reasons. Monopoly rents earned internationally will not lead to deadweight loss to the Canadian economy which consequently offsets costs associated with extending the term of copyright. While such monopoly prices may make the world as a whole less efficient, they clearly benefit Canadian copyright title holders and the Canadian economy more generally. The same rationale equally applies to reduced innovation – derivative works may decrease in Canada, but only to the extent that Canadian authors are deterred by paying royalties for an additional 20 years. An arguably greater share of reduced

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19. The following notes and underlying assumptions apply to these calculations : (1) all figures are in 2002 US dollars, (2) additional revenue from royalties is \$53 million in 2002, and \$317 million in 2017, and (3) a straight line annual increase in royalty revenue of \$16.5 million is assumed  $[(\$317 \text{ million} - \$53 \text{ million}) / (2017 - 2002)]$ .

20. The following notes and underlying assumptions apply to these calculations : (1) all figures are in 2002 US dollars, (2) the population in the US and Canada in 2001 was 285,024,000 and 30,007,094 respectively. I was unable to find estimates of aggregate copyright revenue in Canada between 2002 and 2017. Accordingly, to determine a conversion ratio between US revenues and what can be predicted in Canada, I used population of the two countries as a proxy for the differences in copyright revenues between both countries. The US/Canada conversion ratio is 9.50. This proxy is imperfect in the strict sense, but nevertheless provides a relatively good approximation of incremental revenues for authors from extending copyright term in Canada. (3) a straight line annual increase in royalty revenue of \$1,736.842 is assumed (\$16.5M increase in the US divided by 9.50). For sources on US and Canadian population figures, see : United States Census Bureau, «Population Figures», online : <<http://www.census.gov/prod/2003pubs/02statab/pop.pdf>> (date accessed : 2 March 2005), and Statistics Canada, «Population Figures», online : <<http://www12.statcan.ca/english/census01/products/standard/popdwell/Table-PR.cfm>> (date accessed : 2 March 2005).

innovation from a longer term of copyright in Canada will be felt in the US, Europe and beyond.

## **2.2 Cost Savings Resulting from Harmonization**

When countries are segmented based on their terms of copyright, most of them figure either in the life plus 50 or life plus 70 categories. 2003 data from International Trade Canada indicate that between these two terms of copyright, 95% of foreign direct investment («FDI») in Canada is from life plus 70 nation-states, the lion's share coming from the US and Europe, whereas only 5% of reported FDI originates from life plus 50 nation-states<sup>21</sup>. By harmonizing Canada's law to those of its main trading partners, certain costs will diminish, such as those «... associated with management of intellectual property rights as portfolios would expire at the same time across our major markets»<sup>22</sup>. These cost savings will help counteract costs related to inefficiency and reduced innovation – to which extent, however, is indeterminate.

## **2.3 Potential Chilling Effect**

It could be argued that authors are now reluctant, or at the least, less willing to innovate in Canada because of a shorter time period from which monopoly rents can be earned relative to the US and EU. This said, the *Expert Economists* indicate that the incremental NPV per copyright title holder from extending the term of copyright is negligible and cannot rationally constitute incentive to further innovate. But the *Expert Economists'* study is premised on the assumption that people are economically rational and this is often incorrect. Behavioural economics, which is inherently multi-disciplinary, attributes importance to people's perceptions, rational or not. For prospective authors contemplating innovation, a shorter term of copyright may possibly dissuade them from innovation. In fact, «[p]eople invariably look optimistically at their chances of winning, and extension [of the term of copyright] may add to this impression and stimulate additional creative activity»<sup>23</sup>. The economic

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21. International Trade Canada, «Trade and Economic Analysis» (7 October 2004), online : <<http://www.dfait-maeci.gc.ca/eet/cimt/2003/CIIP03-en.asp>> (date accessed : 3 March 2005).

22. ACG, *supra* note 15 at vii.

23. *Ibid.* at 29.

irrationality of such behaviour is not crucial – it happens and Parliament must adapt to this reality. In this light, the status quo copyright term entails perception costs which are culturally disadvantageous to Canada<sup>24</sup>.

### 3. *Eldred Case*

*Eldred* notes two compelling points, *inter alia*, that justify a life plus 70 copyright term : (1) demographics, and (2) technology<sup>25</sup>.

#### 3.1 Demographics

Demographics are important for two main reasons. First, human longevity has significantly increased in North America in the past generation. Second, people bear children at older ages than in the past, which is in part corollary of the former<sup>26</sup>. Given this reality, the majority judgment in *Eldred* argues that it is a natural occurrence for parents to better safeguard the future and prosperity of their children by bequeathing them larger estates. An extended term of copyright facilitates this process by providing the opportunity for such revenue generation. Behavioural economics clearly plays a role in ascendants wanting to affect the behaviour and prosperity of their descendants – this is intuitive and empirically confirmed<sup>27</sup>.

The US term of copyright was last extended in 1976<sup>28</sup>. Life expectancy in the US and Canada has since increased and will indeed continue to do so. From 1976 to 2001, for example, life expectancy in Canada increased by 6.3 years for men and 5 years for women, and is projected based on moderate estimates by Statistics Canada to further increase by 4.7 and 2.1 years

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24. Shira Perlmutter, «Participation in the International Copyright System as a Means to Promote the Progress of Science and Useful Arts» (2002) 36 L.A. L. Rev. 323 at 330.

