

Equitable Remuneration for Performers and Producers of Recorded Musical Works: Underlying Principles

by

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ABSTRACT

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Copyrights in Canada

Copyright means that only its owner (usually the creator) is allowed to produce or reproduce, or let someone else do it, the copyrighted work considered, including any translation of it. It includes also the right of conversion from one form to another (for example: a play into a novel; a novel into a play; a novel into a sound recording) and the rights to reproduce, adapt and publicly present a cinematographic work, communicate the work by telecommunication, present an artistic work at a public exhibition. In so doing, copyright laws aim to reward and protect the creators or their agents who may also choose not to publish their creation and to prevent anyone else from doing it.

The Canadian copyright law applies to all original literary, dramatic, musical and artistic works, defined in a relatively broad sense. Literary works include among other examples books, pamphlets, poems and other works consisting of text and computer programs. Dramatic works include among other examples films, videos, plays, screenplays and scripts. Musical works include among other examples compositions that consist of both words and music or music only. Artistic works include among other examples paintings, drawings, maps, photographs, sculptures and architectural works.

The Canadian copyright law also ensures protection for three other kinds of subject matter: communication signals, performers' performances, sound recordings.¹

❖ Communication signals: broadcasters have copyrights in the communications' signals that are broadcast. This right in communication signals is aimed to protect a broadcaster against other parties who could, without permission, free ride on the broadcaster's investment in the creation of the signal. It aims to prevent therefore the fixation, reproduction, or simultaneous retransmission by another broadcaster without

¹ Although sound recordings have been protected by copyright in Canada for many years, the protection for performer's performances was first enacted in 1994 and expanded upon as of September 1, 1997. Communication signals were protected for the first time in as of September 1, 1997.

authorization. The term of this copyright is 50 years after the end of the year in which the signal was broadcast.

❖ Performer's performance: performers such as actors, musicians, dancers and singers have copyrights in their performances for a period of 50 years after the end of the year during which the performance was performed or fixed in a sound recording. If the performance is not fixed in a sound recording, the copyright includes the rights to communicate it by telecommunication and to produce a sound recording of it. If the performance is fixed, the copyright includes the rights to reproduce it and to rent it out.

❖ Sound recordings: makers of recordings, such as records, cassettes, and compact discs have copyrights in their products for a period of 50 years after the end of the year during which the sound recording was fixed. This copyright includes the rights to publish, to reproduce and to rent out the sound recording.

Therefore there are three possible copyrights involved in a sound recording: the copyright in the musical work (composers, lyricists, songwriters, music publishers), a separate copyright in the sound recording (producers or makers) and still another copyright in the performer's performance (musicians, signers). Copyrights can coexist and each copyright can have a different owner: a songwriter can have copyright in the music and words, a sound recording company can have copyright in the sound recording, and the musicians and/or the signer who perform the song on the sound recording can have a copyright in the recorded performance.

The scope of copyright protection differs though between the three rights in a sound recording. The songwriter is more broadly protected than the sound recording and the performer's performance. For example, with regards to the public performance (examples: playing of recordings in shopping malls, bars, nightclubs, discotheques, hotels, airlines, skating rinks and restaurants) and communication by telecommunication of sound recordings and performer's performances (example: radio airplay), the producer or maker of the sound recording and the performers have, since September 1997, the limited right of "equitable remuneration" in lieu of the broader copyright protection of the songwriter. Before that time, only the songwriter and composer of the music had an explicit right to

receive payment for such uses of the sound recording. The royalties for neighbouring rights are paid to eligible performers and record producers² and are shared equally between them.

The underlying principles of “equitable remuneration” for performers and producers

Principle 1: The Willing Buyer Willing Seller Principle

Principle 2: The Principle of Competitive Markets (Proxies)

Principle 3: The Principle of Marginal Utility

Principle 4: The Principle of Marginal Cost

Principle 5: The Principle of Marginal Value for Intermediaries/Resellers

Principle 6: The Royalties Sharing Principle

Principle 7: The Risk Sharing Principle

Principle 8: The Principle of Competition/Financial Impact

Principle 9: The Surrogate Principle

² Canadian citizens or permanent residents of Canada, citizens or permanent residents of a Rome Convention country; and corporations with headquarters in Canada or a Rome Convention country. Sound recordings where “all the fixations” for the recording occurred in Canada or a Rome Convention country are also eligible.