



REFORMING CANADA'S COPYRIGHT ACT TO PROTECT PERFORMING ARTISTS IN THE DIGITAL WORLD

September 2009

INTRODUCTION AND STATEMENT OF PRINCIPLES

ACTRA has represented Canadian performers who work in the recorded media in the English-language for more than 60 years. Today, ACTRA has 21,000 members: professional artists whose work in television, radio, film, sound recordings, digital media productions and commercials entertains, educates and informs Canadians and global audiences. Members of ACTRA live and work in every region of the country and work for all of Canada's broadcasters, the NFB, commercial producers, independent television and film producers, the sound recording industry, and developers of electronic games and other digital media products.

ACTRA is responsible for negotiating and administering collective agreements establishing minimum conditions of engagement and a framework for how producers engage individual performers. Launched in 1984, the ACTRA Performers Rights Society, a division of ACTRA, is a collective that secures payment of outstanding fees due to performers. Since 1997 the ACTRA Recording Artists Collecting Society, which is a member of the Neighbouring Rights Collective of Canada, has administered the royalty and private copying levy due to performers in sound recordings.

ACTRA members have a vital stake in the future of all Canadian media, the emergence of digital media and the new forms of distribution. This interest arises more than just because it is our livelihood: members feel passionately that there should be a strong Canadian presence wherever entertainment and information services are offered.

Alliance of Canadian Cinema, Television and Radio Artists

ACTRA National Office

625 Church Street · Suite 300 · Toronto ON M4Y 2G1
Toll free 1-800-387-3516 · Tel (416) 489-1311
Fax (416) 489-8076 · E-mail national@actra.ca · www.actra.ca

Affiliated with the Canadian Labour Congress (CLC)
and the International Federation of Actors (FIA)

Branch Offices: Vancouver · Edmonton · Calgary · Regina · Winnipeg
Toronto · Ottawa · Montreal · Halifax · St. John's

ACTRA is working for the reform of copyright laws in Canada and internationally at the World Intellectual Property Organization (WIPO) because a modern copyright system is essential to create opportunities by stimulating the production of Canadian content and to encourage a strong Canadian presence on the Internet. It is a cornerstone of an economic development policy that values creative industries.

If we are to achieve our creative promise, artists whose work is enjoyed by audiences everywhere must be compensated fairly for their efforts and those who use the work must respect the integrity of the artistic creation. ACTRA's collective agreements have taken steps toward these objectives. But in the digital era it is essential for ACTRA's efforts to be supported and extended through economic and moral rights in Canada's *Copyright Act*.

The fundamental starting point for our position on copyright and performing artists is that the work of the performer must be protected by copyright law since the performance adds economic and artistic value to the work by giving life and grandeur to the script or composition.

ACTRA urges the government to move decisively on digital issues. Digital technologies are bringing major changes to our industry through new production, new distribution platforms and tools, new forms of artistic expression and new markets. Most of these were not foreseen when Canada's current copyright laws came into force. And it is precisely because these technological changes have had such a profound effect on the way our members work and presage even greater changes in the future that ACTRA urges the government expeditiously:

- 1. To ratify the provisions of the WIPO Performances and Phonograms Treaty (WPPT) and the WIPO Copyright Treaty (WCT) (together the "WIPO Treaties") by amending Canada's *Copyright Act* to comply with the terms of the WIPO Treaties.**
- 2. To provide performers a full range of economic and moral rights for their performances in sound recordings and in audiovisual works in Canada's *Copyright Act*; and**
- 3. To update and expand Canada's private copying regime to apply to all technologies ordinarily used by Canadians for private copying purposes, so that performers are fairly compensated for their performances in both sound recordings and in audiovisual works and consumers can make copies, in whatever format they want, for their own personal use.**

BACKGROUND

For many years in Canada and around the world, copyright protection was not provided to performers. Performances have been utilized in sound recordings and films since the early part of the last century, in radio broadcasts since the 1930s and in television programs since the 1950s. The Rome Convention, the first international treaty that benefited performers, did not come into force until 1961 and, even today, has not been ratified by all countries. The rights it provides to performers are not extensive. The international copyright system began to catch up with technological developments in recorded media with the negotiation of the WIPO Treaties in 1996, and the 2000 Diplomatic Conference which concluded negotiations on 19 out of 20 articles of a proposed Audiovisual Performances Treaty.

