**ARTISTS AND LAWYERS FOR THE ADVANCEMENT OF CREATIVITY**

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**SUBMISSION OF ALAC TO THE STANDING COMMITTEE ON CANADIAN HERITAGE ON REMUNERATION MODELS FOR ARTISTS AND CREATIVE INDUSTRIES (November 28, 2018)**

Artists and Lawyers for the Advancement of Creativity (ALAC) is a not-for-profit corporation that helps actors, musicians, dancers, visual artists, writers, filmmakers and other creators address legal issues. ALAC's Artists' Legal Advice Services (ALAS) is a free legal clinic established by volunteer practising arts and entertainment and IP lawyers and law students over 30 years ago to serve artists working in all artistic disciplines – creators who want to understand their legal rights or obtain guidance on dealing with specific legal problems. ALAC also provides educational programs to help creators to understand laws affecting them and their businesses.

We have made recommendations to the INDU Committee statutory review of the Copyright Act.. However, for the purpose of your study on remuneration models, we will concentrate on those of our recommendations that are related to revenues for creators.

Our observations are that self publishing and production is becoming increasingly common, supplementing established models where authors and performers rely on publishers and producers, mostly large corporations, to produce, administer and sell their work. We also note increasing opportunities for both authors and performers to affiliate with collective societies for licensing their rights and collecting royalties. Looking ahead, we foresee that many more artists will operate independently of traditional models to produce, market and sell their works and sound recordings. In our view collective societies, because of economies of scale, are essential for the efficient compensation of both self published and traditionally published artists in all disciplines. In the present environment of rapid technological innovation permitting mass dissemination of creative works, collective societies have harnessed technology – and continue to innovate – to minimize revenues lost to rightsholders because of third-party dissemination costs and lack of transparency and to maximize their ability to provide services for rightsholders. In this regard collective societies play a vital role in the remuneration models available for creators.

**OUR SPECIFIC RECOMMENDATIONS:**

1. **Write the "three-step test" into the *Copyright Act* and make explicit its application to all limitations or exceptions to the copyright of authors and performers. This affects several of our further recommendations that are key to creators' ability to earn a living.** The "three-step test" sets an international benchmark for limitations or exceptions that

Canada is bound to apply and that Parliament should observe when enacting legislation because of Canada's obligations under the *Berne Convention*, the *World Intellectual Property Organization* (WIPO) *Copyright Treaty* and W*IPO Performances and Phonograms Treaty*, and the World Trade Organization's *TRIPS* agreement. The *United States-Mexico-Canada Agreement* is the most recently negotiated agreement requiring Canada to apply the three-step test to copyright exceptions and limitations. We recommend that the *Copyright Act* itself spell out this international obligation to "confine limitations or exceptions to exclusive rights to certain special cases that do not conflict with a normal exploitation of the work, performance or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder." Canadian judges would then look at the three-step test when interpreting limitations and exceptions to rightsholders' rights, as do national courts in many European countries.

The third element of the three-step test – unreasonable prejudice to the legitimate interests of the right holder – strongly points to the need to insert the three-step test into the *Copyright Act*, at least to alter the sixth factor set out by the Supreme Court Canada in *CCH Canadian Ltd. v. Law Society of Upper Canada (2004)* as part of assessing whether a reproduction is "fair dealing": "If the reproduced work is likely to compete with the market of the original work, this may suggest that the dealing is not fair. Although the effect of the dealing on the market of the copyright owner is an important factor, it is neither the only factor nor the most important factor…." The likelihood of competition in an author's market would certainly prejudice the author's legitimate interests and violate international obligations to comply with the three-step test.

Our following three recommendations address exceptions that put Canada in breach of its international obligation to comply with the three-step test.

**(I)** **Revise the "fair dealing" exception for the purpose of "education"** (a 2012 amendment) **or add regulations**. Schools, colleges and universities have adopted their own arbitrary, overbroad guidelines showing how much they think they should be entitled to copy from published works without permission from rightsholders, and they stopped paying royalties to the collective societies representing rightsholders. This resulted in a huge drop in revenues to authors because of massive unpaid copying in educational institutions, much of it replacing purchase of textbooks and licensing excerpts from books and periodicals. This broad "catch-all" for "education" is not a "special case" as required by the three-step test (unlike narrower, specific exceptions for educational institutions already in the *Copyright Act* but largely ignored because of fair dealing for "education").

**(ii)** **Give collective societies management of the "User-Generated Content" ("UGC") exception** (a 2012 amendment). Sometimes referred to as the "YouTube exception", this exception to copyright infringement allows an individual to use an author's existing work or performer's existing performance in creating a new work or performance "solely for non-commercial purposes". However, it allows that

individual to authorize a disseminator with a commercial purpose, like YouTube or Facebook, to make the UGC available to the whole world on the Internet. Publicly disseminated UGC, such as a song mash-up or unauthorized sequel to a novel, could diminish or entirely scoop the value of the existing performance or work. UGC dissemination should be restricted to its creator's own private circle. If not restricted to truly private communications (e.g., personal email), the original author or performer should receive royalties for commercial dissemination. As well as calling for safeguards for this UGC exception when for private use, we recommend that this UGC (i.e., produced by individuals for non-commercial purposes) be licensed for commercial dissemination, subject to the original creator's right to opt out entirely or to exclude certain works from commercial dissemination. Collective societies would maintain an exclusions list, collect royalties for UGC disseminated commercially and pay authors and performers whose existing works and performances are used in its creation.

