ACTRA

PROTECTING CANADIAN PERFORMERS

Assessing the Impact of Canada's Proposed Bill C-27, ***Artificial Intelligence and Data Act***

Submission to the House of Commons Standing Committee on Industry and Technology
Prepared by the Alliance of Canadian Cinema Television and Radio Artists (ACTRA)

Marie Kelly, National Executive Director
Ian Chai, Regional Director

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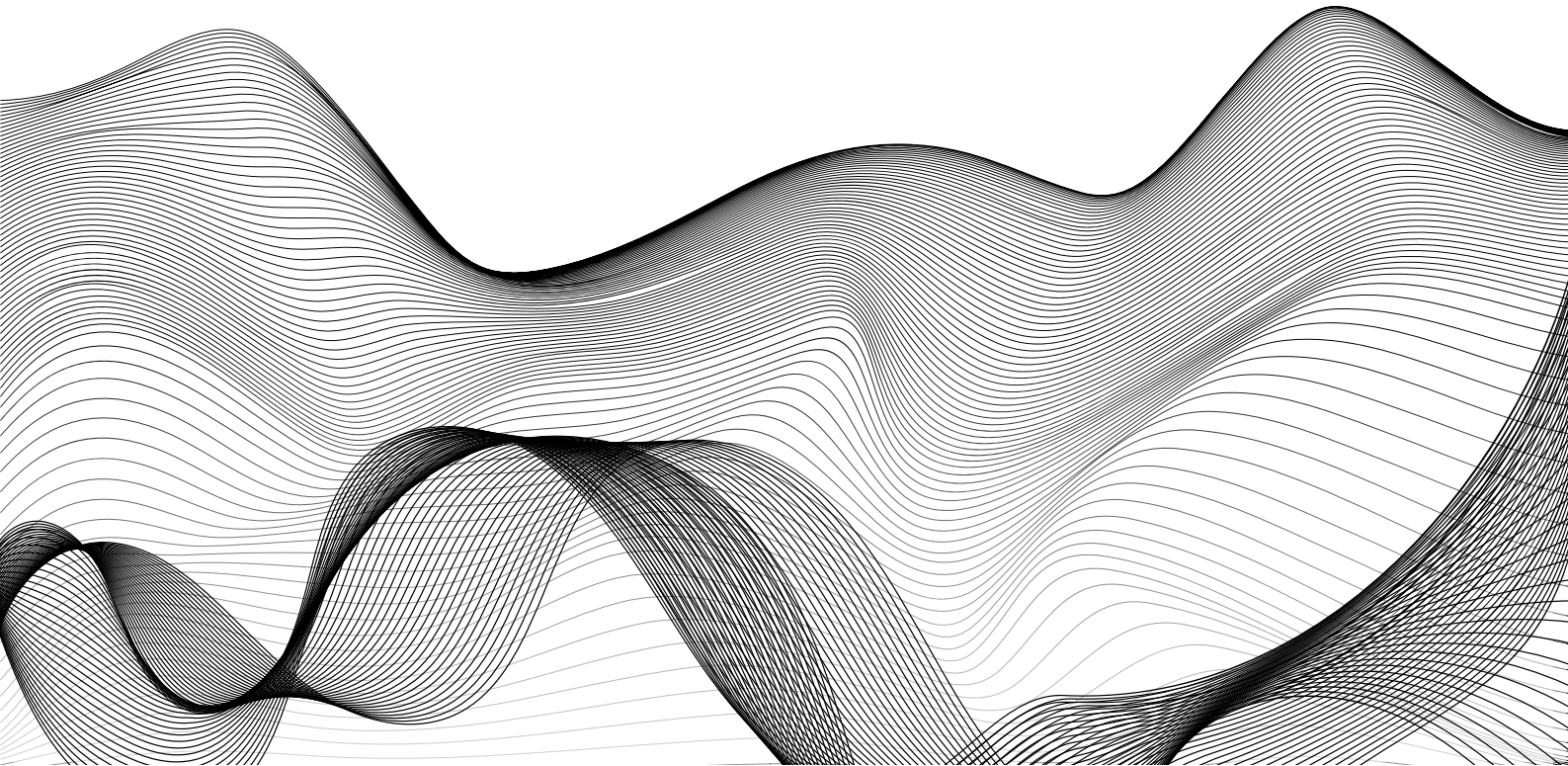


INTRODUCTION

This is the submission of the Alliance of Canadian Cinema Television and Radio Artists (ACTRA) regarding Bill C-27, Artificial Intelligence and Data Act (AIDA). For 80 years, ACTRA has represented performers living and working in every corner of the country who are pivotal to bringing Canadian stories and music to life in film, television, radio and all forms of digital media.