25. *Eldred*, *supra* note 2 at 772. The economic factors other than those related to globalization will be discussed. Nonetheless, it is difficult to differentiate the two as they are intimately related.

26. *Ibid.* at 782n.

27. B. Douglas Bernheim, Andrei Shleifer & Lawrence H. Summers, «The Strategy Bequest Motive» (1985) 93(6)J. Poli. Econ. 1045. See also B. Douglas Bernheim, «How Strong Are Bequest Motives? Evidence Based Estimates of the Demand for Life Insurance and Annuities» (1991) 99(5) J. Poli. Econ. 899.

28. *Eldred*, *supra* note 2 at 775-76.



respectively by 2026<sup>29</sup>. Although this does not entirely account for a 20 year copyright term extension in the US, it clearly lies within a range of reasonableness which is also applicable to Canada – a copyright term of life plus 50 today represents a lesser window of opportunity in real terms than it did years ago. This paper's calculations again indicate that Canada can expect an incremental NPV between approximately \$176 million and \$123 million using discount rates of 5% and 10% respectively<sup>30</sup>. This revenue potentially explains why authors desire a longer term of copyright; because of the perceived benefit, whether real or not, to themselves and their estates.

### 3.2 Technology

Justice Ginsburg notes that «the failure of the U.S. copyright term to keep pace with the substantially increased commercial life of copyrighted works resulting from the rapid growth in communications media»<sup>31</sup> justifies a life plus 70 term of copyright. Technological advancement has occurred since time immemorial, but few would disagree that the current age has seen unprecedented acceleration in technological evolution and this trend is expected to continue for some time. Landes and Posner argue that a long trend exists towards the extension of copyright term. «This trend is consistent with the fact that the cost of copying has fallen over this period»<sup>32</sup>. The Internet is the example *par excellence* of these developments. Online distribution and digitization have lead to substantial cost savings for many industries and arguably support an extended term of copyright in Canada to sustain this downward trend<sup>33</sup>.

## CONCLUSION

Parliament must amend the *Copyright Act* to extend the current life plus 50 term of copyright by an additional 20 years. The *Expert Economists* note that extending a nation-state's term of copyright creates inefficiency in its economy and reduces innovation. This analysis makes perfect sense in a closed economy, but requires adaptation to an international and Canadian-specific context, and

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29. Statistics Canada. Demography Division.

30. See *supra* note 20.

31. *Eldred*, *supra* note 2 at 782n.

32. *Landes & Posner*, *supra* note 3 at 363.

33. *ACG*, *supra* note 15 at vii.

does not consider a number of factors that have been addressed in this paper. Some 95% of Canada's reported FDI in 2003 originated from life plus 70 nation-states. Parliament must not ignore these data. Indeed, «in an era of multinational publishers and instantaneous electronic transmission ... [,] harmonization ... has obvious practical benefits' and is 'a necessary and proper' measure to meet contemporary circumstances ...»<sup>34</sup> for Canada's prosperity.

US copyright title holders can earn monopoly rents for an additional 20 years in the EU, for example, and the opposite is also true. Canadian copyright title holders cannot do the same further to the Berne Convention and are thus *ab initio* precluded from earning additional revenue in life plus 70 nation-states – this is unfair, unnecessary and disadvantages Canadian copyright title holders. Moreover, the incremental NPV of extending the term of copyright in Canada per average investor may be small, but as an industry, Canadian copyright title holders stand to gain a NPV of some \$150 million assuming a 7% discount rate. This sum is certainly not insignificant. Furthermore, copyright title holders often perceive a longer term of copyright to be more valuable and this belief cannot be ignored. An aging population with a longer life expectancy, complemented by technologically driven times further support extending the term of copyright in Canada.

The Canadian business community that has a vested interest in copyright term duration would prefer a life plus 70 term and Parliament must indeed remain responsive to these needs for a basket of reasons. The copyright-related industry in Canada is indeed very important to the country's gross domestic product («GDP»). According to Industry Canada, «[i]n 2000, the ... GDP ... of the copyright-related sectors publishing, film, music, software, visual arts, etc.) was estimated at \$65.9 billion or 7.4 percent of Canadian GDP. Between 1992 and 2000, the value of these sectors increased by an annual average of 6.6 percent, compared with 3.3 percent for the rest of the Canadian economy. Together, these sectors formed the third most important contributor to the growth of Canada's economy.»<sup>35</sup> Despite the importance of the copyright-related industry to Canada's GDP, amending the *Copyright Act* to extend the current term of copyright has

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34. *Eldred*, *supra* note 2 at 777.

35. Industry Canada, «Supporting Culture and Innovation : Report on the Provisions and Operation of the Copyright Act» (October 2002), online : <<http://strategis.ic.gc.ca/pics/rp/section92eng.pdf>> (date accessed : 25 September 2005).

been a politically oft-ignored matter, and this paper remains doubtful of Parliament's resolve to change the *status quo*.