CCC-DA*MI*© Research Project on
The Working Conditions of Creators in Quebec and Canada

Presented to
Creators' Copyright Coalition
(CCC)

and
Droit d'auteur / Multimédia-Internet / Copyright
(DAMI©)

by
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and
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Summary Report

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(DAMI©)

by
Maryse Beaulieu
January 5, 2005

The Creators' Copyright Coalition and DAMI© feels it important for the voices of creators to be heard in the current debate on copyright. Copyright has been in the news in recent years, and it goes without saying that the advent of the Internet has meant, more often than not, that it is in the headlines. It is not simply the right to respond that artists' organizations are demanding here. The discourses regarding copyright come from various sources, but artists are privileged parties whenever these questions are addressed. This text and the studies on which it is based, are intended to give creators a voice in that discussion.

Questions concerning copyright should not become the prerogative of experts, relegating artists to the sidelines. It would be detrimental both to artists and to society as a whole. The texts that concern copyright are not necessarily easy to understand. Domestic law is affected by international obligations flowing from treaties. So the normative environment is complex, and this means the subject can become tedious and veer toward the purely technical.

These studies commissioned by creators' organizations are therefore meant not only to take into account the legislation concerning copyright, but also to be documents that will be accessible to a general public. The fact that artists and their representatives are speaking here of the realities experienced in the field constitutes a deterrent against slipping into a discourse that is too technical – which, of course, has its place but which not should take over the entire debate.

Artists are a distinct group. They deal with issues involving copyright on a daily basis. It is their works and performances that set them apart. It is as creators that they hold rights. Some may argue that this is obvious, but I would say, on the contrary, that some

arts are often taken for granted because of their nature, and are therefore, paradoxically, ignored.

It is important at this point to speak parenthetically about the terminology that will be used in this document. The constellation of terms that are sometimes used for those whose voices will be heard is complex: "creators," "artists," "authors." It is not my intention to open a broad debate here on this tricky issue where boundaries are not always obvious. I will use the term "creators" in the body of the text, a term that includes performers. I am aware of the difficulties that one choice or another may pose, especially because the normative universe includes both authors and artists. Without wishing to dodge the question, we should note that the report from English Canada talks of "creators" while the Quebec report uses the terms "creative artists" and "performing artists," groups that are not comparable in every way, but that are nevertheless very similar. Since one terminology or another is called for, I have chosen the term "creators." However, when these reports are discussed individually, I use the terminology of the respective original text.

It was important to the creators' organizations that the situation of their members be documented. Even though there is copious literature on copyright, few texts represent the point of view of creators. Documentation that covers many artistic practices is even rarer. The studies commissioned by the CCC and DA*MI*© fill this void and supply information over a wide spectrum. It is from the angle of creators that copyright is viewed here – a focus that obliges the reader to have empathy and not to make presumptions about what will be said. Of course, the realities of creators are depicted, but this assumed point of view does not detract from the rigour of the texts in any way. Written from this perspective, these texts effectively paint a portrait of creators' working conditions in Canada, a detailed snapshot of their profession which nevertheless does not claim to be exhaustive.

Although authors are generally owners of rights conferred upon them by the *Copyright Act*, creators and money form a rather odd couple. This mismatch is not new, and it endures with the new media generated by new technologies. To talk of money is important and must not be avoided. For instance, economic rights, in spite of their nature, do not guarantee equitable remuneration. As for moral rights, these can be waived. Contractual practices also have an organic connection with rights, and it proves to be important to make a bridge between copyright and contracts. The contract is the instrument through which the *Copyright Act* is operationalized. These issues will also be discussed.

To be clear, the writing of rules of law establishing a legal system is based on legislative policy that is founded on values and choices. There is nothing inevitable, deterministic, or impossible about this. And in this spirit, creators must be involved and heard, since they are at the heart of the issue of copyright.

What creators want, above all, is to practise their art, and to be constantly at the barricades defending their rights is extremely demanding for them. Much energy has been expended in recent years, and there does not seem to be any end in sight. In spite of everything, creators are making their presence known. They want to be listened to, but even more, they wish to be heard.

In this report, I first present the report *Creators and Copyright* by John Lorinc, then the report from Quebec, CCC-DA*MI*© *Research Project on Artists' Working Conditions*. There are methodological differences between the two reports. The roads

taken differ, and so these texts differ; each contributes in its own way to depicting the current situation of creators in Canada. Finally, I discuss the central ideas the two reports have in common.

What creators experience and the many difficulties that they report occur in a context that is certainly not neutral. "Market economy," "convergence," and "globalization" are terms we hear every day; but there is also a geography to the dominant discourse that favours certain parties over others. We must be aware of existing paradigms that muddy the waters and reveal a short-term view that cannot and must not be encouraged.

The texts: An attempt at typology

The goal of the project was to offer the reader comprehensible texts that do not sacrifice complexity to readability, that privilege the untidiness of the field over an overly Cartesian typology. The texts have much in common yet display diversity – that is what seems to be the subtext. They are, in a word, asymmetrical. The objectives are similar: to document the situation of working artists. This required going into the field to collect information in order to faithfully describe the realities that creators experience. This report is a summary of two reports, one from Quebec and the other from the rest of Canada. It is not a substitute for the original texts whose scope and analysis offer the reader essential material for situating creators in their environment. Rather, it is a reflection of the two. While it is intended to be a synthesis, I have tried to remove myself from the parent texts in order to push the discussion a bit farther. The notion of choice has been mentioned already. The upcoming reforms to copyright are likely to privilege choice, and so documenting the situation of artists will enable the possibility of enlightened choices being made.

Creators and Copyright, by John Lorinc

John Lorinc's text is dense. It must be read carefully since the daily realities of many artists are described in it. One feels very clearly the presence of these separate universes, which, without being mutually exclusive, have their own distinct customs. In order to conduct his study, Lorinc interviewed artists and representatives of artists' associations and copyright collective societies. He also consulted secondary sources, and he cites a variety of primary sources. In order to illustrate his comments, Lorinc frequently draws examples from reality. The experiences of creators are, in fact, the raw material for the study. Lorinc defines his text thus:

> Obviously, this survey is not exhaustive. Nor is this document intended to be read as a policy brief, a legal opinion on existing collective agreements, or a quantitative analysis of creators' economic circumstances. And while most of the sponsoring organizations have formal positions on copyright reform issues, this report will not attempt to reconcile or harmonize these views, nor present a detailed parsing of the fine points of copyright law. Lastly, I do not pretend to depict the concerns of every category of creator – for example, architects, computer games designers and storytellers, as well as the thousands of individuals who make art only for themselves or their friends. (John Lorinc, *Creators and Copyright*, p. 14)

Lorinc delivers the results of his research with all the rigour and versatility that the subject requires. His text is divided into three parts. The first provides a context. The second looks at the sectors of photography, visual arts, theatre, film, and television, performers, writers, and music. Lorinc thus segments his text by sector and describes the issues in each with regard to copyright. In the last part, Lorinc analyzes the impact of the amendments made to the *Copyright Act* in 1997 in terms of exceptions, the state of collective management in Canada, moral rights, and legislation regarding the status of the artist.