The initial Canadian efforts to provide rights to performers did not occur until 1996, when a provision designed primarily to permit musicians to prevent the unauthorized distribution of bootleg recordings came into effect. In 1997, amendments brought limited but important rights for Canadian performers, with the introduction of the neighbouring right in a sound recording and clauses that permit performers to enforce their collectively-bargained residual fees. These amendments also authorized a levy that become operational in 1999 on blank audio recording media to compensate rightsholders for the private copying of sound recordings and musical works. ACTRA welcomed these developments as the initial step in a process of providing statutory rights to Canadian performing artists.

Canadian performers have successfully negotiated agreements with the producers of sound recordings and audiovisual works since the 1940s. These agreements regulate the terms and conditions of engagement with provisions including minimum rates, hours of work, working conditions and the obligation to provide written contracts.

In the absence of statutory recognition of performers' rights, ACTRA has utilized collective bargaining to provide performers with certain rights that approximate the copyright enjoyed by other artists and by performers in other countries. The collective agreements thus provide certain pecuniary rights when the material is distributed and/or broadcast and some degree of control by performers over how programs that contain their performances can be used and changed, which is akin to moral rights.

With the emergence of digital technologies these solutions have become inadequate. For performers and their unions, the past decade has brought a proliferation in the number and range of uses of our performances and has increased the challenges faced in monitoring their use and securing payments. It has also created new distribution platforms like the Internet through which Canadian performers' work can be made available to Canadians and audiences around the world. Consumers can now make perfect copies and manipulate performances in ways that may not be authorized. They can also make and distribute their own audiovisual productions. Consequently, ACTRA proposes that the government establish a comprehensive regime of copyright protection for performers.

ACTRA proposes a made-in-Canada solution constructed on the foundation of widely recognized international standards agreed to by Canada and already in force in the laws of Canada's major trading partners.

SPECIFIC RIGHTS REQUIRED BY CANADIAN PERFORMING ARTISTS

Rights in Sound Recording Performances

There is no good reason for Canada's conspicuous failure to modernize its copyright law in keeping with international norms, something it signalled it would do by signing the WIPO Treaties in 1997. In order to conform to the WPPT and to ensure that Canada's Copyright Act responds to current technological capabilities, the following amendments are required.

Moral Rights

Since the personality and reputation of an author are so closely attached to his or her artistic work, copyright laws provide a range of rights to authors known as "moral rights." The new digital universe makes it essential for performers to benefit from the same moral rights protection as authors enjoy under the *Copyright Act*.

Further, ACTRA believes it is essential for moral rights to be implemented retroactively, since today's technologies do not distinguish between new and old material. Because moral rights already subsist in the works embodied on sound recordings, ACTRA believes it would not be a burden to grant moral rights to

performers for the performances of those works and for violations that occur after the coming into force of the provision.

ACTRA also believes the *Copyright Act* should be amended to prohibit the waiver of moral rights. In the audiovisual industries, the economic relationship between the individual creator and the producer of the material is such that the creator is almost always required to waive moral rights in exchange for the work opportunity. This is inappropriate and is not done by the producer for fear that the individual artist may make a frivolous or vexatious claim, but rather as an indiscriminate process that has become part of the “business” of making these productions. Moral rights are essential in the digital universe and all rightsholders should be provided with rights that are inalienable.

Private Copying

Since the levy on blank audio recording media was introduced in 1999, the private copying regime has become essential to the livelihood of performers. However, it needs to be updated and expanded to apply to all technologies ordinarily used by Canadians for private copying so that performers are fairly compensated. If and when it is expanded to cover all recording media and devices, ACTRA would then support the right of consumers to make unlimited copies of all musical works and sound recordings available to them, in whatever format they want, for their own personal use.

