Coalition
for the Diversity of
Cultural Expressions

CDCE's urgent and mid-term recommendations for the Review of the *Copyright Act*

Abstract

The CDCE urges that a Bill to amend the *Copyright Act* be introduced in in the Fall of 2023 to help restore a balance for cultural ecosystems. The CDCE members prioritize six recommendations that must be addressed in the Fall, but also wants to remind that six other recommendations should be considered in the mid-term.

The Covid-19 Pandemic highlighted the fragile situation of cultural industries and the precarious condition of artists, creators and workers in the sector, while accelerating the move to digital. The cultural sector has been shaken by the growing access to cultural expressions via the Internet during the 2010's and then by the revision of the *Copyright Act* in 2012, which added several exceptions that do not meet Canada's international obligations.

The market for rights was already broken by digital; it is now collapsing.

The recent conclusion of the Supreme Court of Canada in the dispute between Access Copyright and York University seriously undermines the ability of creators to assert their rights and receive fair compensation for the use of their works. The government must amend the *Act*, as a matter of urgency, to reaffirm its commitment to ensure fair remuneration for rights holders. We consider that no consultation is necessary before a Bill is tabled. Beyond jobs and the contribution of culture to our economy, it is the vitality of the sector and the diversity of cultural expressions that is at stake. Meanwhile, companies providing access to cultural expressions online have made unprecedented profits. They have the means to better remunerate rights holders for the value they derive from the content protected by copyright.

As detailed in the following pages, we can assess the impact of our most urgent recommendations to amend the Act to more than $175 million in annual recurring revenues, paid by companies for the use of content that could be returned annually to the cultural ecosystems and the Canadian economy. At a time when public finances are already under pressure, the revision of the Act presents itself as a fair and relevant market-based solution to contribute to the creation of rich, innovative and diverse cultural expressions.

The six urgent recommendations of CDCE members:

1. Amend the fair dealing provisions in the context of education so that they only apply where a work is not commercially available under a license by the rightsholder or a collective society.
2. That resale right be incorporated into the Copyright Act.
3. Abolish the public performance royalty exemption for performers and producers for commercial radio stations
4. Changing the definition of sound recording
5. Amend the Act to confirm the binding nature of tariffs set by the Copyright Board
6. Restore the private copy regime in the music sector

The six mid-term recommendations of CDCE members:

1. Ratify the Beijing Treaty and grants moral and economic rights to performing artists on audiovisual media in the Act.
2. Raise the upper and lower limits of statutory damages for non-commercial violations and allow the establishment of higher damages in case of systematic and massive use
3. Ensure that right holders in the various sectors have the same tools by ensuring that all collecting societies can claim statutory damages of three to ten times the value of the tariff that has not been paid
4. Improve the private copying regime by allowing the payment of royalties for rights holders in the audiovisual, literary and visual arts sectors
5. Amend the exemption in section 32.2(3) to limit its application to acts without motive of gain
6. Take into account the needs and realities of Indigenous artists, creators and organizations

About the CDCE

The Coalition for the Diversity of Cultural Expressions (CDCE) brings together the main Anglophone and Francophone professional organizations in the cultural sector in Canada. It is made up of some 52 organizations that collectively represent the interests of more than 360,000 professionals and 2,900 businesses in the literature, film, television, new media, music, performing arts and visual arts sectors. The CDCE intervenes primarily to ensure that cultural goods and services are excluded from trade negotiations and that the diversity of cultural expressions is present in the digital environment.

1. Introduction

Artificial intelligence currently occupies a predominant space in our society and several very important questions related to copyright are being raised. These questions must be answered, but to do so, legislators and civil society will have to engage in a rigorous process of reflection and analysis that will take time. However, it would be unfortunate that complex AI issues come to delay the adoption of legitimate, consensual measures that are urgently needed by Canadian rights holders. It is therefore on these elements that we insist in this document.

The growing access to cultural expressions via the Internet in the 2010s has disrupted cultural ecosystems including by redistributing a growing share of the value that was accruing to creators, artists, professionals and cultural enterprises to technology companies, telecommunications services and foreign media offering online programming.

