Creators Copyright Coalition
Platform on the
Revision of Copyright
January 2008

The Creators Copyright Coalition (CCC) is an alliance of 16 professional associations of individual creators and performers, and copyright collective societies active in the theatre, the visual arts, the applied arts, literature, music, recording and audiovisual (radio, television, film, and commercials). Together, these associations and collectives represent more than 100,000 creators (authors and performers[1]) who are copyright owners.

The CCC defends the interests of authors and performers in the revision of the *Copyright Act of Canada*.

The platform presented here represents the common position of the associations and collective societies listed below. Each is free to provide further details and supplementary information, to expand on the analysis of the issues pertinent to its field of activity.

List of CCC Members
Alliance of Canadian Cinema, Television and Radio Artists (ACTRA)
American Federation of Musicians (AFM)
Canadian Actors' Equity Association (Equity)
Canadian Artists Representation (CAR/FAC)
Canadian Artists Representation Copyright Collective (CARCC)
Canadian Music Centre
Canadian League of Composers
Guild of Canadian Film Composers (GCFC)
League of Canadian Poets
The Literary Translators Association of Canada
Playwrights Guild of Canada
Professional Writers Association of Canada (PWAC)
Songwriters Association of Canada (SAC)
Society of Composers, Authors and Music Publishers of Canada (SOCAN)
Writers Guild of Canada (WGC)
The Writers' Union of Canada (TWUC)

[1] The terms "authors" and "performers" are used in this paper according to the meaning ascribed to them in the *Copyright Act*. Where necessary, and to make distinctions between groups of creators, other terms, such as artist, may be used.

INTRODUCTION

Copyright is the legal foundation that permits creators to control the use of their work. In the ongoing debate about copyright, however, it is clear that creators are the one group most profoundly implicated by the law and also the group least likely to benefit from it in practice. This is the case despite the fact that copyright was devised to encourage creation. In the past decade, digitization and the Internet have transformed not only the way art is made, but also the way "cultural content" is produced, distributed and consumed. Creators have been at the forefront of this revolution. We have also been in the forefront of the effort to harness the potential of the digital world in the interests of community and culture.

If creators have been at the forefront of this change, we have also been in the line of fire. Artists everywhere – not just in Canada – are experiencing an unprecedented erosion of rights, and reductions in earnings. Creators need to be able to protect their rights in the media marketplace, as do rights holders who are not creators but corporations who engage or hire creators. The interests of these two types of rights holders, however, do not always coincide and often conflict. It is difficult for individual creators to negotiate fair deals with large corporations. Furthermore, public perception of copyright issues has become skewed because corporate rights holders are seen as rich and powerful and in need of restraint in the public interest, with the result that the interest of actual individual creators is easily forgotten or lost.

Increasingly legislators have turned to exceptions in the law as a way of providing guaranteed cost-free access to the public, even though the targeted problems, such as the need of teachers to use the Internet in the classroom, have more to do with budgets (too small) and clearance systems (too complicated) than with copyright law. It is important to remember that professional artists are users as well as creators. We, too, want reasonably priced access to the copyright-protected works of others but sometimes experience unduly high fees for access from other rights holders, often including government institutions and agencies. Creators are, therefore, looking for changes to the copyright law that would facilitate the clearing of permissions, wherever practicable, through collective societies. These rights-holder-run societies, which provide reasonable access to users and reasonable compensation to rights holders, need amendments to copyright legislation in order to be able to function effectively in the digital environment. The real challenge facing legislators is how to provide reasonable access to our cultural heritage to everyone, including artists, without undermining the copyrights that should allow art making to be an economically viable profession. More efficient and effective collective administration can play a key role.

The demands for exemptions from the Education and Library sectors, some of which have already been granted, highlight the misunderstandings and dissension between users and authors. The tendency to privilege users can be seen in the growing attentiveness of public officials to their demands and to the concept of "users' rights" which are being formulated in the name of society's right to benefit from creative work and, more particularly, in the interests of industrial users who are confronted with increasing competition in international markets. This tendency is also evident in several recent decisions of the Supreme Court of Canada that have had the net effect of reversing interpretations of the law that have prevailed for years.[2] These judgements have limited the capacity of creators to derive revenue from certain uses, and have bestowed benefits on users, who are now accorded equivalent recognition to authors and are now officially part of an on-going process of striking a "necessary balance" between them.

The CCC recognizes that some creators choose to provide access to their work free of all technical protection measures and, instead, depend on the force of copyright law alone as their sole defence against unwanted use. Many contemporary creators are choosing to closely define the rights they wish to reserve

[2] *Théberge* and *CCH*.

through new licences such as those provided by the Creative Commons. For some creators there simply are no unwanted uses and, so, they provide their work licence-free as a gift to the public commons. The CCC recognizes and celebrates all of the many ways creators choose to relate their work to the current copyright system. We feel there is no need to alter the fundamental principles of the law to reflect these choices by introducing exceptions. Copyright stands as a definition of specific and limited rights for creators. Whatever rights individual creators choose to reserve are entirely an individual choice. In instances where copyright uses are licenced, the CCC recognizes the right of authors to choose whether or not to participate in that licensing regime.