Right of Reproduction

As the name implies, a core element of copyright law is to regulate who has the right to make a copy of a work, performer’s performance or sound recording and under what conditions. In recorded media, this is referred to as the “right of reproduction.” At present, the Canadian *Copyright Act* limits the right of reproduction enjoyed by performers in a manner not consistent with the WPPT. Accordingly, the *Copyright Act* should be amended to provide that a performer should have the exclusive right of authorizing the direct or indirect reproduction of the performance.

Right of Making Available

This right is the one that WIPO has developed to protect copyright owners in the era of on-demand technologies. Accordingly, the performer should be provided with the exclusive right of making available to the public of their performance in such a

way that the members of the public may access them from a place and at a time individually chosen by them.

Given that streaming technologies permit the instantaneous delivery by computer of musical works and sound recordings primarily intended for other markets, ACTRA urges that the rights of performers be introduced in a manner that includes both on-demand and online streaming.

Rights in Audiovisual Performances

Moral Rights

Perhaps the most pressing challenge and opportunity of the digital era comes from the ability to make perfect copies of a recorded performance and to manipulate the work. It is now simple for virtually anyone with a computer to do what only a few years ago would have required highly-trained professionals using expensive equipment. This has led to extraordinary developments; from the digital re-birth of long-dead performers to the virtual actor. It has also brought unacceptable commercial exploitation of performers and their work such as the unauthorized use of pictures to the digital superimposition of a performer's face on a pornographic image. It is essential for audiovisual performers to have moral rights protection. This was recognized in 2000 at the WIPO Diplomatic Conference on Audiovisual Performances at which it was agreed to include a limited moral rights clause in the provisional Treaty.

Specifically, the performer of an audiovisual performance must benefit from the same moral rights protection as authors enjoy under the *Copyright Act*. ACTRA believes these rights should apply to principal performers individually, while the rights of other performers could be asserted only on a collective basis.

Further, ACTRA believes it is essential for moral rights to be implemented retroactively, since today's technologies do not distinguish between new and old material. Because such rights already subsist in the same audiovisual work for other rights holders, ACTRA believes it would not be a burden to grant moral rights to performers for existing performances for violations that occur after the coming into force of the provision. ACTRA also notes that its collective agreements have for many years contained provisions that establish an ongoing relationship between the performer and the work, including requirements for the permission of the performer to be obtained before the work may be re-edited for subsequent re-use. The

agreements also contain requirements relative to performer credits. Thus, applying moral rights retroactively would merely coincide with existing measures and not represent a significant departure for the producer; but it would ensure that performers could protect their integrity in case their performances are misused in the future.

Right of Broadcasting and Communication to the Public

Since broadcasting remains the most important existing market for the recorded performance, it would be inappropriate to have rights for audiovisual performers that do not include an appropriate right in this field. Further, ACTRA believes it is vital that performers have such rights introduced in a manner that covers webcasting and streamed video, as well as traditional forms of exhibition, perhaps in a form such as "communication to the public whether of a fixed or unfixed performance."

In anticipation of concerns raised by broadcasters and others that the introduction of an exclusive right for performers leaves open the possibility that performers could seek "double payment" for the same use of the work, ACTRA states unequivocally that we do not seek double payments for uses that are presently the subject of bargained collective agreements. Therefore, we would consider the possibility that the right of broadcasting would be limited by a provision such as "that performers covered by a collective bargaining agreement could not object to" certain uses of the recorded performance, if those uses are already covered by such collective bargaining agreement.

Right of Making Available

As discussed above, this is obviously a key issue for the digital age and performers want to see the strongest possible right to preserve options for future collective bargaining and/or royalty application. The right must be applicable whether the material is made available by wire or wireless communication.

