ARTISTS AND LAWYERS FOR THE ADVANCEMENT OF CREATIVITY
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November 21, 2018

Standing Committee on Industry, Science and Technology indu@parl.gc.ca
Sixth Floor, 131 Queen Street
House of Commons
Ottawa ON Canada K1A 0A6

Attention: Michel Marcotte, Committee Clerk

To the Members of the Committee:

SUBMISSION OF ARTISTS AND LAWYERS FOR THE ADVANCEMENT OF CREATIVITY TO THE STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY FOR THE STATUTORY REVIEW OF THE COPYRIGHT ACT

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 problems. ALAC's Artists' Legal Advice Services (ALAS) is a free legal clinic established by a group of 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 wish to understand their legal rights or obtain guidance on dealing with specific legal problems. ALAC also provides educational programs to help creators to understand the laws that affect them.

We ask you to consider the following 13 recommendations. Some of our recommendations involve issues brought to the ALAS clinic by creators, some would improve the ability of creators to earn a living from their profession, others would provide greater artistic freedom to both professional and other creators, and all of our recommendations would indirectly benefit everyone.

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. 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. The recent *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* should 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." This would also allow Canadian judges to look at the three-step test when interpreting limitations and exceptions to rightsholders' rights, as do national courts in many European countries.

2. Revise the "fair dealing" exception for the purpose of "education" (added to section 29 of the *Copyright Act* in 2012) **or add regulations**. Schools, colleges and universities have adopted their own arbitrary and overbroad guidelines showing how much they think they should be entitled to copy from published works without permission from authors (or their publishers), and stopped paying royalties to the collective societies representing authors and publishers. This resulted in a huge drop in revenues to authors because of the massive volume of unpaid copying that goes on in educational institutions, some of it replacing purchase of textbooks and licensing excerpts from other books and periodicals.

3. Add "pastiche" and "caricature" to "parody or satire" (added to section 29 of the *Copyright Act* in 2012) **as additional purposes of "fair dealing"** to lessen risk of copyright infringement by creators who use these forms of expression and to reduce the chill that inhibits their use. "Pastiche" involves the selection of excerpts or clips from various authors' works or from performers' performances or the imitation of the style of other creators, both kinds of pastiche often intended to express admiration for the creator whose work or style is copied. Both pastiche and caricature are often neither parody nor satire but, like parody and satire, should be defences to copyright infringement. Canada should follow the example of France, subsequently adopted in the European Union's *Copyright Directive* providing that member states may provide "exceptions and limitations" to the reproduction right "for the purpose of caricature, parody or pastiche", subject to the three-step test. The United Kingdom implemented this in their copyright legislation in 2014 by inserting "caricature, parody or pastiche" as purposes of fair dealing.

4. Give collective societies management of the "User-Generated Content" ("UGC") exception (added as section 29.21 of the *Copyright Act* in 2012). Sometimes referred to as the 'YouTube exception, this unique 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. Public dissemination of a song mash-up or an unauthorized sequel to a novel, for example, could diminish or entirely scoop the value of the existing work or performance. Dissemination of UGC should be restricted to its creator's own private circle. If not restricted to truly private communications (e.g., personal email), the original authors and performers should receive royalties for the commercial dissemination of their works or performances in or as UGC. As well as further safeguards for this exception for private non-commercial use by individuals, we recommend consideration be given to the licensing of UGC for "commercial" purposes, subject to the original creator's right to opt out. The collective society would collect royalties for user-generated content disseminated commercially and pay the authors and performers whose existing works and performances were used in its creation.

5. Implement and ratify the *Beijing Treaty*, adopted internationally in 2012. The protection of all actors and other performers for performances that are fixed in an audiovisual work, such as a film, television program or a multimedia work, e.g. a game, needs to be addressed. We propose that this protection can be extended to performers through adherence to the *Beijing Treaty for Audiovisual Performances* without further delay. We support Canadian performers in television, film and digital media in their efforts to amend the *Copyright Act* to comply with the *Beijing Treaty*. This treaty recognizes the right of audiovisual performers to be fairly compensated for

their work when it is broadcast, communicated on the Internet or shown in theatre and recognizes their moral rights (including the right of attribution). Canada should not continue to ignore the importance of this international treaty that would benefit Canadian television, film and other visual media actors and would put them on an equal footing with Canadian audio performers and Canadian authors who currently have rights under the *Copyright Act.*

6. Revise the definition of "sound recording" (in section 2 of the *Copyright Act*) to get rid of the exclusion of soundtracks when accompanying films and other audiovisual works, i.e., when exhibited in theatres or broadcast on television or streamed on or downloaded from the Internet. This means that performers – unlike authors who write music that performers sing or who write stories that they narrate or otherwise tell – do not receive remuneration when their performances are broadcast or communicated digitally as part of an audiovisual work. Performers should also be paid for the retransmission of distant signals carrying television (and radio) programming.