Canadian laws and their application have not been able to rebalance the situation. Worse, the 2012 revision of the *Copyright Act* has deprived cultural ecosystems of valuable revenues, notably by adding several exceptions that do not meet Canada's international obligations. Indeed, the International Literary and Artistic Association has officially expressed a wish to the Canadian government, inviting the government to reduce the number of free exceptions in Canadian law[1].

As Me Ysolde Gendreau reminded us when she appeared before the INDU Committee in 2018, businesses that benefit from cultural expressions always resist the payment of copyright royalties. But most of them have been doing so for more than 100 years now, and new balances have been struck each time progress has demanded it. We are once again invited to seek this delicate balance following the development of new technologies over the last two decades. Indeed, rights holders have witnessed two major trends in recent years: on the one hand, an enormous reluctance on the part of public authorities to regulate new players, and on the other, a legislative and jurisprudential movement that favors the user to the detriment of the creator.

The pandemic has considerably accelerated the digital shift in the cultural sector. Already badly affected by the inability to put in place a system that adequately remunerates rights holders, particularly to take account of the growing supply of online content. While one in four people working in the sector lost their jobs in 2020[2], the digital platforms that distribute cultural content to a growing proportion of the Canadian population have reaped record profits. These companies are profiting from their artificial intelligence systems, which not only allow for the personalized curation of huge catalogs, but also for the analysis of a gigantic amount of data that is, for the most part, jealously guarded[3].

In February 2021, the Standing Committee on Finance (FINA) recommended that the government "complete the review of the *Copyright Act* later this year by making the necessary amendments to the Act to ensure that rights holders are fairly compensated for the use of their works." [4] Let's recall that the GDP of culture exceeded $57 billion in 2019, or 2.7% of the Canadian GDP and represented in 2018 more than 655,000 jobs, far ahead of the agriculture, natural resource extraction, oil and gas, utilities and automotive[5].

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[1] ALAI (2017). Wish Expressed By ALAI to the Government of Canada

[2] CAPACOA (2021), 2020: The Year One in Four Arts Worker Lost Their Job.

[3] Still, data-sharing initiatives, such as Spotify's or Google's, are to be commended.

[4] Report of the Standing Committee on Finance, Hon. Wayne Easter, Chair (2021), Investing in Tomorrow: Canadian Priorities for Economic Growth and Recovery, p. 37.

[5] See Statistics Canada data for culture, agriculture, Randstad for resource extraction, oil and gas, public services, Canadian Government for automotive.

COVID has revealed the vital contribution that culture provides to people's lives, in their wellbeing and their mental health[6], but it has also highlighted the fragile balance of the cultural industries and the precarious situation of artists, creators and workers in the sector. Beyond jobs and the contribution of culture to our economy, which is in itself an important contribution, it is the vitality of the sector and the diversity of cultural expressions that is at stake.

We urge that a bill to amend the *Copyright Act* be introduced in the Fall of 2023 to help restore a balance for cultural ecosystems. At a minimum we can assess the impact of our most urgent recommendations to amend the Act to more than $175 million in annual recurring revenues, paid by companies for the use of content that would be returned annually to the cultural ecosystems and the Canadian economy. At a time when public finances are already under pressure, the revision of the Act presents itself as a fair and relevant market-based solution to contribute to the creation of rich, innovative and diverse cultural expressions.

2. Urgent recommendations: the CDCE members identify 6 urgent recommendations to put in place in the Fall 2023

a. URGENT RECOMMENDATION 1: Amend the fair dealing provisions in the context of education so that they only apply where a work is not commercially available under a license by the rightsholder or a collective society.

Within weeks of the introduction of "education" as a new allowable purpose under the fair dealing exception in 2012, several educational institutions outside of Quebec adopted self-defined policies for the copying of works which promote widespread and systematic free copying of published works[7]. Since then, the challenges are multiplying for collective societies, especially in the field of book publishing. Legal costs are therefore being swallowed up in defending the rights of authors and publishers.

For Me Erika Bergeron-Drolet, "The 2012 amendments to the exceptions regime of the Copyright Act are significant, not only in terms of their number, but in that they ignore collective management mechanisms and the payment of royalties as tools to counterbalance the increased rights granted to users"[8].

Outside Quebec, since the 2012 revision, most public elementary and secondary educational institutions, as well as post-secondary institutions, have stopped paying licence fees to Access Copyright for the reproduction of published works[9].