In the first part, Lorinc introduces the reader to the political and legal context. He offers a brief history in order to situate the emergence of copyright legislation in Canada. He also discusses the amendments made to the Act over the years, notably the reforms of 1988 and 1997. The adherence of Canada to international treaties on copyright and their effects on domestic statutes are mentioned, as are major reforms made elsewhere in the world, notably by our neighbours to the south. Lorinc also takes a look at recent jurisprudence through rulings on important issues in the *CCH*, *the Society of Composers, Authors and Music Publishers of Canada, the BMG Canada Inc*., *the Robertson, Théberge,* and *Desputeaux* cases. As a number of these were made by the Supreme Court of Canada, they are very important decisions.

In addition, a new process of reform of the Act has been underway since 2001. The thorniest question currently being discussed involves the use of online material used by educational institutions. In March 2004, the Standing Committee on Canadian Heritage tabled an interim report dealing with some questions: ratification of the WIPO treaties; changes to put photographers on the same footing as other rights holders; amendments to make Internet service providers responsible, under certain conditions, for the content that they put online; and the introduction of an extended collective licence for educational institutions to cover uses of works found on the Internet. The reform process is still ongoing, and we cannot know what the future will bring. However, it is the context for the next, central part of Lorinc's report. In this part, Lorinc analyzes the seven sectors, offering a brief portrait of each, and then examining in greater detail the stakes at play for creators in each of them. Here is an overview.

Photography

In many cases, photographers work in several worlds at once in order to earn a living. Advertising and art photography are generally identified as being at the extremes of a continuum of professional practices. This is the environment in which photographers work. Structural changes in the media industry have affected them inasmuch as there are now fewer and bigger players. Electronic rights are now demanded of creators, and the remuneration attached to these uses is rather symbolic. The advent of new technologies has also had a major effect. Film and darkrooms have given way to expensive digital equipment that must be updated very frequently. This constitutes an extra financial burden that clients certainly do not assume in its entirety. Moreover, digitised images are easily used, often without permission. Moral rights have been weakened as a result; the work is not often associated with its author and the integrity of the work is breached more easily than before. The fact that photographers are not on the same legal footing as other authors is problematic and should be the object of amendments that make photographers the initial rights owners of their works.

The situation of illustrators is also briefly described in this section. Illustrators and photographers both belong to CAPIC (Canadian Association of Photographers and Illustrators in Communications). Besides their work for book publishers, illustrators also work in the media and for advertising agencies. Like photographers, they often work in diverse environments. There is no "standard" contract; illustrators must negotiate individually. The results of negotiations are therefore highly variable.

Visual arts

In this sector as well, many artists fund their artistic projects from income provided by more commercial and market-oriented jobs. It is noted that artists receive reprography royalties.

The relationship between artists and museums and galleries is extremely important. The exhibition right was instituted in 1988 during Phase I of the reform of the *Copyright Act,* over the objections of these public institutions. When museums acquire works for their permanent collections, they often ask artists assign their rights, invoking budgetary constraints. And when museums put works online, artists are not paid as a general rule. Another issue is the "remix" culture, which consists of using other works in a new artwork. This practice invites the use of certain works without permission. In the *Théberge* case, a Supreme Court decision, we have a demonstration of the erosion of artists' moral rights. Meanwhile, judging from the federal government's Section 92 report, a "*droit de suite*", which would provide artists with a portion of the price paid upon subsequent sales of their work, does not seem to be about to become a reality.

Live Theatre

The Playwrights Guild of Canada, working with the Association québécoise des auteurs dramatiques (AQAD) and Access Copyright, has developed an online publishing service for scripts. This service makes available texts that would otherwise be much more difficult to access. For a fee, users may purchase the right to print one copy of the text. This streamlined distribution that appropriates new technologies has proven to be positive for authors. Not that many plays by Canadian authors are performed in a given year, and playwrights frequently have to work in related fields to make a living. An emerging trend is for theatres to seek participation rights from the playwright whose play was commissioned or presented as a premiere production. This enables the theatre to receive a share of that play's royalties for a period of, typically, between five and ten years. This practice, which originated in the United States, is spreading. Other individuals involved with the mounting of a play are also beginning to demand the right to participate in royalities, all of which tends to shrink further the playwright's piece of the revenue pie.

Current practices in live theatre respect the moral rights of the author. Electronic rights are not an issue, at least for the moment. Current exemptions for educational institutions, on the other hand, are real threats.

Film and television

The many film shoots coming from the United States have led to huge changes in the field of film and television. The regulatory framework and tax incentives have played a primary role in stimulating production. More recently, however, there has been a downturn, and the Canadian government has again been asked to help stimulate domestic production.

In the film sector, authorship is a particularly important issue. The *Copyright Act* does not define the author of audiovisual works. It is on the status of the "director" that a number of the discussions converge. Screenwriters are protected under the *Copyright Act.* Collective agreements also provide a framework for practices in this field. The Canadian Screenwriters Collective Society, created in 2000, collects royalties for secondary uses. Agreements with foreign collective societies are particularly important in this area.

The advent of new technologies has had an impact on the work of directors and screenwriters. For screenwriters, the extra writing required for websites is now covered by a collective agreement, and disputes over unauthorized uses are settled by the Writers Guild of Canada. Meanwhile, the National Film Board is digitizing its collections and would like to develop a Web site for managing royalties. Because the *Copyright Act* is silent on the status of directors, they have neither control over this type of use nor access to the revenues that will eventually be generated.

It seems that Canadian productions have fewer difficulties than Hollywood blockbusters with the illegal downloading of works. The challenge for the Canadian movie industry remains access to screens.

Performers

Neighbouring rights, which were introduced in Phase II of the reform of the *Copyright Act* in 1997, affects performers. Performances for audio recordings benefit from certain protections. Organizations such as ACTRA and Actors Equity (CAEA) represent performers, and many types of performance fall under collective agreements. Performers are also affected by the advent of new technologies. New practices are arising: video games drawn from films for which voice-overs must be recorded, as well as new forms of online advertising.

The growing popularity of digital versions of films is an issue. Low-budget productions have always existed and union organizations have tried to take account of this reality, but the "democratization" of these technologies is exerting extra pressure to reduce the costs of hiring actors, and this phenomenon may become problematic.

Writers

Lorinc emphasizes the very diversified environment in which writing is practised. He discusses newspapers and magazines, databases, books, poetry, and textbooks, along with uses for educational purposes on the Internet.

Magazines and newspapers

Relations between freelance journalists and editors of newspapers and magazines are more formal than they once were. The contracts that freelancers must sign cast a wide net and often strip freelancers of all of their economic rights. Moral rights are also affected by these practices. The digital environment has definitely had an impact, and contracts signed by freelancers covering new uses do not translate into better financial conditions. Internet uses and the business model to be deployed have not yet been developed, and much unauthorized use has been noted.

Databases

The use of materials in databases has been questioned by freelance journalists. The class-action suit launched by Heather Robertson was aimed at obtaining a ruling on whether

use by electronic means of texts is an electronic version of the paper publication or a new use. Robertson, a Toronto freelance journalist, went to court in 1996 over whether articles written for the *Globe and Mail* and found in other databases constituted unauthorized use of those articles. The Ontario Court of Appeal ruled in her favour in October 2004. The case is still before the courts.

Books
Book publishers are on the lookout for developments in their industry in media other than paper. It appears, however, that books as we know them are still preferred by readers. Publishers nevertheless ask authors to assign electronic rights although these rights are often not clearly defined and their extent is not always easy to determine. If publication on demand becomes viable, this could change relations between publishers and authors; currently, when the print run of a book is exhausted, the rights revert to the author. In the future, publishers may ask for exclusive rights in perpetuity.