7. Extend the term of copyright in works from 50 to 70 years after the author's death to be consistent with legal developments elsewhere, including the United States, the European Union (including the United Kingdom), Australia and Brazil, and as will be required by the *United States-Mexico-Canada Agreement*.

8. Maintain 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 (in section 14(1) of the *Copyright Act*), unless this right were to be replaced by a reversionary right exercisable by the author or the author's heirs a specified number of years following a grant by the author during his or her lifetime. The Society of Authors in the United Kingdom and renowned publisher Matthew Evans, who led Faber & Faber for many years, agreed that 20 years was the appropriate maximum duration for a book publishing contract. In the United States, authors or their statutory successors have the right to revert rights granted during a 5-year window beginning 35 years after the date of the grant by the author. These examples recognize that authors often sign unfavourable or inappropriate contracts, perhaps because of their unequal bargaining power, especially in early career, or because of societal or technological changes. The existing reversionary provision gives the author's heirs an opportunity to obtain greater benefit from works that continue to be published or may be republished after the author's death.

9. Recognize directors and screenwriters as co-authors of cinematographic (audiovisual) works and first owners of copyright. Both the Writers Guild of Canada and the Directors Guild of Canada advocate that the *Copyright Act* be amended so that the screenwriter and the director will be considered or presumed to be co-authors of a film or other audiovisual work that has "an original dramatic character". We support recognition of the key creative participants as co-authors and first owners of copyright. On occasion there may be other co-authors (e.g., the composer of music written specifically for a film).

10. Revise the definition of "publication" (in section 2.2 of the *Copyright Act*) so works made available only by communication to the public by telecommunication will be considered to be "published" if there is evidence that publication was intended by the copyright owner (e.g., a diary entry or library cataloguing information). One consequence of the current definition is that the Copyright Board cannot grant licenses for uses of works by unlocatable authors if those "orphan works" were only available on the Internet and, consequently, never "published".

11. Insert an artist's resale right (*droit de suite*) into the *Copyright Act*. A directive of the European Union provides a resale right for the benefit of visual artists that they cannot transfer or waive – the 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 of this right is optional for EU member states but, if implemented, must be subject to reciprocity with respect to non-EU nationals, so Canadian artists generally will continue to be ineligible for artist's resale royalties in EU countries as long as there is no artist's resale right in Canada's *Copyright Act.* Canadian Artists Representation advocates that Canada legislate a resale right and fix the royalty at 5%. We support this proposal. Artwork often becomes much more valuable over time, as the artist becomes better known. Artists should share in the economic success of their work.

12. Remove the $1.25 million tariff exemption that subsidizes commercial radio broadcasters and deprives performers of remuneration (added to the *Copyright Act* as section 68.1(1) in 1997)**.** Commercial broadcasters have benefited from a subsidy that exempts the first $1.25 million of advertising revenue from royalties set by the Copyright Board for whom the ultimate beneficiaries are performers and sound recording owners. Only performers and record companies are singled out under this exemption. By contrast, songwriters and music publishers collect payments from every dollar earned by the broadcaster. This is an unnecessary subsidy for broadcasters at the expense of struggling performers (and record companies) that has deprived them of an additional $8 million in annual compensation without an economic justification.

13. Get rid of caps and bars on statutory damages for infringements for non-commercial purposes – making the existing remedy in section 38.1(b) potentially nothing 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, which are unlikely provable until there have been many infringements. However, 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.

Our recommendations would better the lives of authors or performers and their ability to maintain reasonable control of uses of their works or performances. As lawyers for artists, we know how difficult it is to work as a full-time professional creator. Changes to the *Copyright Act* that enable 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 the Committee for the opportunity to share our experience and views on copyright reform.

Visit our website at: http://www.alasontario.ca/

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