Thus, royalties from the education sector outside Quebec decreased by 92% between 2012 and 2022, resulting in a decrease of nearly 79% in royalties to rights holders. To date, creators and publishers have been deprived of over $200 million in unpaid royalties by the education sector under tariffs approved by the Copyright Board of Canada.[10]

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[6] Statistics Canada (2019), Provincial and Territorial Culture Indicators, 2017

[7] As mentionned by Access Copyright (2018), citing the example of Universities Canada

[8] Érika Bergeron-Drolet (2016), Les exceptions de la Loi sur le droit d'auteur : rétrospective et état des lieux, *Les Cahiers de propriété intellectuelle*, vol. 28, no. 2, p. 318, our translation.

[9] Access Copyright (2018), Access Copyright's Submission to the Standing Committee on Canadian Heritage for the Study on Remuneration Models for Artists and Creative Industries, p. 2

[10] Access Copyright (2022) *Access Copyright Annual Report*, p. 13

In Quebec, the amount of revenue from licenses with higher education institutions has also decreased significantly by nearly $30 million in royalties between 2012 and 2021, with universities paying only about half of what they used to pay per student and right holders receiving negligible compensation for the copying of their work by educational institutions outside Quebec. This is done to the detriment of students and the diversity of cultural expressions.

The average annual salary of writers in Canada in 2017 was only $9384 per year, a decrease of 27% from 2014 and 78% from 1998[11]. While other factors may help explain some of this decrease, it is clear that the 2012 changes have had a very negative impact. Copyright royalties constitute an important part of creators' revenues for their literary works (20%), while they provide 16% of publishers' profits[12]. The economic impact of this exception is certainly difficult to quantify, but there is no doubt that the reduced amounts have a significant impact on the viability of a small publishing house.

And there is more. Copying practices introduced in the education sector in 2012 have accelerated the decline in sales of books for the education sector, with royalty-free copying replacing books[13]. As a result, there has been a 38% (43% taking inflation into account) drop in book sales to educational institutions between 2010 and 2018[14]. Three major publishers have withdrawn altogether from the production of Canadian content for the K-12 education sector. As noted by the Association of Canadian Publishers, "publishers can no longer continue to produce free educational materials" [15].

This exception has an impact not only on the production of knowledge, the diversity of points of view, and the quality of education, but also on the entire Canadian economy, with the loss of thousands of jobs (5300 losts between 2012 and 2020 for the book industry in Canada) [16].

This has also resulted in more litigation of copyright issues, leaving it to the courts rather than elected officials to adapt copyright to contemporary realities. This judicialization of the law weakens Copyright Management Organizations, consolidates and encourages infringing practices, and ends up generating a flagrant imbalance between users and authors.

The trivialization of copyright in educational institutions, where plagiarism is not tolerated and where one claims to value knowledge, is all the more disturbing. One cannot imagine universities illegally installing licensed software and going to court to avoid paying for it, or asking building contractors to build their real estate developments for free.

Canada has attracted the criticism of the international community because of this exception[17]. As the UNEQ pointed out, the former Deputy Director of the World Intellectual Property Organization (WIPO), Mihály J. Ficsor, explained that with this exception, Canada is in violation of four international instruments to which it is bound:

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[11] The Writers' Union of Canada (2018) Diminishing Returns: Creative Culture at Risk.
[12] PricewaterhouseCoopers LLP (2015), Economic Impacts of the Canadian Educational Sector's Fair Dealing Guidelines, pp. 7 & 10, cited by Access Copyright (2018)
[13] PricewaterhouseCoopers LLP (2015), Economic Impacts of the Canadian Educational Sector's Fair Dealing Guidelines, pp. 7 & 10
[14] Data from Statistics Canada for 2012 and 2018.
[15] ACP (2018), Statutory Review of the *Copyright Act,* Submission to the Standing Committee on Industry, Science and Technology, p. 1.
[16] Statistics Canada. Table 36-10-0452-01 Culture and sport indicators by domain and sub-domain, by province and territory
[17] For example, the International Authors Forum, the International Publishers' Union, the Syndicat national de l'édition en France, the Federation of European Publishers, IFFRO (International Federation of Reproduction Rights Organisations), which brings together all the collective management societies (one hundred members).

the Berne Convention for the Protection of Literary and Artistic Works, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty[18].