Poetry
Poets feel vulnerable because their texts are often short. Some younger poets use the Internet as a means of dissemination. Certainly, the smaller market for poetry must be taken into account.

Textbooks
Textbooks have their own niche, and unauthorized use is a widespread phenomenon. The granting of licences by Access Copyright in the education field allows money to be recovered that would otherwise be lost. Authors of textbooks generally receive a lump sum that is not associated with the commercial success of their texts. The publishers, however, have not gained favour with creators because they themselves have not been very respectful of creators' copyright.

Educational use of the Internet
The educational use of copyright-protected materials that are made available on the Internet without protection is an important subject. The education lobby would like an exemption to allow this use of material. Creators, of course, are opposed. Access Copyright has proposed that the *Copyright Act* be amended so that a system of licences can be negotiated with educational establishments regarding use of materials on the Internet, and the Heritage Committee's Interim Report echoed this idea. This is an issue to be followed.

<u>Music</u>
The music sector occupies a privileged position. As in other sectors, creators make their living from a variety of sources. Moreover, a number of organizations exist, both collective societies and professional associations. The music sector benefits from a well-established and smoothly running structure. The new technologies have hit this sector head-on, and the issues raised have been widely publicized in the media. Business models are being developed and the music industry is experiencing major structural changes. Sites where music can be downloaded for a fee have been set up.

The last part of the Lorinc report is divided into subsections. The impact of amendments to the Act in 1997 are discussed from four angles: consequences of the exemptions introduced to the Act through Phase II; the state of collective management in Canada and the capacity of collective societies to generate revenues for creators; the state of moral rights after *Théberge* and *Desputeaux*; and the relevance of adopting status of the artist statutes as a means of increasing artists' control over their works.

Exemptions
The exemptions introduced to the *Copyright Act* were intended to be responses to public policy objectives. Questions must be asked about the technique used, since certain types of use and their costs could be negotiated between users and collective societies, for example. The search for a balance between rights holders and users should not result in free access. Exemptions have a cost, and this means that creators have a gap to make up. In this regard, it is striking to note that the Section 92 review is silent on quantification of costs related to exemptions.

The state of collective management
Collective societies are diverse, ranging from large organizations to very small ones. Tariffs may be set by the Copyright Board or negotiated between users and collectives. These collectives manage large sums of money, but not all the funds collected go to the creators; management fees are also a consideration. The high number of collective societies is another issue. We will have to see how these evolve in the future given the relatively limited nature of the Canadian market. Finally, how collective societies adapt in order to obtain and manage electronic rights will be key. A system of extended collective licences could be an interesting route according to one author, but the Interim Report of the federal government, issued on 24 March 2004 is mute on the question.

Moral rights
The connection between moral rights and economic rights is central. The *Théberge* and *Desputeaux* rulings have had an important impact on them. The new technologies also make works eminently alterable. Moral rights seem to be more fragile than ever. In this spirit, it is perhaps time not to remodel these rights, but to reflect on the role that they must play in the legislation.

Status of the artist legislation
In the early 1990s, the federal government adopted the *Status of the Artist Act.* It was intended to be a supplementary tool for improving the living conditions of artists. The Act is addressed to artists who are independent entrepreneurs. Rules were enacted to provide a framework for the relationships between artists and producers falling under federal jurisdiction. Quebec already had two pieces of legislation regarding the status of the artist that predated the federal statute. Saskatchewan also has its own statute. Ontario is considering writing one, and the adoption of such a statute was part of the electoral platform of the Liberal Party of Ontario elected a year ago. In this context, it is important to consider which is the most effective tool for artists: collective management, status of the artist legislation, or a combination of the two, as in Quebec.

Lorinc's overview shows the extent of the impact of copyright issues on creators. Although each sector has its own set of practices, there are certain common issues. The new technologies affect sectors to different degrees, yet they constitute an important issue for all creators. This is the context in which the exemptions were introduced in 1997, and are now threatening to become a legislative technique. Moreover, the recent decisions by the Supreme Court generally disadvantage artists in favour of users. These are the important elements. I shall return to them below.

CCC-DAMI© Research Project on Artists' Working Conditions: Report from Quebec by Maryse Beaulieu

The report from Quebec was designed differently. Directed interviews were conducted with representatives from artists' associations and collective societies, and with several government representatives. Separate interview guides were prepared for the artists' associations and the collective societies, as the missions of these two types of organizations are not the same. The government representatives provided less formal assessments. The report from Quebec thus gives results for each of these three types of participants. The intent is to depict the realities lived by creative and performing artists with regard to copyright and contracts, both individual and collective. Questions regarding globalization and new technologies were also addressed. The Quebec report, thus, is not structured by sector but by organization. It must also be said that the Quebec legislative reality differs from that in other Canadian provinces because two provincial statutes on status of the artist cover a large part of the field. This specificity must be kept in mind when looking at artists' living conditions.

The Quebec report is organized quite simply. After the executive summary, the objective and context of the study are explained and the methodology is described. Finally, the information gathered is presented in three parts: artists' associations, collective societies, and government representatives.

The interviews were held, for the most part, from late May to mid-June 2004. I conducted 22 interviews, divided as follows: 12 artists' associations, 7 collective societies, and 3 interviews with four government representatives, who, with their respective assignments, are in touch with the issues under investigation. This study addressed two main subjects: copyright and contractual practices. The materials were organized so that the results were divided by reference group and by subject.

What emerges from these directed interviews? The common denominator, of course, is the artist. Equally obvious is the plurality of artists' experiences. It is clear that there are common threads, but the reality is far from monolithic. Issues involving copyright and contractual practices are directly linked in all sectors. I attempted to take these things into account by organizing the material in such a way that examples could be used to illustrate what artists' representatives said without resorting to anecdote. A contract, taken in its entirety, is a sort of snapshot of the relationship between artists and users. It structures uses and practices that are directly connected to the reality of the field and gives a sense of the current state of affairs. Although copyright is of primary interest in this report, it is embodied in broader contractual relations, and I will sometimes note practices that, without being about copyright per se, seem relevant. Below are the points that I consider central in this report.

The impact of new technologies : a reality with a variable geometry
The new technologies are often the lens through which copyright is seen. There is a deep concern about the emerging new media in the field and also a sense of the disparity between emerging uses and existing legal protections. New technologies do not have the same impact in all sectors, however. Time is also a variable in the sense that future development of higher-performance or more accessible technologies will once again change the landscape and may affect sectors that, for the moment, are more or less untouched. For without minimizing the impact of new technologies, we can say that they are not of concern in all fields though they are the window through which issues linked to creators' rights are viewed by the public.

Moral rights: uses vary by sector, and very distinct practices are reported
Although patrimonial rights are bread and butter for artists because they are economic in nature, moral rights are also affected by contractual practices. There does not seem to be a systematic waiver of moral rights, but their scope is definitely being diminished. There is more pressure on moral rights in environments where business activity is intense; due to the dictates of commerce, attempts are made to obtain as much flexibility as possible, and works are becoming more like merchandise. The properties that are on the market are less closely tied, thus, to moral rights.