Often such reforms are proposed in the name of the public interest. It is the contention of the CCC that the making of art and contemporary Canadian culture is a vital part of Canadian life and an essential ingredient in the information economy. We assert that it is in the public interest that this capability be preserved and protected.

For all of the above reasons, the CCC is concerned about the manner in which the revision of Canada's copyright law has been conducted. The pressure of user groups on works protected by copyright has led to the obscuring of the following facts:

- That all artistic work, innovation, and cultural expression, begins with a creator;
- That creators are independent entrepreneurs who assume significant financial risks in their business;
- That these risks relate to the necessity for creators to be associated with the economic life of their creations;
- That the economic success of a work depends on its being circulated, broadcast and distributed as widely and broadly as possible;
- That broad access to and high accessibility of their work is what allows creators to build audience, build careers, and reap the rewards of their labour; and
- That these rewards are meant to permit authors and performers not only to earn a living, but also to reinvest in the creation of new works;
- That a multiplicity of creative work and expression enriches the community;
- That this richness is reflected in real, measurable economic results for Canadian society: 740,000 jobs in the Canadian cultural sector and over $40 billion contributed to our country's gross domestic product[3];
- That the economy of a lively, strong, innovative, diversified and dynamic national culture rests on a Copyright Act that recognizes the importance of authors and performers, and protects their production and values creation.

The attached Platform summarizes a number of changes Canadian creators would like to see in Canada's *Copyright Act*. It is our position that copyright law has too often been allowed to serve the purposes and interests of corporations and individuals who are not creators, and that this has largely been done at the expense of creative artists.

Consequently, the members of the CCC reaffirm that all revisions to the *Copyright Act* should:

1) Recognize the central role of authors and performers in innovation and in the artistic and cultural progress of a society;
2) Reaffirm that the principal objective of the Copyright Act is the protection of the moral and economic rights of authors and performers;
3) Reaffirm their right to just remuneration for the use of their work;
4) Reaffirm that the introduction of new technologies should not threaten the fundamentals of copyright, in particular, activity relating to fair dealing provisions

[3] Statistics Canada 2002.

5) Resist the expropriation of rights through the use of exemptions granted users; and,
6) Avoid placing the entire burden of defending these rights on authors and performers, who should not have to go to court or install costly technological protection measures.

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A: The Recommendations of Authors' Associations

1. Reaffirm that the *Copyright Act*'s main objective is to protect the moral and economic rights of creators

In 1997, the *Copyright Act* underwent a number of modifications, including changes to clarify the extent of the creator's moral rights.[4] It should be recalled that moral rights, which can be waived but not assigned, are intended to enable creators to claim authorship of their works and preserve the integrity of these works. These are essential rights that no one should be required to renounce. Unfortunately, we are seeing more and more contractual practices that force creators to renounce their moral rights.

The Supreme Court of Canada specified, in the *Desputeaux* case,[5] that the Act "does not prohibit artists from entering into transactions involving their copyright, or even from earning revenue from the exercise of the moral rights that are part of it."

The CCC is concerned by the Court's reading of the moral rights provided in the *Copyright Act*. It sees in this interpretation a threat to creators, who generally have very little power in their negotiations with producers and promoters.

The CCC asks that the Copyright Act be amended to strengthen and extend moral rights. These are rights that should allow creators to maintain respect for their work and their name. Moral rights should be inalienable, unwaivable, and unassignable. Additionally, as well as being transferable only on death either to any person named by will or to an heir by intestate succession, moral rights should be perpetual.

2. Ensure that creators are associated with the economic life of their works throughout the duration of the protection provided in the Act

Except for salaried creators who assign *de facto* the economic exploitation of their works to their employer (section 13(3) of the Act), creators commit themselves to and invest freely in the creation of their works. It is thus only when the work is presented, at the end of a process that may take years, that creators – through the royalties that should be ensured to them because of their ownership of copyright – may finally have access to remuneration from the use or sale of their works.

The Act currently has numerous gaps that must be filled if creators are to profit fully and adequately from the revenues that the exploitation of their works may produce.

2.1 Implement the World Intellectual Property Organization (WIPO) treaty on Copyright

In 1996, the Canadian government signed the *WIPO Copyright Treaty (WCT)*.

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[4] S. 14.1 (2).
[5] *Desputeaux* v. *Éditions Chouette* (1987) inc., [2003] 1 S.C.R. 158.

Article 10 of the WCT allows contracting parties to "provide for limitations of, or exceptions to, the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author". It is the expectation of the CCC that the WCT will be implemented with the use of this allowance where necessary to protect both users and creators.