In order to restore fair compensation to creators, Canada should adopt the UK, Ireland and New Zealand approach and limit the availability of fair dealing for educational purposes for educational institutions to when a work is not commercially available through a licence, including a licence by a collective society. This is also consistent with Recommendation 18 from the CHPC *Shifting Paradigms* report.[19]

b. URGENT RECOMMENDATION 2: That resale right be incorporated into the Copyright Act.

Unlike artists in other countries, Canadian visual artists are not currently paid for sales of their work in the secondary market. The Artist's Resale Right (ARR), as promised by the government in an amended Copyright Act, would entitle visual artists to receive a royalty payment each time their work is resold publicly.

The ARR is significant as artwork often grows in value over time, and artists currently have no legal right to receive income from this growth. CARFAC and RAAV propose that 5% of all eligible secondary sales of artwork sold for at least $1,000 should be paid back to the artist.

It would not be collected by the government nor would it be spent by the government. Furthermore, the government would not be involved with collecting, distributing, or monitoring the payment of royalties. To simplify the administrative process, a copyright collective society would oversee the payment of royalties.

In 2021, the overall labour force rebounded to pre-pandemic levels. However, this has not been the case for visual artists, who earned less than half of the average Canadian worker before 2020. If the government were to fulfill its promise to implement ARR in the Copyright Act, it would offer a long-term marketplace solution that would help visual artists recover from the pandemic, and contribute to a more sustainable and resilient cultural workforce.

Indigenous art is highly valued both in Canada and abroad. However, First Nations, Inuit, and Métis artists are often exploited by commercial secondary markets. It is common for art to be directly purchased from an artist at a low price, only to be resold at a much higher value. The Copyright Act can help correct this imbalance through mechanisms such as the ARR, ensuring Indigenous artists may receive fair compensation for their work.

ARR exists in over 90 countries, including: Australia, United Kingdom (UK), all European Union (EU) members, Mexico, Korea, India, etc. In Australia, a country that can be considered comparable to Canada, since 2010, $11 Million (AUD) has been paid to 2,360 Australian artists, over 65% of whom are Indigenous. There is an opportunity for Canada to bring this royalty into alignment with our international partners.

In 2018, the Standing Committee on Canadian Heritage and the Standing Committee on Industry, Science, and Technology conducted consultations on the Copyright Act, and presented reports on their findings. The Canadian Heritage Committee specifically recommended the Artist's Resale Right be established in Canada.

[18] UNEQ, Étude sur les modèles de rémunération pour les artistes et les créateurs dans le contexte du droit d'auteur : mémoire de l'Union des écrivaines et des écrivains québécois (UNEQ) au Comité permanent du patrimoine canadien, 11 décembre 2018, pp. 4-5
[19] CHPC (2019), *Shifting Paradigms*, recommendation 18.

c. URGENT RECOMMENDATION 3: Abolish the public performance royalty exemption for performers and producers for commercial radio stations

In 1997 the Copyright Act was amended to enshrine the remuneration right for producers and performers of sound recordings when their work was broadcast or publicly performed by radio stations and public places such as bars.

In response to concerns raised at the time by broadcasters, a 'special and transitional' exemption was provided to reduce the economic shock of a new fee. As a result, commercial radio stations were asked to pay only $100 in royalties to Performers and Record Labels/Makers on the first $1.25 million of advertising revenue they earn annually.

Twenty six years later, the exemption remains in place, and the commercial radio market is significantly changed. As a result of consolidation, large profitable commercial radio groups are taking advantage of this exemption and paying much less in royalties to Performers and Record Labels/Makers. The commercial radio industry has continued to generate large profits in recent years, despite the impact of the COVID-19 pandemic, which impacted all industries, particularly musicians.

This unfair subsidy costs Performers and Record Labels/Makers approximately $14 million per year in lost royalties, while resulting in:

1. Unfair treatment amongst users
   Commercial radio receives privileged treatment among music users. For example, retail stores, restaurants, bars, sports arenas, and other broadcasters, such as satellite radio, receive no deduction, no privileged treatment, no exemption. Commercial radio is the sole music user to receive this special treatment. Removing this unfair exemption would ensure that commercial radio stations pay rights holders on all of their revenues, the same as any other music user.