The idea that a contract is automatically fair should be rethought
The idea that a contract is automatically fair implies that the parties to the contract have equal strength and that the contract resulting from the negotiations between the parties will be just and equitable. Given this premise, it is not surprising that status of the artist statutes designate mechanisms to provide a balance in individual contracts in which the rules are normally dictated by the parties. Act S-32.1 and the federal *Status of the Artist Act* contain an obligation to negotiate with a view to obtaining collective agreements or scale agreements. Act S-32.01, which applies to literature, visual arts, and arts and crafts, sets out a number of components that must be written into the contract. These provisions depart from the general rules concerning contracts and certainly have a protective function. The existence of these provisions and the formalism that govern individual contracts have not, however, led to in-depth changes.

Collective societies and artists' associations: two modes of appropriation
It seems clear that the most effective modes of intervention in contractual matters are collective mechanisms. It appears that the most conclusive modes for artists exist within organizations, whether they be collective societies or associations that negotiate collective agreements, that have sufficiently strong bargaining power for there to be real negotiation.

Although collectives and artists' associations are organizations based on different premises, they are both tools that enable artists to strike a better balance in their contractual relations.

Establishing the value of copyright: a persistent difficulty
It is interesting to note that uses related to new technologies are often part of a group of uses for which large sums are in play. The importance of establishing a value for these

uses tends to be underestimated. The fact that there is *de facto* access, free of charge, exerts a pressure on the value of use.

Central ideas of the Two Reports

It is important to find the common central ideas in the two reports. What must one retain from these texts? It seems possible to postulate *a priori* that the situation in Quebec and in other Canadian provinces is comparable, without seeking to create artificial parallels between the realities presented in the two reports.

Circulation of works and economic benefit: a two-speed system
One might think that the increased circulation of works would bring increased profits to creators, but this mathematical logic does not seem to apply. The increased use of works and their circulation in the virtual world do not translate into substantial economic gains. The pace of changes in recent years, notably with regard to new technologies, makes it difficult to follow emerging practices and provide them with a contractual framework. The value of these uses is still to be determined.

Moral rights
It must certainly be kept in mind that new technologies make moral rights more fragile, in terms of both the paternity of the work and its integrity. Contractual practices are also modulating moral rights. Pressure from the marketplace and the circulation of goods seems to put creators at a disadvantage.

Exemptions
The exemptions added to the *Copyright Act* in 1997 have opened a major breach because they have weakened the spirit and the letter of the Act, which was adopted initially to protect authors by according them rights to their works. First, creators' work is expropriated without compensation and the revenue linked to exempted uses is thus forgone. Second, the signal sent to users with the introduction of exemptions is bad, as the justifications can assist other users of copyright-protected works who do not wish to pay royalties. Exemptions thus create holes users try to enlarge through further revisions of the Act; they multiply the situations, presented in Kafkaesque terms, for which exemptions provide the solution.

Contractual practices
What clearly emerges is that negotiating power is a key. Collective management, collective agreements, and scale agreements constitute the most efficient means for creators to obtain a stronger negotiating position. It must be taken into account that Quebec has two statutes dealing with the status of the artists: *An Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters* (Act S-32.01) and *An Act respecting the professional status and conditions of engagement of performing, recording, and film artists* (Act S-32.1). Obviously, this fact alone does not mean that no collective agreements exist in the rest of Canada. In fact, the federal statute on the status of the artist, the scope of which is quite narrow, applies to all of Canada. The fact remains, however, that the Quebec's status of

the artist statutes have specificity. In addition, Quebec's legal system is based on civil law, while in the rest of Canada common law governs private law.

Individual negotiation is chancy and is generally detrimental to creators. Contractual practices are an important proof of this, and the uses that arise must also be observed. The party with the greater negotiating power may contractually obtain an assignment of economic rights and a waiver of moral rights. A very wide range of rights may be signed over, and the assessment of the monetary compensation is purely contractual. It may go so far as to be free of charge.

Conclusion

Is the *Copyright Act* – which, in principle, organizes and deploys a system to protect authors – still fulfilling its role? Less and less, it seems. For, with each revision of the Act and each Supreme Court ruling, creators are seeing their rights eroded in favour of the users of their works. Creators feel more and more marginalized by a statute that treats them like an afterthought, and which is being constantly broadened to protect new classes of works such as software and databases, and many more of rights holders who are not creators. In addition, new technologies and globalization are posing new challenges.

In this already difficult context, creators are thus confronted with the task of convincing legislators to return to the primary mission of the law, and to seek legislative solutions to new challenges that respect these primary rights, and to remind them that reform is based, above all, on choices of policy. For, as was said at the beginning, there is neither determinism nor inevitability here. It is not the rule that should dictate what the law will be, but the body that makes the law. Here, parliament, in its wisdom, must step forward.

CCC and DA*MI*© Research Project on
the Working Conditions of Creators in Quebec and Canada

Creators and Copyright in Canada

Prepared for the
Creators' Copyright Coalition
Bill Freeman, chair

by John Lorinc
November, 2004

Author's Note

The following report was commissioned by the Creators Copyright Coalition and DAMIC, an umbrella organization of national artists' groups. It will present a sector-by-sector description of the concerns of various categories of creators, including areas such as digital uses, contracts, and legislative gaps in existing copyright law. The report also presents the experiences of some individual working creators to illuminate a selection of the rights issues they face in their professional lives.

Obviously, this survey is not exhaustive. Nor is this document intended to be read as a policy brief, a legal opinion on existing collective agreements, or a quantitative analysis of creators' economic circumstances. And while most of the sponsoring organizations have formal positions on copyright reform issues, this report will not attempt to reconcile or harmonize these views, nor present a detailed parsing of the fine points of copyright law. Lastly, I do not pretend to depict the concerns of every category of creator -- for example, architects, computer games designers and storytellers, as well as the thousands of individuals who make art only for themselves or their friends.

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Part I: Introduction

The interests of creators and producers are neither identical nor even parallel.

Throughout history, human beings have felt compelled to express themselves by creating works of art – good, bad and indifferent. It is not within the scope of this report to examine the reasons for one of the defining qualities of the human condition. Suffice it to say that the expectation of financial gain is just one of many complex motivations for creators. Indeed, the vast majority of creative work never reaches "the market."

The commercial entities that deal in marketable creative works – publishers, music labels, media conglomerates, theatre companies, etc. – function in much more straightforward ways. With a few exceptions, these companies seek out creative works that can be expected to attract audiences, then, devise strategies for marketing and distributing them. Such firms often make a substantial creative contribution to the "finished product" (editing, sound mixing, etc.). And some have extremely high standards, a fact of corporate life that enhances our culture generally. But the overriding motive for these firms is to earn a profit for their shareholders. They achieve this goal the way companies in all sectors do: by maximizing their revenues, minimizing their expenses, and protecting their assets from rivals.

The foregoing distinction may seem obvious. Yet it bears noting because of the emergence of an unfortunate dynamic in the current global debate over copyright reform and the highly challenging issues posed by digital technology. In Canada, as in many other countries, the discussion has been largely cast in bi-polar terms, with "users" (everyone from libraries to file-swappers to "electronic frontier" activists) in one corner, and copyright owners in the other. Due to the nature of our policy/political process, the copyright owners camp has been dominated by the media and entertainment industries, which can afford to hire lawyers, lobbyists and experts to represent their interests to decision-makers. There's nothing wrong with self-interested advocacy per se. But as this debate has unfolded, the views of the creators themselves have been overwhelmed by those of producers, publishers and media conglomerates, and assumed to always coincide.