The CCC asks the Government of Canada to incorporate the provisions of the WCT into Canadian law.[6]

2.2 Strengthen the right of reproduction

Reproduction of a work, as it is or in any of its forms, is a right that belongs exclusively to the author or the rights holder to whom it has been granted. In this digital era, some are trying to broaden the notion of ephemeral recording[7] in order to eliminate the need to pay a royalty to creators of works. However, digitization accords to users increased advantages in exploitation of all works in terms of effectiveness, control, quality, flexibility, and cost. It is thus essential that rights holders preserve their exclusive right to authorize or forbid, and extract remuneration from, all forms of reproduction.

The CCC recognizes that some artists will choose not to utilize some licensing schemes. Since a number of new licences have been developed specifically for the purpose of better defining which rights an artist wishes to reserve, and since these licences are in wide use, the CCC feels there is no need to alter with exceptions the fundamental legal principles on which these new licences stand.

The CCC recommends that the system of exceptions for all forms of ephemeral recordings or transfer of format not be extended.

2.3 Protect artists' rights in the case of a transfer of medium

The decision rendered in March 28, 2002 by a very divided Supreme Court of four versus three in *Théberge* v. *Galerie d'Art du Petit Champlain inc*.,[8] helped to make the situation of Canadian creators even more precarious in terms of both moral and economic rights.

The CCC asks that Section 3(1) of the Act be amended to provide that copyright in a work means "the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, <u>to transfer the work or any substantial part thereof to another medium,</u> to perform the work or any substantial part thereof in public, or, if the work is unpublished, to publish the work or any substantial part thereof …"

Section l3(4) of the Act should have a corresponding modification to read : "The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, <u>medium transfer,</u> sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for other part thereof, and may grant any interest in the right by licence, but no assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by the owner's duly authorized agent."

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[6] Please note that the CCC makes no comment regarding Article 4 of the WCT as it does not represent creators of computer programs.

[7] "Ephemeral recordings" referenced here are strictly those addressed in section 30.8 of the Copyright Act. They are not ephemeral copies that are privately made during the normal course of information transfer and that are not made for the purpose of facilitating the telecommunication to the public of a performer's performance or a sound recording.

[8] [2002] 2 S.C.R. 336.

2.4 Provision concerning fair dealing

Sections 29, 29.1 and 29.2 of the Act stipulate that there is no infringement of copyright when there is fair dealing for the following purposes: private study, research, or criticism, report, or summary intended for news reporting.

The *CCH Canadian Ltd.* v. *Law Society of Upper Canada*[9] ruling by the Supreme Court of Canada may have considerably enlarged the application of this exception to incorporate commercial uses.

The CCC recommends that section 29 of the Copyright Act, which concerns fair dealing, be reformulated in order to specify clearly that fair dealing for the purpose of private study or research does not infringe copyright provided that it is not for commercial purposes and is accompanied by sufficient acknowledgment.

2.5 Private Copying

Canadian copyright law[10] provides a right of remuneration to the authors of musical works and to the performers who interpret these works when they are reproduced in audio for private use. Remuneration is paid by the manufacturer or the importer of blank tapes or CDs. As these and other media are increasingly being used to record a range of different kinds of work, for example, literary, film and visual art, the CCC recommends that the provisions of the private copying regime be expanded to include all categories of created work, and that new tariffs be levied for the new categories.

The CCC recommends the expansion of the private copying regime to include all categories of work covered by the Copyright Act.

2.6 Exhibition Right

In the 1988 revision of the *Act*, Parliament adopted certain provisions welcomed by creators. One of these was the right of exhibition of an artistic work.[11] Unfortunately, this new right has not had the anticipated results.

A study regarding exhibition rights[12] conducted by the Department of Canadian Heritage and published in November 2000 revealed a widespread practice of non-compliance by public art galleries across Canada. The loss of revenue to Canadian visual artists was, and continues to be, significant.

Visual artists are still often met with public presenters' reluctance to pay copyright royalties in general, and in particular for reproduction or the public communication of images of art. It is clear that the exhibition right has not been satisfactorily integrated into practice and that the respect for copyright in the visual arts remains problematic. It is unacceptable that museums financed by public funds refuse to pay artists royalties due them by law.

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[9] [2004] 1 S.C.R. 339.

[10] Starting at s. 79.

[11] S. 3(1) (g).

[12] *Étude relative au droit d'exposition. Rapport d'étude*, Le groupe de revue stratégique pour la Direction générale des examens ministériels du Ministère du Patrimoine canadien, novembre 2000.

The CCC asks that the government oblige publicly funded exhibitors to comply with the exhibition right as provided for in the Copyright Act, and pay visual and media artists for all uses of their work.

When the exhibition right for artistic works was introduced, it was not made retroactive despite the fact that rights generally apply to all works covered by copyright without reference to the date they are created. The measure was the culmination of years of effort by artists' groups to secure just recompense for the public exhibition of their work.

Although the provision in question unequivocally confers this right, still, in comparison with the rights accorded by the *Copyright Act* to the authors of other genres of work, the authors of visual works have seen their exclusive right relative to the public exhibition of their work restricted only to those works created after June 7, 1988. Absurdly, experienced artists who have worked for an exhibition right that would allow them compensation for exhibiting their work in public have seen a large portion of their *oeuvre* barred outright from any such benefit.