We wish to thank the members of the Standing Committee on Industry and Technology (the "Committee") in advance for your consideration of ACTRA's comments on AIDA, ACTRA would welcome the opportunity to appear before the Committee to discuss our unique concerns directly with Committee members.

ABOUT ACTRA

ACTRA is the national union of professional performers working in recorded media in Canada. ACTRA represents the interests of over 28,000 members across the country – the foundation of Canada's highly acclaimed professional performing community.

ACTRA represents actors, recording artists, comedians, announcers, stunt co-ordinators and performers, dancers, narrators, voice performers, hosts, choreographers, models, singers, background performers, puppeteers and more.

ACTRA's principal role is to negotiate, administer and enforce collective agreements to provide performers with equitable compensation as well as safe and reasonable working conditions.

ACTRA is proud to be a leading voice for Canadian culture in the development of Canada's audiovisual industries. ACTRA lobbies for regulation and government policies that protect Canadian culture and encourage audiovisual production in all genres.

CONTACT US

625 Church Street, 3rd Floor
Toronto, ON M4W 2G1
e: mkelly@actra.ca

PURPOSE OF SUBMISSION

ACTRA, on behalf of the Canadian performers it represents, is contributing this submission to urge the Committee to consider the outsized risk that artificial intelligence technologies including, without limitation, machine learning, neural networks, large language models, and related generative and creative tools (collectively, "**AI**") pose to the livelihood of Canadian performers and, consequently, Canadian culture. At a minimum, the Committee should ensure that Canadian performers are protected from unauthorized and unpaid exploitation and non-transparent processing, use and manipulation of their voices and likenesses. Absent such protections, Canadian performers face unprecedented risks arising from the fact they are not provided an opportunity by AI content producers to:

- consent,
- obtain compensation, or
- control

the use by AI applications of so-called "data sets" which in this case include their personal voices, sound effects, actions, behaviour, images, likenesses and personalities (collectively, "**NIL Rights**").

These risks to Canadian performers are significant and include reputational harm, job displacement, devaluation of their labour, and potential "theft" of their NIL Rights, interfering with their ability to earn a viable living.

Allowing AI developments to subject Canadian performers to these risks without regulation and effective oversight is inconsistent with Canadian values of protecting vulnerable arts workers in a rapidly changing industry. Accordingly, any legislation governing the development and implementation of generative AI technology in the entertainment industry must take into account these three core principles: consent, compensation, and control.

We believe that performers in Canada and elsewhere are the "canaries in the coal mine" on the issue of AI tools impacting jobs and disrupting industries. The protections that we recommend are aimed at safeguarding the fundamental needs of Canadian performers, which are universal in nature: consent, respect, fair wages, and protection against abuse. Furthermore, we believe these protections will also contribute to the health of the Canadian economy generally. Canada's entertainment industry provides substantial contributions to Canada's economy. According to Profile 2022: Economic Report on the Screen-Based Media Production Industry in Canada, in 2021/2022, Canada's film and television industry created 240,760 jobs, contributed $13.73 billion to Canada's gross domestic product, and drew $7.58 billion in foreign investment. [1]

[1] Source: Profile 2022: Economic Report on the Screen-Based Media Production Industry in Canada, published by the Canadian Media Producers Association in collaboration with the Association Québécoise de la production médiatique, the Department of Canadian Heritage and Telefilm Canada.

These protections are all the more important when put into perspective. In 2019 [2] the mean income for ACTRA members (excluding those whose income was nil) was $19,845 with a median income (again excluding those whose income was nil) of $5,501. Only 15% of ACTRA members earn in excess of $20,000 per year, with the largest share of ACTRA performers (35%) earning nothing. It is noteworthy that a performer must earn at least $19,900 ($43,100 for family coverage) to secure basic insurance coverage for the following year from the Actra Fraternal Benefit Society (AFBS).