The Creators Rights Alliances in Canada and the U.K., and similar coalitions elsewhere, have attempted to open up the debate, and draw attention to areas and policies where creators' interests have not been fully articulated, or differentiated.

There are certainly issues where creators and producers' views overlap, but their interests do *not* coincide as a general rule. As many artists understand from professional experience, their own goals do not necessarily match those of companies such as publishers, film studios, etc. This is why we have book contracts, performers' guilds and negotiations over the allocation of royalties or other revenues generated by copyright works.

It should also be noted that creators and their producers or publishers have fundamentally different perspectives on the broader culture. A record label may see the universe of songwriters and musicians in the way that a mining company would regard a geographical region considered to be rich in, say, diamonds. They stake a claim and then attempt to extract the minerals in such as way as to maximize return on investment.

Creators, by contrast, exist *within* a culture, broadly defined, and their work is shaped by the way their own ideas interact with whatever they find in that ambient environment – be it the work of other artists, new technologies, political trends, etc. Creators draw on the culture in unpredictable ways, and so it is in their artistic interest to have as much access to that culture as possible. The cultural environment is healthiest when artistic work can be disseminated as broadly as possible without undermining the rights of creators to reap an economic benefit, as well as ensure that their moral rights are respected (i.e., that they receive credit and their works are not altered without permission).

If their works have a commercial existence, creators naturally want a fair share of the proceeds of copyright. Professional freelancers must maintain control of their intellectual property and their moral rights in order to earn a living. But other creators, because they do not generate a living wage from their work, will view these issues from a range of perspectives. Some teach, and rely on being able to use copyright work in an educational context. There are those who may deliberately use or transform the work of other artists (house music, collages, video art, documentaries, etc.) to produce new forms of art or speech, an approach that may involve collaboration with other artists, on one hand, or copyright or trademark infringement, on the other. And some artists will derive their primary creative income from other sources altogether, e.g., in the case of high profile musicians, ticket sales and merchandising revenues generated by tours.

All of these variations take on yet another layer of complexity when the discussion comes to include the Internet. For instance, a growing number of creators, especially younger artists, hold opinions about the Internet's capacity to distribute creative works that has put them sharply at odds with established artists' groups, and even some high-profile artists, in the debate over piracy, unauthorized copying and digital uses. This perspective places such artists in the rapidly growing "copyleft" movement, which promotes such ideas as "open-source" or free software and the advent of "creative commons" licenses that permit certain types of copying. Others have appropriated the aims of the copyleft movement to question the very future of copyright as a meaningful legal construction.

Stepping back, these are global issues in every way. Digital technology has altered so many creative forms. It respects no boundaries and few conventions. Meanwhile, the growth in the worldwide trade of cultural `goods' – fueled by the ever expanding

influence of enormous media/entertainment conglomerates – situates basic questions about copyright and creators in an international corporate context. Still, Canadian creators must first attend to what's happening at home, and so the following report seeks to provide a domestic perspective in this difficult and dynamic debate.

The Political and Legal Context

As of the fall of 2004, Canada has arrived at a crucial moment in the evolution of its approach to copyright policy. Because of rapid advances in new digital technologies, these issues have a direct impact on a wide range of powerful media industries, as well as public institutions and the thousands of creative individuals who comprise this country's intellectual and cultural life. These challenging debates aren't merely about copyright technicalities such as royalty fees and permissions. Decisions made in Parliament and the courts affect both the public's ability to access creative works, as well as a creator's ability to control his or her intellectual property, and benefit from it economically. In other words, copyright law has a crucial role in determining the expression of ideas and the movement of information, broadly defined, within society.

To understand where we are at this moment, and how we got here, it's important to briefly review the recent history of copyright policy in Canada.

Canada's Copyright Act was enacted in 1924. According to the Department of Canadian Heritage, the law exists to provide "a legal framework within which creators of literary and artistic works, including films, books, sound recordings, information products and computer programs are entitled to payment for the use of their works. It establishes the economic and moral rights of creators to control the publication of their works, to receive remuneration and to protect the integrity of their endeavours."

The origins of Canada's copyright law can be traced to 1710, with the enactment of the Statute of Anne, when English legislators established copyright rules to regulate the book trade to mollify the concerns of booksellers and printers about unauthorized competition. The law also established statutory time limits governing the exclusive rights enjoyed by authors and hence by publishers/printers and booksellers, and thus introduced the concept of the public domain. In effect, the political motive behind copyright legislation was to constrain the commercial clout of the publishing industry, although early judicial decisions also recognized the rights of authors. The concept of a balance between creators and producers rights emerged from common law legal decisions involving contested rights to the publication of a poem composed in the mid-1700s.

As a judge at the time wrote, "It is just, that an author should reap the pecuniary profit of his own ingenuity and labour. It is just, that another should not use his name without his consent. It is just that he should judge when to publish, or whether he will publish…"

Canada's copyright laws, at the same time, are also rooted in the 18th century French liberal tradition of "moral rights." This formulation holds that creators are sovereign individuals and enjoy an inalienable right to have their authorship of a work respected. Moral rights were first enshrined in international law at the Rome Congress of the Berne Convention, in 1928. Apart from their connection to human rights theory, moral rights address the principle of an author's need to protect his or her reputation: the right to be identified as the author of a work or to have his or her anonymity protected; the right not to be published without consent; and the right to have the integrity of the

work respected. Copyright is the only sort of intellectual property right to be associated with such concepts.

A moral rights clause was added to Canada's copyright law in 1931 as part of the ratification of the Berne Convention, and such provisions exist in a handful of Quebec laws. The best known test of Canada's protection for moral rights occurred in 1988, when the Supreme Court of Canada ruled that artist Michael Snow's moral rights had been violated when red ribbons were tied around the necks of the Canada geese sculpture installed in the Toronto Eaton Centre. But two recent court rulings (see below), as well as mounting creator concerns about the ease with which digitized works can be altered without the author's permission, have led to calls for a strengthening of the moral rights provisions in the Copyright Act.

Early copyright statutory provisions focused on the printed word, and contained no provisions governing the *use* of copyright material, nor riders about broader public policy objectives linked to intellectual property. In 1924, the new Canadian law protected the authors of literary and artistic works from unauthorized copying. But it also included a "fair dealing" defense, which allowed individuals to make copies for private research or study without seeking permission from the rights holder. In the early 1930s, the law was amended to regulate the tariff appeal process for composers and music publishers, and to collect royalties from the public performance of musical works.

In 1988, the federal government enacted the first major set of amendments to the Act, and these illustrate how far copyright law has evolved. The changes included an exhibition right for artistic works displayed in museums or galleries; explicit protection for software programs; and measures to improve the collective administration of copyright, and to expand it to cover other works and uses beyond the performance of music.

A year later, following the approval of the Canada-U.S. free trade agreement, the law was again amended to require cable and satellite companies to pay for the retransmission of copyright works. In 1993, Parliament passed a further amendment to the Act to clarify the definition of musical work to include both acoustic and "graphic" (i.e., scores) representations of music, and to make all cable and satellite transmitters liable for royalties.

In 1994, after the North American Free Trade Agreement came into force, the Act was changed to allow a rental right for sound recordings and software (i.e. permitting the lending or rental of such works through libraries, rental chains, etc. or the prohibition of lending or rental) as well as increased protection against the importation of pirated works.