Justice demands that the authors of visual works be allowed full exercise of this right.

The CCC asks that paragraph 3(1)(g) of the Copyright Act be modified to extend the exhibition right to all visual works that are not in the public domain.

2.7 Droit de suite

Visual artists and the organizations representing them have been asking that a *droit de suite* be embedded in Canadian law for many years. The *droit de suite* is a percentage of the sale price paid to artists when one of their works is resold by a gallery or other purchaser. Article 14 of the Berne Convention, to which Canada is a signatory, recognizes that creators of works of art have the unalienable right to benefit from the resale of their works in countries that provide for this in their copyright legislation.[13]

In September 2001, the European Parliament and the Council of Europe issued a directive requiring member states to institute the *droit de suite* right in their copyright policies.[14] A number of European countries – including, recently, the United Kingdom and Ireland – have introduced it into their legislation. Closer to home, California has adopted such a provision. The CCC does not understand why Canada is behind in this area. Because of the inaction of the legislature, Canadian artists cannot benefit from a resale right in countries in which this right exists.[15] Thus, all Canadian artists whose works are sold in a number of European countries and in California are deprived of a major source of revenue.

The CCC asks that the Copyright Act be amended to include a droit de suite that would be an inalienable and non-transferable right in the original artwork giving the creator an economic interest in successive re-sales of the work concerned.

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[13] Article 14*ter* reads: "(1) The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the unalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work. (2) The protection provided by the preceding paragraph may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed."

[14] Directive 2001/84/CE of the European Parliament and of the Council, Official Journal of the European Communities, 13.10.2001.

[15] See article 14*ter*(2), note 13.

2.8 Copyright protection for photographers, printmakers and portrait artists

The CCC feels strongly that photographers, printmakers and portrait artists must be accorded the same basic rights as other creators of original works of art. Photographers, printmakers, and portrait artists must also be considered first owners of copyright and the uses of their works must be set out in contracts – without exception.

The CCC asks that in all cases copyright be accorded to photographers, printmakers and portrait artists, and that all reproduction of these works require a licence from the creator.

2.9 Authorship of films and videos

With regard to films, videos and new media, there is the need to specify the identity of the author or authors of the work. The CCC notes that in the audiovisual sector, most relations between creative artists (notably, directors and screenwriters), performers and producers have been regulated for a long time by collective agreements that set production, distribution and exploitation conditions for works and the resulting rights. Any governmental intervention must thus take account of this fact in order to not upset the balance between the parties.

The CCC asks that any future specification in the Copyright Act respect the general attribution rules that make creators the primary rights holders of the audiovisual work. Assigning authorship of the work, in whole or in part, to the producer is contrary to the spirit of the Act.

2.10 Exploitation of a work in educational institutions

The exception provided in section 29.5(a) of the Act stipulates that "the live performance in public, primarily by students of the educational institution, of a work" does not constitute an infringement of copyright under certain conditions. This exception, which came into force on September 1, 1997, caused a major loss of income to playwrights, and other authors, whose works are performed in educational institutions at the preschool, primary, and secondary levels – losses estimated in Quebec at about one-third of the royalties that playwrights would have received without this provision.

The CCC asks that this provision be struck from the Act so that playwrights and other authors may regain their right to receive fair remuneration when their works are performed by students in educational institutions in the context of pedagogical activities.

2.11 Public recitation of excerpts of published works

Section 32.2(1)(d) of the *Copyright Act* allows the reading or recitation in public by a person of a "reasonable extract" of a published work without there being an infringement of copyright.

This section has the ambiguous notion of "a reasonable extract," while the Act elsewhere already provides that only performance in public of a "substantial" part of a work constitutes an infringement of copyright. What, therefore, is the utility of this notion?

In practice, this exception is used to recite on stage excerpts of copyright-protected works without paying royalties to rights holders.

The CCC asks that this provision be struck from the Copyright Act so that authors of literary and dramatic texts may receive fair remuneration when a substantial part of their work is read or recited on stage.

2.12 Liability of Internet service providers (ISPs)

ISPs claim that, in their role as intermediary, they have no control over the content of the transmissions that their customers circulate on their networks. They are demanding, thus, not to be held accountable for the content put online. In a word, they want to offload certain legal consequences of their commercial activity to copyright holders.

Yet, the ISPs are in the best position to put a quick end to the attacks made on copyright either through contractual clauses prohibiting illegal uses of their networks, or by the implementation of content-filtering mechanisms.

At the same time, the CCC feels that it would be only fair for the enterprise that enjoys the profits generated by an activity (making available on an Internet network) also to assume the responsibilities that flow from this very activity – such as ensuring that their customers' activities on their network do not infringe on the interests of third-party copyright holders. In fact, ISPs are already involved in stopping the activities of sites that put child pornography or hate propaganda online.

The issue here is whether Canada uses a "notice and notice" system (leaving ISPs without the legal responsibility to remove potential infringements from their system) or adopts a "notice and takedown" system which will compel ISPs to police their systems more forcefully on behalf of copyright holders. We welcome the Supreme Court of Canada's invitation to Parliament to enact a statutory "notice and take down" procedure.