KEY RECOMMENDATION

While there is a sense of urgency to act now to regulate AI with the proposed AIDA legislation, expediency must not come at the expense of effective regulation. In its current form, AIDA leaves too much to the discretion of regulators and provides too little certainty to both industry participants and those who will be affected by this technology, including ACTRA's members. Accordingly, **ACTRA urges the Committee to remove Part 3 of Bill C-27 regarding The Artificial Intelligence and Data Act and for it to be reintroduced as a standalone bill, given the complexity involved and time and resources required to properly evaluate and amend the Act to address the risks the new technology poses.**

The new bill, when re-introduced, should ensure that **Canadian performers will not be disadvantaged by the evolving AI technology,** by giving proper attention to the three core principles noted above:

- **Consent**: performers should have the right to consent to, and be credited for, the use of their NIL Rights in new works in the training of AI models.
- **Compensation**: performers should be compensated for all AI uses of their NIL Rights.
- **Control**: performers should be able to control the use of their NIL Rights.

The future iteration of AIDA should ensure that Canadian performers' right to consent, control, and obtain compensation for uses of their NIL Rights are mitigated against the risks created by rapidly developing AI-technologies.

[2] 2019 was selected as a "normal" income year that was not influenced by COVID-19 or the recovery period.

ENTERTAINMENT & CULTURE

At a high level, ACTRA is concerned about the unfettered use of AI in the Canadian film, television, radio and digital media industry. These concerns are not purely commercial in nature – if these concerns are not addressed, the unfettered use of AI technology has the potential to erode the economic and social structures on which Canadian culture depends. ACTRA is seeking to protect both its members and these structures, which enables creators to contribute to our rich cultural heritage that, in turn, perpetuates the Canadian values that benefit us all.

As the statistics above highlight, ACTRA's membership is comprised of performers who, before the advent of generative AI, already represented a precarious economic group. If performers are unable to support themselves through their work, we will inevitably have fewer performers. While this may represent an economic benefit to a select group of industry participants in the short term, the resulting drop in creative output – including lower quality creative output from generative AI models trained on a shrinking dataset – will have long term implications for our shared culture and heritage. [3]

To address these risks, ACTRA seeks to:

- protect performers' work and human creativity;
- preserve performers' NIL Rights;
- protect performers' personal biometric data;
- ensure there is liability for non-consensual and unpaid AI-generated content;
- mandate transparency and credit for the use of generative AI; and
- advocate for the sustainability of cultural assets.

GENERATIVE AI

Of particular concern to ACTRA and its members is the recent proliferation of generative AI technologies. Generative AI refers to the use of AI to generate text, images or other media using so-called "generative models". These models learn the patterns and structure of their input training data (for example, a performer's on-camera film and television or voice performances) and generate new data with similar characteristics (for example, new scenes or dialogue incorporating a performer's NIL Rights).

For performers, generative AI can be used as creatively as you can imagine. Set out below are a few examples of areas where AI is being used in the performance space right now.

[3] See, for example, the lawsuit filed in the United States Federal Court in the Southern District of New York between voice performer, Bev Standing, and TikTok (Standing v. Bytedance E-Commerce, Inc., S.D.N.Y. No. 7:2021-cv-04033), in which Ms. Standing claimed that TikTok used her voice recordings in its popular text-to-speech feature without her consent or any compensation. TikTok eventually agreed to settle the lawsuit by licensing the right to use Ms. Standing's voice for an undisclosed amount.

NOTABLE EXAMPLES OF AI IMPACT ON PERFORMERS

CASTING

AI still largely functions as a supplemental tool in the casting and project analysis processes within the entertainment industry. Content creation workflow AI Largo.ai, for example, launched in 2018. The model is trained on a dataset of movies, television shows, and talent to create an all-in-one suite that analyzes commercial potential. Largo.ai can also directly connect producers and casting directors with actors based on its analysis of scripts, characters, and an actors' appearance. With generative AI, however, actors are already seeing companies similar to Largo.ai reaching out to them to use their likeness in lieu of providing casting for new work opportunities. [4]

DUBBING

With apps like Flawless AI, filmmakers have been adjusting on-screen visual dialogue to match other languages. That means filmmakers can simply re-dub their movies in post-production without having to hire actors to obtain additional footage. This has the advantage of expanding the possible distribution of the content and widening its potential audience, but this must be weighed against the fact that it is putting more workers in the creative industry (both actors in front of the camera, and those behind the camera) out of work.