A year later, the members of the World Trade Organization established the "Trade Related Aspects of Intellectual Property Rights Agreement" (TRIPS) – a multilateral framework with an arbitration mechanism. The agreement exists not only to promote protection for intellectual property rights, but to encourage WTO nations to see these as a means to an end, which is the development and dissemination of new technologies "to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare…" As a Creators Rights Alliance commentary on TRIPS notes, the agreement represented a change of intent with regard to copyright. "Historically, IPRs (intellectual property rights) have not been burdened with objectives other than the protection of creators' rights and the public interest in access to information and cultural heritage."

The second phase of Canada's copyright reforms were enacted in 1997. The amendments, contained in Bill C-32, included a broad range of reforms benefiting various industries as well as rights owners. Book publishers were granted a so-called "distribution right" allowing them to sue booksellers that circumnavigated exclusive distribution arrangements negotiated between Canadian and foreign firms. Performers and producers won the right to collect royalties on music broadcast by radio stations and other public performances – a "neighbouring right." Traditionally, only composers and song-writers were entitled to receive royalties for the public performance of their music.

The legislation, furthermore, established a levy on blank tapes, cassettes and disks sold in Canada, with those revenues divided up among music producers, composers and lyricists, and recording artists. This provision essentially recognized the *fact* of widespread unauthorized copying of recorded music, and established a compensatory – as opposed to legally punitive – solution designed to provide revenue to copyright owners for foregone record sales.

But the most historic component of C-32 involved the enactment of a series of "exceptions" to the provisions of the law. These covered a range of "uses" deemed to be in the public good: education institutions were granted exemption for the use of copyright materials for some instructional purposes, such as overheads and tests; and an exception allowing the reproduction and use of radio and TV and news commentary broadcasts for up to a year from the taping date without payment of royalties. Non-profit libraries, museums, libraries and archives were granted a "single copy exemption" in certain circumstances so they could make duplicates of rare or unpublished works to maintain collections or participate in an inter-library loan system; and the right to reproduce entire articles from newspapers or magazines that are at least 12 months old, for private study or research. These institutions were also given limited liability with respect to the use of self-serve photocopiers.

Lastly, individuals with perceptual disabilities, hearing loss and learning disabilities were included in the new legislation, through an exception that allows the copying of a literary, musical, dramatic or artistic work in an alternative format, such as a talking book or a Braille text. The proviso in the law is that the alternate version of the work is not already commercially available in Canada.

All together, Canada's copyright legislation is considerably expanded from the original legislation. As amended, the law establishes a range of related rights that don't involve copying per se, various mechanisms for collecting royalties, legislated protections for both industries and individual rights holders, and provisions governing uses and users, both individual and institutional.

Where it fell silent, however, was on any special treatment for the realm of "digital uses." The federal government decided to deal with this matter in the next round of reforms, when (or so the reasoning went at the time) there was a greater sense of clarity about the immensely complex copyright issues arising from the advent of the Internet. At the time, of course, the dominant digital medium was the Web, and technologies such as Napster, peer-to-peer (p2p) file-sharing, MP3, CD burning, and DVDs were in their infancy.

Since C-32 received royal assent, there have been numerous critical developments in the realm of policy directed at digital issues, as well as all rapid technological changes that are well known. In 1997, Canada signed two World Intellectual Property Organization: the WIPO Copyright Treaty (WCT) and the WIPO Performances and

Phonograms Treaty (WPPT), both negotiated shortly after the TRIPS agreement came into force. Parliament has yet to make the legislative changes that would allow Canada to ratify either treaty. Both treaties came into effect in 2002. Canada's slow pace in making the necessary amendments has been increasingly noted abroad by its trading partners.

The WCT and the WPPT aim to curb unauthorized downloading of copyright works, such as music files. They clarified or established the so-called "making available right." In effect, this new exclusive right provides creators, producers and performers with the right to authorize others to make their work available to the public – for example, if someone uploads a commercially available song to a p2p server, the copyright owner would have the legal means to exercise this right to permit or prohibit that posting. The WIPO treaties also established the principle that it should be illegal to tamper with digital encryption systems ("technological protection mechanisms") installed to prevent unauthorized copying or with digital rights management systems.

(A 2003 study for Industry Canada, written by Marcel Boyer, of the Universite de Montreal, observed that a dearth of hard data makes it "extremely difficult" to predict the economic impact of these treaties on authors, photographers and publishers. But he concluded that strong and transparent copyright laws will "foster cultural development and diversity as well as contributing to the social well being of all.")

In the United States, in the meantime, several pieces of legislation – including the Digital Millennium Copyright Act and the Sonny Bono Copyright Term Extension – were approved by Congress. The DMCA (1998) implements the WIPO treaties. The Sonny Bono law extends the term of copyright to "life of the artist plus seventy years", (the so-called Disney rule thereby protecting Mickey Mouse from falling into the public domain). There are also tougher legal mechanisms to fight unauthorized digital copying, such as a requirement that Internet Service Providers (ISPs) can be forced to disclose the names of individuals suspected of copyright infringement on the Internet. The European Union, meanwhile, adopted a handful of directives covering such issues, including extension of copyright to life plus 70 years, which is the new world standard.

The global scope of both the Internet and the media/entertainment industry, as well as the growing number of multi-lateral treaties governing IPRs, are now determining to a significant degree the broad parameters of copyright policy reform within Canada.

Still, in the past few years, much of the nuance in the domestic debate over copyright policy has come from a series of landmark Canadian court cases that have tested the definition of fair dealing; the ability of rights holders to prosecute those parties alleged to be involved in illegal downloading; the link between commercial online databases and copyright infringement; and the legal extent of the moral rights enshrined in Canadian copyright law and international covenants. These include:

* The fair dealing case involved a lawsuit launched in 1993 by three legal publishers against the Law Society of Upper Canada, in Toronto. The publishers alleged that the Society's Great Library infringed their copyrights by (i) authorization of copyright infringement by patrons using the library's photocopiers; and (ii) copying legal decisions and faxing them on a fee-for-service basis to lawyers without being licensed. In March, 2004, the Supreme Court overturned an appeal court decision and ruled that the LSUC was acting legally.

The decision, moreover, extends far beyond the world of legal publishing. The court effectively expanded the "fair dealing" defense, which had never before been tested at this level. The ruling also interpreted the definition of "originality" in the Act – a test

that is of great concern to creators. And it established a significant precedent -- that an institution which provides the technical means for copying isn't, in turn, necessarily liable for any unauthorized copying that may take place. Supporters of the ruling have described it as establishing a code of user's rights. And the fact is that fair dealing also benefits creators (including academics, journalists, etc.) who rely on the use of material in library collections for professional purposes. Despite that, creator organizations and some legal experts feel the decision ultimately tilts the balance of copyright law away from rights holders.

* In 2002, the industry association representing the major record labels sued Canada's five largest ISPs, demanding the names and addresses of 29 people who, the record companies alleged, had posted hundreds of music files on the Internet. The action mirrored similar high-profile lawsuits launched by the Recording Industry Association of America (RIAA), citing provisions in the DMCA. The U.S. lawsuits -- which resulted in substantial fines imposed on individual file swappers, some as young as 12 -- provoked enormous controversy, and the accusation that the recording industry was waging a legal war against music fans. In Canada, by contrast, the Federal Court, in March, 2004, ruled that it would not compel the ISPs to disclose the names of alleged file sharers. The decision, regarded as a victory for file-swappers, is under appeal.