2. Discrimination amongst creators
   Uneven treatment exists within the music creator community as well. The license fees paid to SOCAN (Authors) are based on 100% of the radio stations' advertising revenue (with no deduction or exemption) while the fees paid to Re:Sound (Performers and Record Labels/Makers) for the same rights remove the first $1.25 million of advertising revenue from the calculation.

3. Canada being an outlier
   There is no parallel or similar royalty exemption in any country in the world – this includes every nation that recognizes performers' rights in whole or in part. Protections are already in place for both small radio stations and community stations. The Copyright Act provides that community broadcasters (including campus radio stations) pay only $100 annually to Re:Sound. Re:Sound is not proposing to remove this exemption. In addition, the Copyright Board has set lower rate tiers for commercial radio stations with revenues under $1.25M, providing preferential treatment to small broadcasters. No special exemption is required under the Act to ensure that truly small, independent stations are treated fairly. This is part of the Copyright Board's mandate and better addressed by the Board which can adjust rates and revenue tiers based on current market and economic conditions.

   The Government of Canada should remove the unfair exemption for commercial radio stations in its entirety.

Moreover, as recently as 2019, both House of Commons Committees (Canadian Heritage and Industry), who were mandated by statute to review the Copyright Act, unanimously recommended the $1.25 million exemption be abolished.

d. URGENT RECOMMENDATION 4: Changing the definition of sound recording

The current definition of Sound Recording in the Copyright Act unfairly excludes Canadian performers and makers from the right to receive compensation when their sound recordings are performed in audiovisual works, such as film and television. This contrasts with authors, composers, and music publishers, who are compensated for this same use, through SOCAN which collects over $100Mi annually for this right. This right also exists in most developed countries worldwide, resulting in Canadian performers and makers being disadvantaged against their peers.

As part of the Copyright Act Review, the Heritage Committee, whose mandate dealt specifically with remuneration – and who heard directly from affected rights holders – recommended unanimously that the definition be amended to allow sound recordings used in television and film to be eligible for public performance remuneration (Recommendation 11; p. 28). While the INDU committee did not recommend amendment of the definition, it did so out of concern that such amendment would reduce performers' ability to negotiate "payment up-front for the integration of a sound recording in a cinematographic work" (Recommendation 12; p.48). Such concern is unwarranted as the market-place for synch licensing will naturally adjust to the introduction of this right, just as it has for authors, composers and publishers in Canada, and for performers and makers in numerous territories worldwide.

The rights holders represented by Re:Sound and its member organizations lose millions in royalties each year because of the restrictive definition of "sound recording."

Should the definition of "sound recording" be amended, Re:Sound would propose tariffs with similar scopes and terms to those already granted to SOCAN for the use of musical works in television broadcasts, public performance of films in movie theatres, and online streaming of audiovisual content. The proposed tariffs would then be reviewed by the Copyright Board in a full and transparent process in which all affected music users would have the opportunity to participate and provide witness testimony and economic evidence. The rates and terms for the tariffs would ultimately be determined by the Copyright Board after hearing from all interested parties.

Under the Copyright Act, Re:Sound must propose a new tariff no later than October 15th of the second year before it takes effect. So if the Copyright Act were to be amended to change the definition of sound recording prior to October 15, 2023, Re:Sound would file proposed tariffs that would not take effect until 2025. If the Act was not changed until later in 2023 or 2024, Re:Sound would file its proposed tariffs by October 15, 2024, to take effect in 2026. This ensures the affected music users would have ample notice and opportunity to prepare for new tariffs. It also means, that the longer there is a delay in amending the Act, the more years of royalties continue to be lost by performers and makers.

Updating the definition would more equitably treat rights holders in Canada and reflect how these rights are managed in most developed countries worldwide. The Government of Canada should amend the definition of Sound Recording so that Performers and Record Labels/Makers can receive compensation when their music is used in audio visual formats.

e. URGENT RECOMMENDATION 5: Amend the Act to confirm the binding nature of tariffs set by the Copyright Board.

The conclusion of the Supreme Court of Canada in the litigation between Access Copyright and York University that tariffs approved by the Copyright Board are not binding on infringers[20] severely damages creators' ability to enforce their rights and receive fair compensation for the use of their works.