Other Economic Rights

The economic rights required by performers in the digital era are more than just the right of making available: all the economic rights enjoyed by authors of works should be recognized. While many of the following rights seem obscure, each is enjoyed by other copyright holders in the same audiovisual works and together they create a bundle of rights essential for Canadian performers. The performer should have the right to fix the performance in any material form, including in an

audiovisual work (this simply means the right to authorize the recording of their performance). The performer should have the right to authorize the reproduction of the fixed performance (this means the right to authorize the making of copies). Finally, the performer should have such other rights, including retransmission, rental and distribution, if these are also provided to other rights holders in the same works.

Private Copying

With the proliferation of digital media, it is now relatively easy for anyone with a computer to make a perfect copy of an audiovisual work. Many Canadians expect online access to a wide array of films, television programs and other copyright-protected works, and expect to be able to use them in whatever format is most convenient, and to share them with family and friends. ACTRA believes the most effective and balanced approach to this issue is to expand the current paid right to make private copies to all technologies that Canadians ordinarily use to make such copies. The private copying provisions in the Copyright Act would need to be commensurately expanded to ensure that rightsholders are fairly compensated for use of their works. If such provisions were expanded to cover all recording devices and media, ACTRA would support a consumer right to make copies of all copyright materials available to them, in whatever format they want, for their own personal use.

Beneficiaries of Protection

ACTRA believes that the beneficiaries of protection should be all performers whose performance is recorded in Canada. Where performers are involved in international co-productions, which can involve artists from many countries and work in these and other countries, appropriate rules and bilateral relationships will need to be developed to ensure performers are properly protected.

Other Clauses

ACTRA further urges the adoption of other clauses agreed to in the provisional WIPO Audiovisual Performances Treaty.

Transfer of Rights

Consistent with the principles of Canadian copyright law, the performer should continue to be the first owner of the copyright in the performance and there must not be any presumption of a transfer of rights or any statutory transfer to any other

party. To be valid, transfers that are consented to by the performer must be expressed in writing and in exchange for appropriate payments. There should be a prohibition against transferring rights for uses not yet developed.

Primacy of Collective Bargaining Agreements

There is a need to introduce the rights of performers in a manner that reflects and respects the collective bargaining system that has been used by the industry to regulate some of these matters.

Accordingly, ACTRA believes that where the performance is governed by the terms of an existing collective bargaining agreement that provides for remuneration when the material is used in one of the fields in which the performer has an economic right, the performer should have no right to file a tariff with respect to such use. Where no collective bargaining agreement is in place or where remuneration for use of the material in the field is not provided in an agreement or is not fair in the circumstances, the performer should have the right to equitable remuneration for such use and the Copyright Board should be empowered to determine the appropriate royalty. The choice between seeking remuneration through the collective bargaining process or a tariff filed with the Copyright Board should rest exclusively with the performers collectively: the choice can be exercised through an appropriate copyright collective.

The Right to Enforce Collectively Bargained Residual Fees

With the expansion of rights for performers, Section 17(2) of *Copyright Act* will require amendment to ensure that performers may enforce contractually negotiated residuals that arise from any use of the work.

Other Issues

Technological Protection Measures (TPMs) and Digital Rights Management Information (DRMs)

The WIPO Treaties require that there be “adequate legal protection” for performers and other rightsholders who choose to protect their work with “technological protection measures” or who attach “digital rights management information” on the work.

The choice of whether or not to use a TPM in connection with controlling access to a copyright protected work or which restricts copyright protected acts rests with rightsholders. Some will choose to use them, others will not. In accordance with the WIPO Treaties, rightsholders should have recourse against persons who deliberately circumvent their TPMs. By the same token, users who have legal access to a work should not be prevented by TPMs from availing themselves of statutory exceptions or limitations. Moreover, legal protection for TPMs should be subject to privacy, interoperability, and encryption research considerations, for example.

In a similar vein, rightsholders, including performers, should have recourse against persons who deliberately alter or remove rights management information in order to facilitate or conceal copyright infringement or to deny a rightsholder's right to equitable remuneration.