Serious and authoritative provisions need to be built into the law to protect all parties from fallacious and/or frivolous notices. Conditions for notices, and serious penalties for notice misuse must be built into the Canadian system.

Exempting ISPs from liability for infringement devolves the heavy responsibility of policing the Internet onto rights holders, who must then assume the consequences of copyright infringements resulting from the commercial activities of service providers, even though they do not enjoy the profits generated by these activities. And this responsibility impoverishes rights holders further given the cost of the measures that they must take and the impact on their income of mass distribution of their work on the Internet.

In addition, vertical integration results in many ISPs offering multiple services to consumers. As a consequence, it may prove to be increasingly difficult to distinguish their activities as content providers from their activities as Internet service providers. For this reason, if ISPs were to be exempted from copyright liability, this exemption should be limited to those situations where the ISP is totally ignorant of and does not participate in a copyright infringement on its network. It goes without saying that, in order to take advantage of this exception, ISPs must not have any influence on the content reproduced on its Internet network and have taken all reasonable measures to stop copyright infringements.

More important, still, is the eradication of any notion of "efficiency" in connection with ISPs in order to justify their lack of accountability. In effect, this notion is arbitrary and it does not even take into account the economic advantages that users draw from it. The Copyright Board, quoting the Federal Court of Appeal, has deemed this notion fallacious a number of times: "If the appellant recorded Bishop's work, it did so because it was in its interests to do so. It thereby ensured that its broadcasts would be of a better quality and could later be rebroadcast more cheaply. *It is quite understandable that the appellant should have to pay for these benefits* [our emphasis]."[16]

Indeed, the CCC observes that the efficiency of a new measure is often judged by lower costs for a given user; yet, all "new broadcasting (and reproduction) techniques optimize the use of these new techniques,

[16] *Bishop* v. *Stevens*, [1987) 18 C.P.R. (3rd) 257, 260 (F.C.A.)

thus entitling rights holders to a fair share of the efficiencies arising from this reproduction."[17] It also considers that an ISP that fails to withdraw illegal content after having been notified of its presence by a rights holder must, in certain cases, be considered an accomplice in the copyright infringement. The Supreme Court of Canada shared this opinion when it stated, "The presence of such knowledge [of the infringing nature of a work] would be a factor in the evaluation of the 'conduit' status of an Internet Service Provider."[18] Pushing its logic further, the Court later states "copyright liability may well attach if the activities of the Internet Service Provider cease to be content neutral, e.g. if it has notice that a content provider has posted infringing material on its system *and fails to take remedial action* [our emphasis]."[19]

This is why the Court concluded, "A more effective remedy. . .would be enactment. . . of a . . .'notice and take down' procedure as has been done in the European Community and the United States."[20]

The very principle of non-liability lessens the effectiveness of the Act in the digital environment. It is therefore important for rights holders that any provision on liability not adversely affect licences that have already been negotiated with other organizations whose main purpose is not to supply Internet services. Educational institutions, businesses, and other organizations often offer their students, employees, or users access to a limited-access intranet or Internet network. There is no justification for organizations that have some authority over users of their networks and can easily identify offenders and take the necessary measures, not to be accountable. If these organizations were exempted from liability, it would permit them to escape their responsibility with regard to copyright infringement by their employees, teachers, or students. Under these circumstances, it would be difficult for rights holders and copyright collective societies to collect royalties.

If the government were to adopt a policy exempting ISPs from liability and fail to impose a "notice and takedown" procedure, it would place a responsibility on rights holders that would be out of proportion with the costs associated with the measures required to secure the withdrawal of illegal reproductions. This is even more unacceptable to the CCC, as rights holders do not have rapid and low-cost measures available to them, such as an interlocutory injunction, which would permit them at least to have accessible recourse in the case of copyright infringement.

The CCC asks the government to:

- ***recognize in the wording of the Copyright Act that ISPs share in the responsibility for the content of the transmissions that customers circulate on their networks;***
- ***ensure that this responsibility be conveyed through the recognition of shared liability for copyright infringement when an ISP neglects to withdraw illegal content after being advised of its presence by the copyright holder;***
- ***specify that ISPs must not undertake, directly or indirectly, any activity that approves, sanctions, allows, favours, or encourages an activity involving telecommunication to the public or reproduction of content without appropriate compensation to creators/copyright owners;***
- ***adopt the "notice and takedown" procedure advocated by the Standing Committee on Canadian Heritage;***
- ***limit the concept of "Internet service provider" to entities whose commercial activity is the provision of Internet services; and***
- ***provide conditions for notices, and serious penalties for notice misuse to avoid any legal intimidation of fair-dealing uses by rights holders.***

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[17] Copyright Board Canada, Statement of Royalties to Be Collected by CMRRA/SODRAC Inc. for the Reproduction of Musical Works, in Canada, by Commercial Radio Stations in 2001, 2002, 2003 and 2004. Decision of the Board, March 28, 2003.