* In 1995, the Society of Composers, Authors and Publishers of Music of Canada (SOCAN), which is the leading music industry rights collective, filed an application with the Copyright Board to impose a levy, or tariff, on Internet Service Providers. The reasoning was similar to the case in favour of levies on blank media: because Internet users "communicated" music via computer networks, the owners of those networks should pay a royalty to compensate rights holders for unauthorized copying. The process took over six years considering the so-called Tariff 22 proposal, and, in 2002, SOCAN appealed its rejection of the levy to the Federal Court. The Federal Court ruled that in certain cases ISPs would be held liable if they cache copyright-protected works (i.e. temporarily store digital files containing copyright works).

But in June, 2004, the Supreme Court over-turned that decision in a 9-0 verdict, arguing that ISPs can not be held liable for the communication of copyright material over their networks even when they cache copyright works. Still, the court made a number of significant rulings that benefit copyright owners in general. One is that a communication takes place in Canada even if it comes from a source outside the country – i.e. that Canadian rights owners have the ability to license those kinds of transmissions. Secondly, ISPs will be held liable if they function as more than mere conduits for copyright work. Lastly, the court implied that the federal government needed to modernize Canadian copyright law to ensure right owners' works are protected when they are used on a medium such as the Internet, which didn't exist when the law was drafted in the 1920s.

* In 1996, Toronto freelance writer Heather Robertson initiated a bid to launch a $100 million class action lawsuit against Thomson Corp. asserting copyright to articles written by freelancers in The Globe and Mail that were included on Thomson CD-ROMs and InfoGlobe, an electronic database available to subscribers. Robertson argued she had not authorized the republication of her articles on the database, and that the Globe owed her royalties for these uses. At issue is whether freelance writers, photographers and illustrators retain the rights in their works that would allow them to control their copyright after first publication, as per long-standing practice. As well, the question tested

in this action is whether the database is merely an electronic version of the newspaper, or if it is a substantially different product, with discrete copyright requirements.

In October, 2004, the Court of Appeal of Ontario upheld a lower court ruling which found in favour of Robertson's copyright infringement claims and challenged a central pillar of the Globe's defense of its actions, i.e. that the database is merely an electronic version of the newspaper, and that perpetual re-publication of freelance articles is an implied element of the original contract between the writer and the newspaper. As a PWAC official noted in response to the ruling, "Unlicensed re-use of freelance writing has been a blight on the industry, making it harder and harder for writers in Canada to make a living at their profession. In many ways it's a shame the courts have had to rule on something as fundamental as a person's ownership of the work they have created."

This freelancers' class action against Thomson – which is still subject to further appeals -- mirrors another class action suit involving the Montreal Gazette, but also the famous Tasini case in the U.S., in which freelance writers sued the New York Times and two other publications for selling their articles to commercial databases (including Lexis/Nexis) without permission or compensation. The publishers defended their actions by arguing that including such articles in a database is merely a revision of the original work. But in a landmark 7-2 judgment handed down in 2001, the U.S. Supreme Court ultimately ruled in favour of the freelancers. According to the majority opinion, databases are not just altered versions of the original publications (by contrast to microfilms), and thus freelance contributors retain the right to authorize the republication of their articles in these kinds of electronic information products. As University of Ottawa associate law professor Daniel Gervais points out, the decision didn't prevent the publishers from using the material, but "forced" the two sides to negotiate terms that provided freelancers with suitable compensation.

* In the latter-1990s, the prominent Quebec painter Claude Théberge sued three Montreal commercial art galleries for copyright infringement arising, he said, from a process whereby the ink from paper posters of his paintings was mechanically transferred onto canvas; these "paintings" were then sold, even though Théberge had not authorized this kind of commercialized reproductions of his work. His case against the galleries was upheld by Quebec courts, but in March, 2002, the Supreme Court of Canada overturned those rulings on a 4-3 vote that split down linguistic lines.

Writing for the majority, Justice Ian Binnie argued that no infringement had occurred because no additional copies of his work had been produced from the ink transfer process. He also stated that moral rights, while representing "a continuing restraint on what purchasers can do with a work once it passes from the author," can not masquerade as economic rights. The dissenting justices pointed out that the copyright law's provisions on reproduction make no mention of the number of copies produced, but rather the act of making a copy. "Fixation of the work in a new medium," wrote Justice Gonthier, is therefore the fundamental element of the act of 'reproduc[ing]…in any material former whatever' what already existed in a first, original material form. That type of conduct amounts to plagiarism and constitutes infringement…"

The other salient moral rights case is *Les editions Chouette (1987) inc. v Desputeaux*, handed down by the Supreme Court in March, 2003. It involved the authorship of a series of children's books by illustrator Helene Desputeaux. In that case, the illustrator was commissioned to produce the books, but the project led to a contractual dispute over whether or not the president of publishing house was a co-author of the

works, which had spawned a television show and other commercial spin-offs. An arbitrator ruled that the illustrator was only a co-author without looking at the books to judge the nature of authorship. Desputeaux's appeal ended up in the Supreme Court. Its judgment upholding the arbitrator's decision overruled a Quebec Court of Appeal verdict, in which it was pointed out that the right to be credited with authorship, "just like the right to respect for the name [,] has a purely moral connotation connected to the dignity and honour of the creator of the work." As Desputeaux's lawyer Normand Tamaro observes, "Since Desputeaux, in Canada the status of an author can…rest on a vacuum. An author can also be deprived of his rights without the decision maker being concerned with seeing his works." Subsequent Supreme Court rulings have re-affirmed this verdict.

This brings us to the present day. Since 2001, the federal government has been moving, very slowly, towards the enactment of a new set of amendments to the copyright rules. The government has conducted extensive public consultations and issued discussion papers on digital issues and the adequacy of existing copyright rules.

Without question, the most contentious issue that has arisen involves the use of online material by schools, universities and colleges. Computers and Internet access are standard equipment in educational institutions, and the content on them ranges from subscriptions to online encyclopedias for elementary school libraries to university course websites and electronic course-packs. Moreover, students at all levels now rely on material found on the Internet for projects, assignments and presentations. Canada's copyright law exempts educational institutions from specified types of copyright infringement. It authorizes collectives such as Access Copyright to negotiate blanket licenses with school boards and universities. There is, however, no special treatment for educational users of copyright material on the Internet.

With the rapidly expanding use of the Internet for educational purposes, the Council of Ministers of Education of Canada began urging Ottawa to extend the existing exception to school use of the Internet. Groups representing copyright holders (publishers, authors, etc.) strongly disagreed with this proposal, warning that such a move could lead to widespread unauthorized electronic copying of textbooks and other copyright work that can be uploaded onto the Internet. They further argued that copyright holders should not be expected to subsidize educational institutions, which must pay for all sorts of other resources and equipment, from desks to software licenses.

In the spring of 2004, shortly before the dissolution of Parliament, the House of Commons Standing Committee on Canadian Heritage released an "interim report" that represents the latest iteration of formal policy-making.

The report proposed a series of recommendations (to be discussed in more detail later in this report) to "modernize" Canada's copyright legislation. These included:

- formal ratification of the WIPO treaties;
- changes in the treatment of photographs and photographers under the Act;
- amendments that would make ISPs liable for copyright infringement of content transmitted on their networks, subject to some conditions;
- a set of rules establishing an "extended collective licensing" system that would allow copyright collectives to authorize and collect fees from educational institutions for the use of copyright works available over the Internet, but to also structure these licensing arrangements so users would not

be charged when accessing online material that is clearly intended to be used without charge or in the public domain (all collectives have well-established administrative policies designed to exempt public domain material from licensing agreements).

