



ACTRA

Alliance of Canadian Cinema, Television and Radio Artists (ACTRA)

***Submission to the Federal Government's
Standing Committee on Industry, Science and
Technology for the Statutory Review of the
Copyright Act***

December 2018

Introduction

ACTRA (Alliance of Canadian Cinema Television and Radio Artists) and ACTRA PRS (Performers' Rights Society) welcomes the opportunity to make this submission in response to the Standing Committee on Industry, Science and Technology's current statutory review of the *Copyright Act*¹ (the "Act").

The Act recognizes the inherent value of creative works and is an important piece of legislation that has a material impact on performers and their ability to sustain a living and contribute to Canadian culture. New technology has dramatically changed the way creative industries work and the Act needs to reflect the new economic reality in which our artists operate.

For 75 years, ACTRA has represented performers living and working in every corner of the country who are pivotal to bringing Canadian stories to life in film, television, sound recording, radio and digital media. ACTRA Performers' Rights Society (PRS) is a collective management organization, incorporated by ACTRA, mandated to represent the rights and interests of artists who perform in audiovisual productions and on sound recordings. ACTRA and ACTRA PRS represent the collective voice of 25,000 professional performers working in the English-language recorded media sector in Canada.

ACTRA has taken steps to negotiate use provisions into our contracts and ensure performers are paid for their work throughout its use, but strong copyright legislative provisions are necessary to underpin the rights of audiovisual performers.

Audiovisual Rights

ACTRA's interests in the reform and modernization of the Act are multifaceted. However, for this short brief, we will focus on professional performers' very strong interest in having Canada codify in the Act economic and moral rights for their audiovisual performances. In this regard, ACTRA's members wish to have a similar statutory framework in the Act that is currently enjoyed by sound recording performers and authors. Residuals and royalties, payments for the use and exploitation of their work, at home or internationally, are the fair compensation all performers deserve. In ACTRA's view, there is no valid

¹ R.S.C., 1985, c. C-42.

reason for audiovisual performers to be denied any longer those statutory rights that their fellow creators possess in Canada and around the world.

The types of economic and moral rights ACTRA seeks for its members are the international standard. Countries around the world grant performers rights for their audiovisual performances which, in Canada have only been enjoyed by performers of audio performances under the *1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* (“Rome Convention”) and the *1996 WIPO Performances and Phonograms Treaty* (“WPPT”). To date, Canada has taken no substantive steps to grant similar rights to audiovisual performances.

Many countries around the world have granted rights to audiovisual performances for decades. Recently, even more countries have recognized the value in audiovisual performances by signing the Beijing Treaty, which has 75 signatory countries including Canada’s major trading partners. Twenty countries have ratified or acceded to it. It will enter into force once 10 more countries ratify or accede.

Importantly, audiovisual rights have come to the fore internationally owing in part to a couple of developments. First, over the past few decades there has been a significant increase in the amount of audiovisual content created, exploited, and consumed globally over-the-air and online. Second, with the increased exploitation and consumption of audiovisual content, the unfairness associated with audiovisual performers not having rights in their performances, like those provided by the Rome Convention and the WPPT, has been brought into higher relief. Put simply, there is no compelling rationale for why performers of audiovisual performances should not have substantially similar rights to those possessed by audio performers.

Canada needs to meet the global standard for performers’ rights in their audiovisual performances. ACTRA urges the Standing Committee on Industry, Science and Technology to adopt proactively in principle the need for Canada to implement strong economic and moral rights in the Act, similar to those found in the Beijing Treaty. In so doing, the Committee will endorse the need and the fairness of Canada treating audiovisual performers in a similar fashion to the way it has treated sound recording artists for decades. The Committee will also be endorsing an elevation of the standing of performers in the audiovisual sector and promoting the important cultural contributions they make in Canada.

Economic Rights

Performers are generally granted four exclusive economic rights in their 'fixed' audiovisual performances -- namely rights of: (1) reproduction; (2) distribution; (3) rental; and (4) making available. For 'unfixed' or live audiovisual performances, performers are granted three rights: (1) broadcasting (excepting rebroadcasting); (2) communication to the public (excepting broadcast performances); and (3) fixation.

The Beijing Treaty also provides performers with the exclusive right to authorize the broadcasting and communication to the public of their performances fixed in audiovisual fixations.²

The codification of the foregoing rights (collectively referred to below as the "AV Performer Rights") can provide a framework for collective bargaining, underpinning our negotiation efforts on behalf of performers. The need for a well-crafted statutory framework is increasingly important in Canada and abroad where digital distribution and consumption of audiovisual content has risen dramatically but average incomes for professional performers have remained low.