[18] *Society of Composers, Authors and Music Publishers of Canada* v. *Canadian Association of Internet Providers,* [2004] 2 S.C.R. 427, 2004 SCC 45.

[19] Ibid.

[20] Ibid.

3. Recognize that collective management of copyright in the digital environment can permit proper circulation of copyright-protected works by facilitating their use and the payment of royalties by users while ensuring equitable compensation to copyright holders

Currently, the Act sets out a system of exceptions that exempts certain uses of copyright-protected works from payment of royalties. However, any exception diminishes the revenues that the interested creator of a work may legitimately hope to draw from its use. Previous revisions of the Act instituted provisions that recognize the legitimacy of collective societies. These societies are authorized by the Act to operate a general licensing system with respect to a repertoire of works, and the Copyright Board plays the role of arbiter between them and users' representatives, if necessary, if there is a conflict concerning royalties to be paid by users for a particular use of a work.

It is our understanding that the Government of Canada is regularly solicited by powerful lobbies to introduce new exceptions to the Act and, as a consequence, to expropriate rights from creators; however, for decades collective societies have been responding to the needs of both users and rights holders. In effect, collective management of rights preserves not only the freedom of negotiation, but also respect for the desires of interested rights holders and their capacity to live from the fruits of their work. It also provides users of protected works the means to access these works easily, rapidly and legally.

The CCC feels that the government should encourage users to turn to copyright collective societies to obtain the licences required for commercial uses (including formal educational uses) of works. Collective societies allow for effective management of rights, easy access for users, and appropriate protection for rights holders, thus guaranteeing that a balance is maintained between the parties.

When it comes to digital uses of works, collective societies may not have the same repertoire as they do for analogue uses. This is in part due to the difficulty of obtaining reciprocal agreements from foreign collective societies, notably for the digital reproduction and distribution of literary works. This situation is improving, but the diverse and growing needs of users are by no means satisfied. There are legislative solutions that the government could adopt that would assist collectives to build repertoires that are responsive to the demands of users, notably educational institutions.

One of these solutions, an extended licensing system, is in force in Scandinavia. This system gives users access to a comprehensive national and international repertoire of works for reproduction on digital media while protecting the rights of rights holders and preserving the revenues that they may draw from their work. The extended licence also presents the advantage of truly respecting the desire of rights holders by permitting them to withdraw voluntarily from the repertoire of the extended licence. This licence allows parties to negotiate the terms and conditions of using copyright works.

Collective societies are a better solution than exceptions, as collective licences can be easily and continually modified in response to the changing needs of all parties, while exceptions are fixed in law and address only the needs of some. Recognizing that some individual creators and some types of creators will choose to opt-out of collectives in pursuit of other business models, the CCC therefore feels an extended licence model should allow authors to explicitly withdraw works.

In its interim report on the reform of copyright made public in May 2004, the Standing Committee on Canadian Heritage recommended that the Government of Canada:

- Modify the Act to permit the granting of extended collective licences for use of material accessible on the Internet for educational purposes (recommendation 4);
- Institute a system of granting extended collective licences so that the use of information and communication technologies by educational institutions with the objective of supplying copyright-protected works may be authorized more effectively (recommendation 6);

- Envisage the implementation of a system for granting extended collective licences that would permit the granting of licences authorizing the electronic delivery of copyright-protected documents in order to ensure systematic and effective electronic delivery of copyright-protected documents to library users, for the purpose of private study or research (recommendation 7).

The CCC recommends that further changes to improve the general licensing system and facilitate collective administration be applied, and that this system be preferred over one which would have the effect of maintaining and extending the current system of exceptions.

The CCC asks the Government of Canada to adopt a system of extended collective licensing that covers all works except those explicitly withdrawn.

B: The Recommendations of Performers' Associations

1.1 Provide a full range of economic rights to performers in all media including cinematographic works

The performance of a work by a performing artist contributes to the value of the work and makes it accessible to the public. It is fair and reasonable for performers to share in the economic return to which they contribute. When a performance is recorded in any medium, that performer should be accorded a full and complete right of reproduction and all the other exclusive rights that are provided to audio performers by the WIPO Performances and Phonograms Treaty (WPPT). In conformity with the WPPT, these rights should be provided retrospectively, so that they apply to all performances that are not in the public domain.

In addition to WPPT rights in an audio recording, performers need to have a copyright in a performance incorporated into cinematographic work, such as a film, television program or other audiovisual medium. This right should not be subject to any automatic transfer, work-for-hire doctrine, or extinguishment. Thus, section 17 of the *Copyright Act* must be repealed since it extinguishes the rights of a performer when the performance is recorded in a cinematographic work. A performer must have the same rights, as do other creators of film and other audiovisual works, to authorize his/her performance recorded in such works.