DIGITAL TRANSFORMATION

One of the first notable instances of digital transformation was in 2021, when a shockingly convincing deepfake of Tom Cruise made with Metaphysic.ai went viral. While there's yet to be a fully AI-generated performance on the big screen, studios and creators are already utilizing the technology to augment human performances. For "Indiana Jones and the Dial of Destiny," for example, Lucasfilm utilized AI to comb through old Harrison Ford footage to de-age the actor in certain scenes. What once took VFX artists hours of rendering and shot compositing can now be accomplished in a fraction of the time, and the possibilities are nearly endless when it comes to AI-powered VFX; from replacing the faces on stunt doubles with the actors they're working for to recreating long-dead people to making actors look like robots or aliens.

MOTION CAPTURE

A number of ACTRA members work within the motion capture industry to provide human-based performances (motion data) on which digital content (for example, movies like Avatar and Rise of the Planet of the Apes) can be based. With generative AI, production companies can obtain 360-degree image scans to create digital replicas and by-pass the need to use human performers (the motion capture suits are no longer a necessity) as the basis for motion-capture. While this lowers costs for production companies, it depresses wages for motion capture performers. Within this context, performers can credibly be replaced using pre-existing materials (for example, rehearsal or even archived footage).

[4] For example, Casting.Ai and Casting Droid.

KEY RISKS

ACTRA recognizes the benefits that AI can offer society and its potential to enhance the creative vision of creators; however, we are also cognizant of its less palatable consequences, including a significant risk of job displacement and technological advances that jeopardize a performer's control over their NIL Rights. Accordingly, AI must not be permitted to develop in a vacuum and robust safeguards must be established to ensure that it flourishes in a manner that upholds fundamental rights of human arts workers and preserves the intrinsic worth of human creativity. ACTRA's aim is not to eliminate or obstruct the use of AI tools, but rather to ensure that AI augments and works collaboratively with humans to benefit not only performers, but arts workers, the entertainment/media industry, and society at large.

As performers and creative artists, ACTRA members depend heavily on the licensed use of their NIL Rights – essentially, their rights to personal and non-personal data – to make a living. Their business is quite literally their face, body, and voice, the use of which they carefully curate and control. New legislation must protect performers' NIL Rights, including against the unauthorized "theft" of their images and voices (i.e., without consent, compensation or control) to prevent abuse by emerging AI technology.

Today, these invaluable personal assets are being used in unauthorized, non-transparent and uncompensated ways at an unprecedented scale to train AI models, which are used in turn to generate synthetic content that competes directly with the performers they effectively mimic. Increasingly, this content is becoming indistinguishable from the performers' own work and invariably has been utilized as a substitute for human creativity.[5] Regrettably, this often occurs without the performers' consent or financial compensation.

We believe that allowing this kind of business model to become dominant will reduce incentives for human creativity, and that the resulting wave of generative AI content will devalue human creativity to the detriment of society at large. Despite the research to date and rapid industry development, AI currently mimics, and does not emulate, human performances. The risk posed by the unrestrained pursuit of short-term profits on the back of AI technology is further exacerbated by the increasingly apparent flaws in generative AI, including hallucinations, drift and inherent bias.[6] If the existing economic and social structures are irreversibly undermined by this short-term commercial pursuit, there is a significant risk that the overall quality of cultural output will degrade together with these unregulated AI models.

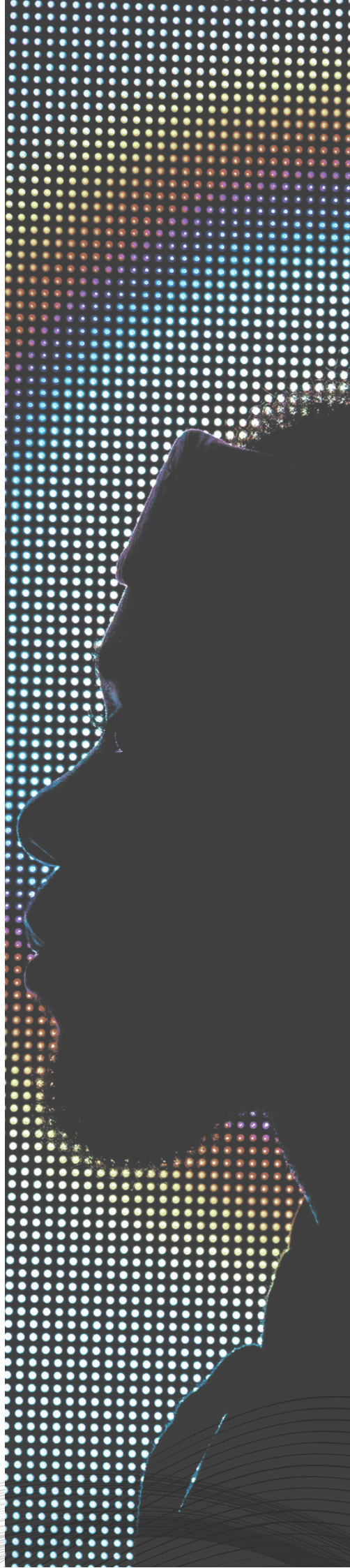
The likelihood of performers being replaced by AI-generated digital doubles is a complex and evolving topic. As noted above, AI-generated digital doubles have been used in certain contexts, such as for de-aging actors, creating realistic visual effects, or completing scenes when an actor is unavailable. However, fully replacing human actors with AI-generated digital doubles on a large scale in mainstream entertainment is problematic for several reasons:

[5] See, for example, the AI-generated songs created by the pseudonymous "Ghostwriter", whose song "Heart on My Sleeve" – which mimics Canadian artists Drake and The Weeknd – went viral and has since been submitted to the Recording Academy for best rap song and song of the year.
[6] "Hallucinations" refer to the tendency of AI models to create seemingly correct but entirely false output, while "drift" refers to the degradation in performance of AI models over time and with continued use.

AI RISKS TO HUMAN PERFORMERS

Emotional Expression and Creativity: Acting involves conveying complex emotions and portraying characters with depth and authenticity. Capturing these nuanced aspects through AI-generated models is a significant challenge, as genuine human emotions and creativity are not easily replicated.
Audience Acceptance: Audiences have strong connections to human actors and their performances. Replacing them with AI-generated counterparts might be met with resistance, as many viewers appreciate the unique qualities that human actors bring to their roles.
Legal and Ethical Considerations: Using AI-generated digital doubles raises legal and ethical questions, including intellectual property rights, the potential for misusing performers' likenesses or voices, and issues related to consent and privacy.[7]
Technical Challenges: While AI and machine learning have made significant strides, creating completely convincing and realistic digital doubles, especially in dynamic and diverse scenes, will remain a technical challenge.
Cost and Resource Constraints: Developing high-quality AI-generated digital doubles requires substantial resources, both in terms of technology development and computational power. This will limit the practicality of widespread adoption, especially for smaller productions, which will create an uneven competitive landscape and reduce diversity in our creative industries.
Artistic Vision: Filmmaking and acting involve collaboration, interpretation, and the realization of an artistic vision. While the contributions of human actors to the creative process may be replicable by AI in the near-term, the value of their contributions over the long term will not be.
Cultural and Genre Variability: Different genres, cultures, and historical contexts often require unique performances, for which the requisite data sets are not available. Allowing generative AI applications to push out human performers will accordingly lead to a reduction in creative variability.

For these reasons among others, failing to protect the humanity in our performing arts industry will have long-term implications for the richness and diversity of our culture that will not be easily unwound.



[7] With respect to privacy concerns, we note (i) the cyber security guidance from the Canadian Centre for Cyber Security (https://www.cyber.gc.ca/en/guidance/generative-artificial-intelligence-ai-itsap00041), which noted the potential risks of misinformation, data privacy concerns and biased content, and (ii) the joint statement issued by Canada's Privacy Commissioner and the Roundtable of G7 Data Protection and Privacy Authorities (https://www.priv.gc.ca/en/opc-news/speeches/2023/s-d_20230621_g7/), which noted the privacy harms that may arise from the unregulated use of generative AI, urging developers to embed privacy considerations in the design and implementation of generative AI technologies.

RECOMMENDATIONS

ACTRA urges the Committee to take action to ensure that human performers are central to the use of AI in the entertainment industry, such that AI models are aligned with our core Canadian values. This is consistent with the reflection of unique Canadian values throughout our legal system, including in the Canadian Human Rights Act (RSC, 1985, c. H-6), the Personal Information Protection and Electronic Documents Act (S.C. 2000, c. 5), the Status of the Artist Act (S.C. 1992, c. 33), and the Copyright Act (R.S.C., 1985, c. C-42). These Acts recognize, among other things, the status of the artist, the relationship between artists and content producers in Canada, the important contributions made by artists to Canadian culture, and the importance of protecting the associated rights, including moral rights which, importantly, cannot be assigned to corporations but may only be waived by the individual "authors".