Intermediary Liability

The Internet has become a major vehicle through which creative works of all kinds are distributed. However, some creators and producers find their work distributed online without their authorization. An important issue is how can the rights of the creators and producers be enforced if this is happening? In the European Community, the United States and Australia, governments have responded by establishing a "notice and take down" system.

ACTRA believes that we need a system in Canada that is effective and based on the rightsholder initiating a complaint that his or her material is being distributed without their authorization. It is not the job of Internet service providers to determine the legality of material being transmitted through their networks. However, since they may be facilitating access to offending material, they must be involved in resolving the complaint. Meaningful checks and balances in the system must permit the alleged infringer to demonstrate it has the legal right to use the material and to prevent unsubstantiated complaints.

Penalties for Copyright Infringement

There must be strong penalties against massive online copyright infringement. Despite the fact that copyright infringement done for non-commercial, private purposes unfairly harms the economic interests of performers (e.g., illegal downloading), ACTRA believes the government should concentrate on copyright reforms that facilitate legal access and fair remuneration, rather than focus on amendments to statutory damages for non-commercial and personal albeit

infringing use. This can be accomplished through the expansion of the current private copying regime.

Fair Dealing

Canada's *Copyright Act* contains a number of "exceptions" which permit certain users and uses to be made of copyright material without authorization of the rightsholder and/or without payment. Any time a new exception is contemplated, it must take into account the economic consequences for performing artists and other creators.

One of the exceptions is fair dealing, which permits individuals to use a fair portion of a copyright work for the purposes listed in the *Copyright Act* (research, private study, criticism, review or news reporting). In determining whether a use is "fair," courts consider a number of factors including the purpose of the use, the nature of the work, the character and amount of the dealing, and whether there are alternatives.

It is important to note that the fair dealing provisions found in common law countries outside the United States are far narrower than the "fair use" provisions of the U.S. law, which may allow more free uses of copyright protected material.

ACTRA does not believe the importation of U.S.-style fair use would help maintain or promote the balance that exists in Canada. In this, as in all copyright issues, ACTRA supports a solution that responds to Canadian circumstances, challenges and legal principles.

The Supreme Court of Canada's recent liberal interpretation of fair dealing exceptions encourages a balance between the respective rights and interests of rightsholders and users. It may be useful for the government to consider areas to broaden beneficially and carefully the balance in a manner that does not harm the economic interests or moral rights of creators. A fair dealing exception for parody and satire could be one such area for consideration.

CONCLUSION

There are any number of changes that could and should eventually be made to provide Canada with a 21st century *Copyright Act*. However, in order to make much-

overdue progress on this very complex and often controversial file, ACTRA urges the government to focus on changes required to comply with the WIPO Treaties, provide audio and audiovisual performers a full range of moral and economic rights, and update and expand Canada's private copy regime.

To reiterate, ACTRA urges the government expeditiously:

- 1. To ratify the provisions of the WIPO Performances and Phonograms Treaty (WPPT) and the WIPO Copyright Treaty (WCT) (together the “WIPO Treaties”) by amending Canada’s *Copyright Act* to comply with the terms of the WIPO Treaties.**
- 2. To provide performers a full range of economic and moral rights for their performances in sound recordings and in audiovisual works in Canada’s *Copyright Act*.**
- 3. To update and expand Canada's private copying regime to apply to all technologies ordinarily used by Canadians for private copying purposes, so that performers are fairly compensated for their performances in both sound recordings and in audiovisual works and consumers can make copies, in whatever format they want, for their own personal use.**

Performers are excited by the opportunities the expanding digital world is creating. It's getting easier for Canadians and people around the globe to see and enjoy our work. However, current laws need to be modernized to ensure a balance between the need for performers to protect the integrity of our images and to be paid, while allowing Canadians to enjoy digital material when and where they want.

That's why ACTRA is urging the government to act immediately to provide Canada with fair copyright laws that balance the interests of Canadian consumers with the rights of Canadian creators and makers in their creative works. In an increasingly digital world, balanced copyright law will make sure artists' rights are not just protected, but strengthened for the benefit of all Canadians.