The CCC asks that:

- ***performers be accorded a full and complete right of reproduction, and that this right extend to all performances not in the public domain, and***
- ***section 17 of the Copyright Act be repealed.***

1.2 Extend the private copying system

Performers believe that the private copying system for audio works and the remuneration they receive from the levy should be maintained and extended to other media, such as films and other audiovisual works. Performers also maintain that the levy should be enhanced to include all current and future technological systems that allow private copies to be made. Performers ask that technological protection measures implemented to protect their performances be enforced and the levy maintained until the possibility of making an unauthorized copy is completely eradicated. Extending the remuneration system should in no way impair or reduce the rights and benefits now enjoyed by the authors of musical works and the performances an marketing of sound recordings.

The CCC recommends that:

- ***the private copying regime and its remuneration system be extended to include audio/visual works and their constituent performances;***
- ***the law clearly indicate that the private copying regime can be applied to all technologies that permit private copying; and,***
- ***the current private copying system be maintained until the possibility of making unauthorized copies is effectively eradicated, or otherwise monetized.***

1.3 Implement of the WIPO Treaty on Performances and Phonograms (WPPT)

Performers require the application of Article 15(4) of the WPPT. The *Copyright Act,* in other words, should provide that phonograms (sound recordings), which are made available to the public in whole or in part using wired or wireless technologies in such a way that everyone can have access to the location, and at a time that they choose individually, be deemed to have been "published" for the purpose of the *Copyright Act.* This would ensure that communicating performers' performances of musical works to the public by telecommunication of sound recordings or clips could generate fair remuneration. This is also important to authors of musical works for the same reason.

At the moment it is possible for recordings to be put directly on-line without ever having existed in material form. In reference to section 2.2 of the Act regarding the publication of a sound recording, which results in copies of the work being made available to the public, the law currently could be interpreted in such a way as to exclude sound recordings online. And given that the reasonable remuneration foreseen in section 19 of the Act is for public performances or communication to the public by telecommunication of a published sound recording, it is essential that publication covers on-line dissemination, so that, to give an example, the radio broadcast of a recording put online without pre-existing in material form nevertheless generates equitable remuneration.

The CCC asks the Government of Canada to incorporate the provisions of the WIPO Performances and Phonograms Treaty (WPPT) into Canadian law, and to ensure that the rights accorded performers cover all performances not in the public domain.

1.4 Abolish the special tariff for broadcasters

Performers feel section 68.1 of the *Copyright Act*, which provides for a discount for broadcasters with respect to royalties on all the performances of musical works or recordings embodying such works, constitutes a quasi-exemption that deprives them of a considerable sum of money for no reason. Repeal of the section would enable the Copyright Board to set an appropriate tariff after considering the data and arguments put forward by the performers' organizations and by broadcasters.

The CCC recommends the repeal of section 68.1(1)(a)(i) of the Copyright Act, which provides for the payment of a sum as low as $100 per year on the first $1.25 million of broadcasters' annual advertising revenues.

2. Provide moral rights to performers

The essence of a performer is his/her performances and these must be protected from unauthorized uses. The digital age makes it possible for individuals to use recorded performance in ways never envisioned and not authorized by the performer, and to manipulate it in ways that could conceivably denigrate the performer's work or reputation. For this reason, performers should also have moral rights in their performances. Moral rights should be provided to all existing recorded performances, including future

uses of existing performances. Performers believe that these moral rights should be inalienable and the *Copyright Act* should provide that they be neither be assigned nor waived.

The CCC asks the Government of Canada to provide performing artists with moral rights in all their performances, including existing performances, and that these be inalienable, unwaivable and unassignable.

3. Transitional Measures

Performers need rights that are substantive, effective and provide a real benefit. We therefore seek a transitional system that will forbid any possibility of a grant, waiver or assignment of a new right before the provisions of the *Act* granting that right come into force. All contractual arrangements entered into before the *Act* comes into force that purport to assign, transfer or waive a new right should be declared null and void.

The CCC asks that transitional measures be included which will prohibit the possibility of any grant, waiver or assignment before the new provisions come into force.

3.1 Immediate Application of the Law, and Abolition of Third Party Immunity

Performers consider that the system set out in section 32.5 of the Act – whereby third parties are able to carry on with marketing their products while enjoying immunity from the owners of new kinds of rights so long as they pay compensation to those performers – should be repealed. It should be replaced by a system requiring new rights holders to provide notice of their new rights and possible termination of the third party's entitlement to make and distribute new products, which would now (but for the transitional measure in 32.5) infringe the performers' new rights. Care must be taken so that the newly acquired rights regime does not result in performers "paying" by ceding new rights, which the economic reality of most artists practically dictates. The CCC believes notification would provide a grace period following the receipt of such a notice that, for example, would allow for the third party to liquidate its stock. The intervention of the Copyright Board may still be required in determining fair conditions of payment and/or termination.

The CCC recommends the regime provided for in Section 32.5 of the Copyright Act be replaced by a notification system more suitable to Canada.