BALANCING OF RIGHTS UNDER THE COPYRIGHT ACT

Canada's jurisprudence similarly recognizes the importance of ensuring balance in these relationships. As noted by the Supreme Court of Canada, the core policy aim of the Copyright Act "is to balance users' and authors' rights". It does this by securing just rewards for authors while facilitating "public access to and dissemination of artistic and intellectual works, which enrich society and often provide users with the tools and inspiration to generate works of their own." (SOCAN v. ESA, 2022 SCC 30, para 67).

In a similar vein, the U.S. District Court for the District of Columbia recently rejected an inventor's attempt to copyright artwork produced by an image generator he designed, noting that "human creativity is the sine qua non at the core of copyrightability, even as that human creativity is channeled through new tools or into new media."[8]

At a high level, to be consistent with these Canadian values, any legislation governing the development of AI and the implementation of AI technology in the entertainment industry must provide for three principles: consent, compensation, and control. Specifically:

CONSENT

- protections, consent and the right to be credited should be required for the use of (i) a performer's NIL Rights in new works, and (ii) NIL Rights in the training of AI models or the creation of synthetic content. In addition, consent must be:
- *informed consent*, which includes requiring studios to request consent to the creation and use of an actor's NIL Rights to create "digital replicas" for any future project by informing them about any proposed use and
- accompanied by *full transparency* for how the NIL Rights and materials are to be used.

COMPENSATION

- performers should be compensated for all uses described above, subject to certain established exceptions permitted under the existing right to publicity jurisprudence. Protections against the current practice, whereby artists are compensated for the right to commercialize their likeness in perpetuity with one-off payments, should be included. Remuneration should reflect the value of performers' contributions to the artistic output. Residuals should also be paid to anyone whose work is used to train (so called "human data producers") generative AI, or AI tools and applications.

CONTROL

- performers should be able to control their likeness and voices. This requires protections against the unauthorized and potentially abusive use or misuse of their voices, likenesses and performances by generative AI. Fake performances can otherwise damage reputations.

[8] Thaler v. Perlmutter, D.D.C., No. 1:22-cv-01564. See also the U.S. Copyright Office's Copyright "Registration Guidance on Works Containing Material Generated by Artificial Intelligence," published on March 16, 2023, which stresses the human authorship requirement,

MORAL RIGHTS

Because creative performances, that incorporate a performer's NIL Rights, are so closely tied to a performer's personal identity, AI legislation should protect performers from more than just financial infringement. AIDA should expressly incorporate the concept that an artist should have the right to retain some control over their performer's performance, irrespective of who owns such performance at any time, as well as the right to preserve their integrity, reputation and association with the performance. This already exists in the concept of "moral rights" which are codified in sections 17.1- 17.2 and 28.1-28.2 of the Copyright Act:

Moral Rights

17.1 (1) In the cases referred to in subsections 15(2.1) and (2.2), a performer of a live aural performance or a performance fixed in a sound recording has, subject to subsection 28.2(1), the right to the integrity of the performance, and — in connection with an act mentioned in subsection 15(1.1) or one for which the performer has a right to remuneration under section 19 — the right, if it is reasonable in the circumstances, to be associated with the performance as its performer by name or under a pseudonym and the right to remain anonymous.

No assignment of moral rights

(2) Moral rights may not be assigned but may be waived in whole or in part.

No waiver by assignment

(3) An assignment of copyright in a performer's performance does not by itself constitute a waiver of any moral rights.

Moral Rights Infringement

28.1 Any act or omission that is contrary to any of the moral rights of the author of a work or of the performer of a performer's performance is, in the absence of the author's or performer's consent, an infringement of those rights.

Nature of right of integrity

28.2 (1) The author's or performer's right to the integrity of a work or performer's performance is infringed only if the work or the performance is, to the prejudice of its author's or performer's honour or reputation,

(a) distorted, mutilated or otherwise modified; or
(b) used in association with a product, service, cause or institution.