Any recourse granted to collectives over time to strengthen their ability to collect the sums owed to rights holders for access to their works is severely undermined, including Parliament's intent in 1988 and 1997 to provide collectives with effective enforcement mechanisms against users who use works of rights holders without their authority. Such mechanisms work only if the tariffs are binding and enforceable against users who make unauthorized uses of works covered by a tariff.

Binding tariffs create a level playing field for users of copyright-protected works. If any user can "opt out" of the tariff regime, this requires collectives to negotiate licence terms with each user individually, completely eradicating the efficiencies gained from collective administration.

The government must correct this and amend the *Act* to establish the binding nature of the tariffs approved by the Copyright Board.

f. URGENT RECOMMENDATION 6: Restore the private copy regime in the music sector

The principle of private copying allows for a compromise between the rights of users and the creators' right to remuneration. It allows users to multiply the opportunities for access to cultural expressions and to let their creativity run wild by arranging portable playlists as they wish while ensuring that creators are compensated for the copies thus created.

The most crucial problem with the Canadian private copying regime is that it is not technologically neutral.

Logic would dictate that the system should be technologically neutral in order to adapt to new and constantly evolving technology and user practices. Today, the private copying levy is only applied to recordable CDs, a product that is practically no longer sold. This is why annual royalties are declining: from a peak of $38 million in 2004, they only reached $1 million in 2021[21]. Meanwhile, royalties from the various private copying regimes around the world have risen steadily since 2007, increasing to over 1 billion Euros collected in 2018[22].

In Canada, the Federal Court's strict reading of the English version of the Act overturned the application of a levy on MP3 players in 2005. Rather than remedying the situation and restoring remuneration to rights-holders, the Harper government introduced a new exception in 2012 for reproduction for private purposes (section 29.22), though it does not apply to copies on levied media. To the extent that this new exception is too broad or not accompanied by remuneration, Canada is in violation of its international copyright treaty obligations[23].

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[20] Université York v. Canadian Copyright Licensing Agency (2021) SCC 32.

[21] Canadian Private Copying Collective (2020), Written Submission for the Pre-Budget Consultations in Advance of the Upcoming Federal Budget (2021)

[22] In the majority of countries (80%) where a private copying regime is in place, it includes royalties for the audiovisual sector, while other countries are also beginning to remit royalties to the literary and visual arts sectors.

[23] The so-called "Berne Convention three-step test" specifies that exceptions to copyright protection, like private copying regimes, are only valid if the exceptions a) are limited to special cases, b) do not conflict with a normal exploitation of the work; and c) do not unreasonably prejudice the legitimate interests of the rights holder.

With regards to the first exception, according to the Société des auteurs et compositeurs dramatiques and the Société civile des auteurs multimédia (SACD and SCAM), "...Canada would not have met its international obligations since this new exception does not meet the requirements of the Berne Convention's three-step test, which provides that limitations or restrictions on the exclusive rights of authors must be subject to conditions which limit their application to certain special cases where they do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author" [24].

Despite the increase in streaming, Canadians are still using private copies. The Canadian Private Copying Collective conducted a national survey in 2019 that found that there are 5.95 billion tracks of music stored on telephones and tablets in Canada, and that half of those copies are unlicensed. The very reason private copying regimes exist is to compensate for copies like these, that cannot be controlled.

Passage of the necessary amendments to the Act would make it possible for rights-holders to propose a private copying levy on a wide range of physical media and devices (telephones, USB keys, hard drives, tablets, etc.), as is the case in many countries around the world.

As always, it would be up to the Copyright Board to determine which devices should be levied, and at what rate. The average royalty in Europe on the sale of a smart phone is $3 CDN (for private copying of music). A $3 levy on sales of smart phones and tablets in Canada would logically generate approximately $40 million in royalties annually.

[24] Société des Auteurs et Compositeurs Dramatiques et Société Civile des Auteurs Multimédia- SACD-SCAM (2018), Mémoire Présenté dans le cadre de l'examen prévu par la loi de la Loi sur le droit d'auteur au Comité permanent de l'industrie, des sciences et de la technologie, pp.8-9. The text refers the reader to Article 9(2) of the Berne Convention. Our translation.

3. MID-TERM RECOMMENDATIONS OF THE CDCE

a. MID-TERM RECOMMENDATION 1: Ratify the Beijing Treaty and grants moral and economic rights to performing artists on audiovisual media in the Act.