RECOMMENDATIONS

1. ***The CCC asks that the Copyright Act be amended to strengthen and extend moral rights. These are rights that should allow creators to maintain respect for their work and their name. Moral rights should be unwaivable, inalienable and unassignable. Additionally, as well as being transferable only on death either to any person named by will or to an heir by intestate succession, moral rights should be perpetual.***

2. ***The CCC asks the Government of Canada to incorporate the provisions of the WIPO Copyright Treaty (WCT) into Canadian law.***

3. ***The CCC recommends that the system of exceptions for all forms of ephemeral recordings or transfer of format not be extended.***

4. ***The CCC asks that Section 3(1) of the Copyright Act be amended to provide that copyright in a work means "the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to transfer the work or any substantial part thereof to another medium, to perform the work or any substantial part thereof in public, or, if the work is unpublished, to publish the work or any substantial part thereof …"***

Section l3(4) of the Copyright Act should have a corresponding modification to read : "The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium transfer, sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for other part thereof, and may grant any interest in the right by licence, but no assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by the owner's duly authorized agent."

5. ***The CCC recommends that section 29 of the Copyright Act, which concerns fair dealing, be reformulated in order to specify clearly that fair dealing for the purpose of private study or research does not infringe copyright provided that it is not for commercial purposes and is accompanied by sufficient acknowledgment.***

6. ***The CCC recommends the expansion of the private copying regime to include all categories of work covered by the Copyright Act.***

7. ***The CCC asks that the government oblige publicly funded exhibitors to comply with the exhibition right as provided for in the Copyright Act, and pay visual and media artists for all uses of their work.***

8. ***The CCC asks that paragraph 3(1)(g) of the Copyright Act be modified to extend the exhibition right to all visual works that are not in the public domain.***

9. ***The CCC asks that the Copyright Act be amended to include a*** **droit de suite** ***that would be a non-transferable and inalienable right in the original artwork giving the creator an economic interest in successive re-sales of the work concerned.***

10. ***The CCC asks that in all cases copyright be accorded to photographers, printmakers and portrait artists, and that all reproduction of these works require a licence from the creator.***

11. ***The CCC asks that any future specification in the Copyright Act respect the general attribution rules that make creators the primary rights holders of the audiovisual work. Assigning authorship of the work, in whole or in part, to the producer is contrary to the spirit of the Act.***

12. ***The CCC asks that Section 29.5(a) be struck from the Copyright Act so that playwrights and other authors may regain their right to receive fair remuneration when their works are performed by students in educational institutions in the context of pedagogical activities.***

13. ***The CCC asks that Section 32.2(1)(d) be struck from the Copyright Act so that authors of literary and dramatic texts may receive fair remuneration when a substantial part of their work is read or recited on stage.***

14. ***The CCC asks the government to:***

- ***recognize in the wording of the Act that ISPs share in the responsibility for the content of the transmissions that customers circulate on their networks;***
- ***ensure that this responsibility be conveyed through the recognition of shared liability for copyright infringement when an ISP neglects to withdraw illegal content after being advised of its presence by the copyright holder;***
- ***specify that ISPs must not undertake, directly or indirectly, any activity that approves, sanctions, allows, favours, or encourages an activity involving telecommunication to the public or reproduction of content without appropriate compensation to creators/copyright owners;***
- ***adopt the "notice and takedown" procedure advocated by the Standing Committee on Canadian Heritage;***
- ***limit the concept of "Internet service provider" to entities whose commercial activity is the***

provision of Internet services; and

- ***provide conditions for notices, and serious penalties for notice misuse to avoid any legal intimidation of fair-dealing uses by rights holders.***

15. ***The CCC recommends that further changes to improve the general licensing system and facilitate collective administration be applied, and that this system be preferred over one which would have the effect of maintaining and extending the current system of exceptions.***

16. ***The CCC asks the Government of Canada to adopt a system of extended collective licensing that covers all works except those explicitly withdrawn.***

17. ***The CCC asks that:***

- ***performers be accorded a full and complete right of reproduction, and that this right extend to all performances not in the public domain, and***
- ***section 17 of the Act be repealed.***

18. ***The CCC recommends that:***

- ***the private copying regime and its remuneration system be extended to include audiovisual works and their constituent performances;***
- ***the law clearly indicate that the private copying regime can be applied to all technologies that permit private copying; and,***
- ***the current private copying system be maintained until the possibility of making unauthorized copies is effectively eradicated, or otherwise monetized.***

19. ***The CCC asks the Government of Canada to incorporate the provisions of the WIPO Performances and Phonograms Treaty (WPPT) into Canadian law, and to ensure that the rights accorded performers cover all performances not in the public domain.***

20. ***The CCC recommends the repeal of section 68.1(1)(a)(i) of the Copyright Act, which provides for the payment of a sum as low as $100 per year on the first $1.25 million of broadcasters' annual advertising revenues.***

21. ***The CCC asks the Government of Canada to provide performing artists with moral rights in all their performances, including existing performances, and that these be inalienable, unwaivable and unassignable.***

22. ***The CCC asks that transitional measures be included which will prohibit the possibility of any grant, waiver or assignment before the new provisions come into force.***

23. ***The CCC recommends the regime provided for in Section 32.5 of the Copyright Act be replaced by a notification system more suitable to Canada.***