Since the Copyright Act expressly acknowledges and protects performer's moral rights in certain performances, by including statutory restrictions on a performer's right to assign their moral rights (rights can never by assigned during the lifetime of the performer– only waived as contemplated in sections 17.1(2) and 17.1 (3) of the Copyright Act), AIDA should similarly protect the integrity and reputation of performers by incorporating the "3 Cs" concept (consent, control, compensation) in the legislation. This will help to protect performers in instances where their performances are defamed, edited or otherwise modified by AI without their permission,

If a waiver of moral rights (or performer's informed consent) is required before AI content creators are permitted to use AI technology to replicate or modify performers' performances, artists will:

- have appropriate control over the use of their work; and
- be able to seek fair compensation for their NIL Rights.

Furthermore, a requirement for waiver of moral rights or performer consent will permit licensees to use their performances (and related NIL Rights) according to specific contractual terms, providing more certainty for both parties, enabling more productive use of those performances or NIL Rights, as applicable.

SUMMARY OF RECOMMENDATIONS

ACTRA urges the Committee to consider the removal of Part 3 of Bill C-27 regarding The Artificial Intelligence and Data Act and for it to be reintroduced as a standalone bill, given the complexity involved and time and resources required to properly evaluate and amend. While ACTRA appreciates the intent behind proposing a skeleton piece of legislation, there are a number of issues that need to be resolved at the outset rather than left to the regulators who will be made responsible for the Act, once enacted. This is required not only to ensure the protections ACTRA seeks in these submissions, but also to provide certainty to businesses in the AI industry. To do so, ACTRA supports the more robust approach currently being considered by the European Union including, for example, the banning of AI systems that are considered to fall within an "unacceptable risk" category because it constitutes a clear threat to the safety, livelihoods and rights of citizens (for example, social scoring by governments or chatbots that encourage dangerous behavior) and detailed requirements for acceptable but "high risk" AI systems. [9] **Failing that, ACTRA makes four key recommendations:**

DEFINITION OF "HARM"

"Harm" is currently defined in AIDA as (a) physical or psychological harm to an individual, (b) damage to an individual's property, or (c) economic loss to an individual. The harms noted above, however, are more systemic in nature and are unlikely to be captured in the definition's current form. The Commission should take care to ensure this definition, and the use of it throughout the statute, is "future proofed" in a way that addresses core, enduring human values, rather than a narrow view of individual harm.

HIGH-IMPACT SYSTEMS:

The text of AIDA was drafted before the release of ChatGPT and related proliferation of generative AI and related applications. The potential impacts of this technology, some of which are becoming increasingly clear as noted above, were accordingly not taken into consideration when AIDA was drafted. Given the potential long-term risks and the difficulty in addressing those risks through the concept of "harm" as noted above, ACTRA believes that all generative AI models should be specifically included as "High-Impact Systems" as defined in s. 5(1) of AIDA.

STATUTORY MINIMUMS

AIDA and related legislation should be amended to introduce (i) statutory minimums regarding the licensing of a performer's likeness that cannot be contracted out of, and (ii) the concept of "informed consent". With respect to the former, limitations to consider include per-use compensation for the use of the performer's likeness and maximum license terms, so that, for example, a single engagement does not result in indefinite and unlimited use of a performer's likeness. With respect to the latter, the viability of consent to the use of an individual's personal characteristics and biometric data in the training and deployment of AI systems should be contingent on such consent being informed on the intended and potential uses of such data and the model, as trained on such data.

SECURITY

AIDA should be amended to provide that data collected and used to generate a performer's voice and likeness will be subject to rigorous data privacy and security standards, with appropriate penalties for the mishandling of such data, to ensure that performers' (and others') comprehensive likenesses are not easily susceptible to theft.

CONCLUSION

While there is a sense of urgency to act now on AI legislation, expediency must not come at the expense of effective regulation. In its current form, AIDA leaves too much to the discretion of regulators and provides too little certainty to both industry participants and those who will be affected by this technology, including ACTRA's members. ACTRA reiterates the need to remove AIDA from Bill C-27 for further public consultation, to be reintroduced as a standalone bill, drafted with the benefit of knowledge derived from recent developments in the technology so that it can be appropriately tailored to the risks they pose.

[9] The European Parliament adopted the Artificial Intelligence Act on June 14, 2023, which takes a risk-based approach that separates AI systems into categories of (i) unacceptable risk, which are banned outright, (ii) high risk, which are subject to registration and requirements regarding data and data governance, documentation and record keeping, transparency and provision of information to users, human oversight, robustness, accuracy and security, and (iii) limited or minimal risk, which are subject to transparency requirements.