The Beijing Treaty on Audiovisual Performances came into force 28 April, 2020. It has been ratified by 33 states and signed by 58 others. It grants "performers new economic and moral rights in their performances fixed on audiovisual work"[25].

It should be recalled that currently, performers participating in sound recordings have economic and moral rights while performing artists whose performances are incorporated into cinematographic works have no equivalent. This sometimes leads to aberrant situations, as in the case of music videos, where the artist will benefit from copyright protection for his or her performance incorporated into the sound recording but will not be able to benefit from it on the video recording of the same performance. Moreover, this creates discrimination between performers, depending on whether they are filmed or not[26].

The Beijing Treaty would therefore make it possible to give performers participating in audiovisual recordings, regardless of the nature of their performance (acting, music, dance), the same rights as those available to performers participating in sound recordings. The CHPC supported this recommendation in 2019.

For its part, the Alliance of Canadian Cinema, Television and Radio Artists (ACTRA) explains that "the need for a well-designed legislative framework is increasingly important in Canada and abroad, where the digital distribution and consumption of audiovisual content has increased dramatically, but the average income of professional artists has remained low"[27]. Indeed, according to ACTRA, the average annual income of performers was less than $11,000 in 2017.

Regarding moral rights ACTRA has noted in its own submissions to government that ongoing and increasing use of deepfake technology for the creation and sharing of audiovisual content is an imminent threat that must be addressed. The best protection against this danger is to grant moral rights to audiovisual artists in Canada's *Copyright Act*. ACTRA's sister union in the U.S., SAG-AFTRA, defines deepfakes as "realistic digital forgeries of videos or audio created with cutting-edge machine-learning techniques."[28] Deepfakes are an amalgamation of artificial intelligence, falsification and automation. They use deep learning to replicate the likeness and actions of real people. SAG-AFTRA estimates the vast majority (96 per cent) of deepfakes are pornographic and depict women. It further estimates 99 per cent of deepfake subjects are from the entertainment industry. One could be forgiven for thinking that such technology is a decade away. It has, in fact, already arrived.

b. MID-TERM RECOMMENDATION 2: Raise the upper and lower limits of statutory damages for non-commercial violations and allow the establishment of higher damages in case of systematic and massive use.

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[25] Gazeau, Maxime-Pierre (2020), Entrée en vigueur du Traité de Beijing, Artisti.

[26] Artisti (2016), Mémoire d'Artisti Déposé dans le cadre de la consultation publique sur le contenu canadien dans un monde numérique p. 10

[27] Alliance of Canadian Cinema, Television and Radio Artists – ACTRA (2018), *Mémoire sur l'examen des modèles de rémunération des artistes et des industries créatives dans le contexte du droit d'auteur, présenté au Comité permanent du patrimoine canadien de la Chambre des communes*, p. 4-5.

[28] See the presentation Deep Fake Update presented by ACTRA-SAG at LIT Summit 2021.

The 2012 revision lowered the upper limit on the statutory damages that a court can award a rights holder to only $5,000 for non-commercial use. Several organizations such as the ACP have argued that this cap is far less than the legal costs of a copyright infringement lawsuit, which of course discourages the use of these penalties for rights holders, as much as it reduces the risk that users are willing to incur to contravene the Act.

As a result, it does not provide an incentive for organizations, such as educational institutions, to negotiate licences or to honour the Board's tariffs.

It should be noted that both INDU and CHPC had recommended that damages be reviewed in 2019. However, it does not seem sufficient to raise the upper and lower limits of statutory damages for non-commercial violations. These limits should, of course, be raised, but a judge should be able to award higher damages in the case of systematic and massive use.

c. MID-TERM RECOMMENDATION 3: Ensure that right holders in the various sectors have the same tools by ensuring that all collecting societies can claim statutory damages of three to ten times the value of the tariff that has not been paid

Behaviour that contravenes the Act should be subject to penalties. All collective societies should have the same ability to enforce their rights and incentivize users to pay for the use of works in their repertoire. The CHPC had recommended in 2019 the harmonization of the remedies of collective societies.

d. MID-TERM RECOMMENDATION 4: Improve the private copying regime by allowing the payment of royalties for rights holders in the audiovisual, literary and visual arts sectors

In addition to not being technologically neutral, the essential problem with the Canadian private copy regime it that it applies only to the music sector.