This value gap is evident in the fact that, despite no shortage of acting jobs in Canada, the annual average earnings per performer for 2017 were just below \$11,000. Performers are increasingly building their careers by working in a number of different media, earning small incomes from a number of different sources.

In order for performers to truly gain from the AV Performer Rights discussed above, care needs to be paid to their implementation in the Act. Through collective bargaining, ACTRA has contractually negotiated some benefits for its members. However, in an uncertain environment of changing production and distribution models, performers need the certainty that comes with being able to negotiate the exploitation of statutorily prescribed rights going forward. In ACTRA's view, the collective bargaining framework that currently exists between it and Canadian producers will complement the codification of the AV Performer Rights.

² The *Beijing Treaty* also alternatively provides for an equitable remuneration right for the direct or indirect use of performances fixed in audiovisual fixations for broadcasting or for communication to the public. ACTRA does not believe such right is necessary at this juncture so long as the full suite of exclusive rights discussed above are implemented.

As part of the negotiation process, ACTRA appreciates that producers also need certainty when it comes to the exploitation of AV Performer Rights. ACTRA is confident that it will be able to work with the Canadian Media Producers Association (CMPA) to jointly recommend the statutory language of the Act under which the performers will have the right to receive royalties in respect of the AV Performer Rights after they have transferred such rights to the producer.

The language of the Act establishing the foregoing right to receive royalties will be critical for at least two reasons. First, it would be useless to performers if the Act only established that they have AV Performer Rights without ensuring that they can in practice earn a fair share of remuneration generated from their exploitations. And secondly, the language will be a critical component of establishing reciprocity with other countries that have audiovisual performance rights in their legislation.

Once Canada has implemented the AV Performer Rights in the Act in a manner that best reflects and supports its audiovisual sector's needs, thus putting itself in a position to ratify the Beijing Treaty, ACTRA PRS will be able to negotiate bilateral agreements with foreign performers' collective management organisations (CMOs) located in other countries who have audiovisual performance rights, including those which have ratified or acceded to the Beijing Treaty. ACTRA PRS currently negotiates such bilateral agreements on behalf of and for the financial benefit of Canadian sound recording artists it represents through its division ACTRA Recording Artists' Collecting Society (RACS). ACTRA PRS anticipates being able to similarly collect remuneration for its members whose audiovisual performances are exploited abroad. ACTRA PRS will be able to leverage its long-standing contractual relationships with foreign CMOs to help ensure Canadian audiovisual performers are paid in a timely and efficient manner.

In addition to the implementation of the AV Performer Rights, ACTRA encourages the government to seize on the opportunity to extend the private copying regime to audiovisual performances and the devices that are designed, manufactured and advertised for the purpose of copying audiovisual works. In 2012, the Conservative government curtailed the scope of the private copying regime to the great detriment of musicians and songwriters, and at the same time introduced free-use time shifting, back-up copying, and user-generated content exceptions. In so doing, an important income stream was taken away from creators. Given the current economic situation of the average author and performer in Canada, this is exactly the opposite of what needs to be done. Instead, the government should be

modernizing the private copying regime and restoring the opportunity for creators to be paid rightfully and fairly for the use of their works and performances.

Moral Rights

In addition to economic rights, audiovisual performers seek the kind of moral rights authors and sound recording artists enjoy in Canada. For example, the Beijing Treaty provides performers the right to: (1) claim to be identified as the performer of their performances, except where omission is dictated by the manner of the use of the performance; and (2) object to any distortion, mutilation or other modification of their performances that would be prejudicial to their reputation, taking due account of the nature of audiovisual fixations.

As with the economic AV Performer Rights, there is no good reason for audiovisual performers to be denied moral rights in Canada. The implementation of moral rights is largely about allowing performers to uphold their reputations by preventing unauthorized distortions or modifications of their performances. Such implementation of moral rights can be done without creating complication in the audiovisual sector. Modifications to performances that are done in the normal course of a use authorized by the performer, like editing or media formatting, would not be a violation of the performers' moral rights.

To ACTRA's knowledge there has been no disruption in the sound recording industry since sound recording artists were granted in Canada in 2012 the kind of moral rights that audiovisual performers now seek.

Thank you for your consideration. We would be pleased to answer any questions the Standing Committee may have on this submission.