**(iii)** **Revise the definition of "sound recording"** to get rid of the exclusion of soundtracks accompanying films and other audiovisual works, i.e., when exhibited in theatres or broadcast on television or streamed on or downloaded from the Internet. It is unfair that audio performers – unlike authors of music that performers sing or stories that they narrate or tell – do not receive remuneration when their performances are broadcast or communicated digitally as part of an audiovisual work. Nor, equally unfair, are they paid for retransmission of distant signals carrying television and radio programming.

2. **Remove the $1.25 million tariff exemption that subsidizes commercial radio broadcasters and deprives audio performers of remuneration** (a 1997 amendment). Commercial broadcasters benefit from a subsidy exempting their first $1.25 million of advertising revenue from royalties set by the Copyright Board. Performers (and record companies) lose about $8 million in annual compensation. (By contrast, songwriters and music publishers collect payments from every dollar earned by the broadcaster.) This exemption for broadcasters was intended as a transitional measure when new rights for performers and owners of sound recordings were introduced in 1997. It no longer has any economic justification.

3. We recommend the following additions to the *Copyright Act* to secure or increase remuneration of audiovisual performers and visual artists, including revenues from other countries that they may not receive if derived from a right that Canada does not protect.

**(i)** **Implement and ratify the *Beijing Treaty*, adopted internationally** (in 2012). Officially the *WIPO Audiovisual Performances Treaty*, this agreement protects actors and other performers for performances fixed in an audiovisual work, including a film, television program or digital work, e.g., a game. Canada should implement this treaty without further delay to secure the economic rights of audiovisual performers to fair compensation for their work when broadcast, communicated on the Internet or shown in a theatre, as well as to confirm their

moral rights. This would put Canada's audiovisual performers on an equal footing with audio performers and authors, who have rights under the *Copyright Act.* Like them, audio visual performers have uncertain and fluctuating incomes. Like the other WIPO treaties for authors and audio performers, the Beijing Treaty specifically includes the three-step test.

**(ii) Insert a visual artist's resale right (*droit de suite*) into the *Copyright Act*.** About 80 countries worldwide provide such a right including Australia, Brazil, France, Mexico, Russia and the United Kingdom and, in the United States, California. To take one example, a European Union directive provides a resale right that visual artists cannot transfer or waive – their right to receive a percentage of the proceeds (up to a maximum royalty payment) when their original artistic works are resold (over a minimum sale price). Implementation is optional for EU member states but, if implemented, must be subject to reciprocity for non-EU nationals, so Canadian artists generally will continue to be ineligible for resale royalties in EU countries as long as there is no resale right in Canada's *Copyright Act*. We support the Canadian visual artists' demand for a resale right. Artwork often becomes much more valuable over time, as the artist becomes better known. Artists should share in the economic success of their work.

4. **Replace the current right of an author's heirs to revert rights granted by the author to publishers and producers 25 years following the author's death with a reversionary right exercisable by the author or author's heirs a specified number of years following the grant by the author during lifetime.** In the United States, authors or their statutory successors have the right to revert rights during a 5-year window beginning 35 years after the date of the author's grant. The Society of Authors in the United Kingdom and renowned publisher Faber & Faber agreed decades ago that 20 years was the appropriate maximum duration of a book publishing contract. The *Directive on Copyright in the Single Digital Market*, approved in September 2018 by the EU Parliament, sets 20 years following publication for automatic expiry of authors' digital grants to newspaper and magazine publishers. We also note that this new EU Directive will entitle authors (and performers) to request a "contract adjustment" when their original agreement is "disproportionately low compared to the subsequent relevant revenues and benefits derived from the exploitation of the works or performances." All these examples recognize that authors have unequal bargaining power and often sign unfavourable or inappropriate contracts especially in early career, or because of societal or technological changes. A reversionary provision which may be exercised a fixed number of years following the author's grant of rights would give the author (or author's heirs) an opportunity to obtain greater benefit from works that may continue to have a market.

5. **Get rid of caps and bars on statutory damages for infringements for non-commercial purposes** – making the existing remedy potentially no more than a single licence fee for many non-commercial infringements by any number of infringers. Few authors and performers can afford to litigate to prove actual damages, and once a work or

performance is disseminated on the Internet, there is no real remedy for its creator. Effective statutory damages are an essential deterrent to infringements, and infringements mean lost revenues.

As lawyers for artists, we see how difficult it is to work as a full-time professional creator. Changes to the *Copyright Act* enabling creators to make a decent or better living from practising their profession will allow them to spend more time working as artists and will benefit everyone.

We, the ALAC Board, thank your Committee for the opportunity to share our experience and views on copyright reform.