In the majority of countries (80%) where a private copying regime is in place, it also generates royalties for the audiovisual sector, while other countries are also beginning to remit royalties to the literary and visual arts sectors.

e. MID-TERM RECOMMENDATION 5: Amend the exemption in section 32.2(3) to limit its application to acts without motive of gain.

The Copyright Act provides an exception at section 32.2(3) for the payment of royalties for the public performance of music when the performance is “in furtherance of a religious, educational or charitable object.” This exception prevents compensation to music creators where the use is of a charitable purpose.

No other creative profession (including filmmakers, literary authors, or visual artists) is required to forego compensation for the use of their works by charitable, religious or educational organizations. These organizations, regardless of the purpose for which they are using literary, dramatic, artistic or cinematographic works, are required to properly remunerate these creators to do so.

The charitable exemption is currently being exploited by some music festivals and venues operated by charitable organizations earning millions in revenue. Despite receiving government funding and paying market rates for costs associated with putting on such events (e.g: paying venues, promoters, food providers, advertisers, staff and so forth), these organizations refuse to pay the songwriters, composers and music publishers their share for the public performance of their works, citing the exemption under section 32.2(3). Even though this section has been

judicially interpreted by the Supreme Court of Canada to not apply to events where music is used in an ordinary business sense for entertainment, these organizations still refuse to pay.

This abuse of section 32.2(3) creates an unfair imbalance in the market between charitable organizations who recognize that the section does not apply to their commercial activities and pay royalties versus other organizations who do not.

In the May 2019 Shifting Paradigms report, the Standing Committee on Canadian Heritage at Recommendation 15 agreed that the charitable exemption should be clarified to "apply strictly to activities where no commercial monetary gain is intended."

f. MID-TERM RECOMMENDATION 6: Take into account the needs and realities of Indigenous artists, creators and organizations

Several Indigenous artists and organizations participated in the consultations conducted by INDU and CHPC in 2018. The CDCE does not currently have Indigenous members on its membership. The CDCE does not have the expertise or legitimacy to make a specific recommendation, but wishes to support elements that have been raised through the testimonies and contributions of Indigenous individuals and organizations.
First of all, it seems clear that the *Act* is not adapted to the protection of traditional cultural expressions, and that, as a result, the *Act* may even promote the cultural appropriation of traditional expressions. As stated in the INDU report,

> *Under the Act, an expression will not be recognized and thus protected as a work under the Act unless it is fixed in a more or less permanent form. Many traditional cultural expressions, however, are not fixed in such forms. A non-Indigenous person can, however, fix such cultural expressions in a permanent form and thus claim copyright over the resulting work or subject-matter for themselves*[29].

The abuses can be numerous and dramatic. For example, associating Indigenous cultural expressions with commercial products or services without consent or preventing Indigenous people from interpreting or creating based on traditional expressions.

This situation seems to us to contravene article seven of the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, to which Canada is the first signatory:

> *1. Parties shall endeavour to create in their territory an environment which encourages individuals and social groups:*
> *(a) to create, produce, disseminate, distribute and have access to their own cultural expressions, paying due attention to the special circumstances and needs of women as well as various social groups, including persons belonging to minorities and indigenous peoples;*
> *(b) to have access to diverse cultural expressions from within their territory as well as from other countries of the world.*[30]

[29] Report of the Standing Committee on Industry, Science and Technology (2019), Statutory Review of the *Copyright Act*, Dan Ruimy, chair, P. 27.
[30] 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Article 7, paragraph 1: https://en.unesco.org/creativity/sites/creativity/files/convention2005_basictext_en.pdf#page=18

In his testimony, Tony Belcourt asked that the *Copyright Act* be amended to take into account the cultural rights recognized in the United Nations Declaration on the Rights of Indigenous Peoples (Article 11):

> *1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.*
> *2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent....*[31]

Finally, several stakeholders requested that the government undertake consultations "to explore ways to protect traditional arts and cultural expressions from misappropriation and copyright infringement, and to reconcile Indigenous notions of ownership with the Act"[32].

[31] Passages read by Tony Belcourt on October 31, 2018 during his testimony before INDU

[32] Report of the Standing Committee on Industry, Science and Technology (2019), STATUTORY REVIEW OF THE COPYRIGHT ACT, Dan Ruimy, chair, p. 29.