As of this writing, the timetable for the adoption of these and other recommendations remains uncertain given the present minority Liberal government in Ottawa. But Canada is the only G-8 country that has yet to ratify the WIPO treaties – a process that involves harmonizing Canadian legislation with the provisions of the treaties – and the glacial pace of reform is quickly becoming a source of international embarrassment. Among other things, the WIPO treaties reaffirm the principle that exemptions in national copyright laws must be limited and minor, and not intended to damage the economic interests of rights holders.

Meanwhile, recent Canadian court rulings have prompted artists to call for additional legislated protection of their moral rights, and a re-consideration of the fundamental principles animating the moral rights provisions in the act. Creators also see the need for a critical re-examination of the impact of the Act's various exemptions on the livelihoods of the creators who produce work that has been, in effect, stripped of part of its economic value in the name of a public policy objective.

Part II: Sectoral Issues

Photography

There are approximately 14,000 photographers working in Canada today, many of them earning all or substantial portions of their income in this medium. Two organizations – the Canadian Association of Photographers and Illustrators in Communications, and the more recently founded Canadian Photographers Coalition – represent the interests of the profession. Membership in these industry organizations is not mandatory, and, apart from photographers employed by unionized newspapers, there is no collective representation. Rather, Canadian photographers tend to be freelancers, and function as small businesses, contracting with individual or corporate clients.

Photographers function in a range of commercial and artistic environments, and, like many creative people, earn their incomes by keeping a foot in several worlds. It's not unusual for a photographer to have purely commercial clients (e.g. advertising agencies, consumer product manufacturers, private portrait commissions, etc.), as well as relationships with media organizations (magazines, wire services) and stock agencies, all of which may provide income to subsidize creative projects. These images may end up in galleries, monographs or private collections, or they may not find "a market" at all.

There are fine art photographers who derive a portion of their income from teaching, as well as those who are dedicated amateurs, in the sense that they regard their photographic pursuits primarily as a hobby which, on occasion, produces a sale.

CAPIC also represents professional illustrators. Besides working for book publishers, they are often commissioned by media organizations and advertisers to create images to be reproduced in some kind of published commercial medium. Images or characters they may create for a children's picture book, to take another example, can

become highly valuable consumer commodities that turn into widely distributed brands, marketed as television shows, plush toys, electronic games, trademarks, etc. Such uses – e.g. Franklin the Turtle, etc. – are capable of generating revenues that the vast majority of visual artists rarely achieve. This kind of exploitation traces back to a highly-structured contractual relationship between an author/illustrator and a book publisher.

More typical is the case of the illustrator who works for magazines, newspapers or other corporate clients as a way of generating income to subsidize their non-commercial art. There is no "standard" contract between the illustrator and the client. Some commissioning clients will buy the illustration outright, while others may only purchase first print right or one-time reproduction rights. Whatever relationship exists is negotiated between the parties.

In some cases, the sale of an image can wind up depriving the creator of substantial earnings. A designer with a solid working relationship with an ad agency sold an image outright, but later discovered that the client had made extensive use of this work on billboards and other media, including an animated film. "She was horrified because she felt she'd sold something that was very lucrative for a pittance."

Improvident? In such cases, yes. But on the other hand, some illustrators recognize the opportunity to negotiate trade-offs that work to their own benefit. A Toronto painter tells of working with a major magazine that insists on buying all rights on a permanent basis, and refuses to negotiate. But the illustrator enjoys working with this publication because they provide her with a high degree of artistic independence. Another example she cites: websites will seek to purchase her work, offering, typically, a small fee. She, in turn, grants digital rights provided that there's a link to her own self-promotional website – a trade-off that has proven to generate new business.

A painter and illustrator who also works as a cartoonist tells of an arrangement with a U.S. syndicate that places his work in U.S. publications. The relationship is entirely verbal: the cartoonist regularly sends electronic images of his drawings to the syndicate, and they are sold to news organizations. The good news is that once a year, a cheque for a few thousand dollars arrives in the mail. The downside is that unauthorized copies of his images now routinely show up on websites. The exact form of the contract is secondary to the more fundamental question of whether there's an ongoing flow of royalties for repeat uses. That's the measure of whether copyright is being respected.

Like illustrators, many professional photographers deal with the media industry, and thus are affected by structural changes, such as consolidation and concentration. For example, some acquisition-oriented media companies, such as Transcontinental, now publish magazines in both the English and French markets. That means some magazines now buy both English and French rights as a package, whereas previously the photographer would have made separate sales. As with magazine writers, media organizations want digital rights, but still pay little more than a token amount to publish an image on a website. What's more, there is also a downward pressure on photographers' fees.

Technology, in recent years, has had a dramatic impact on many photographers, especially those working with or for media organizations. Rapid advances in digital photography have provided both benefits and added costs. Conventional film, for example, has always been a major expense, and the advent of digital imaging reduces those costs. At the same time, many photographers are facing growing pressure from their

clients to invest in professional quality digital cameras and studio equipment – a substantial capital expenditure that can run as high as $60,000 to $70,000.

Increasingly, there's a growing supply of stock photographs available on the Internet and on CDs, and some professionals believe this development in their profession has turned images into commodities, with diminishing economic value. As one photographer puts it, digital film "democratizes creativity, but destroys specialization."

For photographers who subsidize their art by teaching, the advent of digital scanning technology raises another set of complexities – essentially, putting the copyright shoe on the other foot. Fine art teachers have long relied on the pedagogical technique of showing their students slides created by photographing works from art books. This practice is now authorized by exemptions. The making of photocopies of artistic works is covered by blanket licenses between such institutions and copyright collectives.

As one fine art photographer explains, he now scans images into a computer linked to a digital overhead projector, rather than going through the more cumbersome process of taking photographs. This approach to teaching the visual arts to future artists significantly reduces the instructor's budget – the cost of producing dozens of slides per lecture is typically an out-of-pocket expenses – and makes it possible to expose students to a wider range of images. But in so doing, as this artist explains, he has effectively created an electronic database of digital images, for which no permission has been obtained. The process of clearing the electronic rights for hundreds of photographs per lecture is beyond the ability of the individual instructor. In effect, artists who wish to control their own work have found themselves exploiting the works of others without permission.

Similarly, the Internet provides both opportunities and risks for photographers. Almost all professional photographers now have their own websites, which represent a highly efficient marketing tool for disseminating samples of their photography.

On the other hand, some photographers are growing increasingly anxious about the problem of having their images "swiped digitally," as one photographer puts it. Typically, photographers may send a computer file containing an image to a gallery or a commercial client. But these are often not returned to the photographer, raising questions about what happens to the image subsequently. Increasingly, photographers will find their images published without authorization on third party websites or without their name. Software, moreover, can be used to alter photographs without the permission of the photographer – a classic example of how technology can undermine moral rights.

One photographer relates the following conundrum: he will sell an image to a commercial client, such as an ad agency, and the agency, in turn, will allow the image to be used by another party on its website for one client, or in a brochure. There are legal difficulties arising from such transactions – for example, model waivers, which may apply to the first use of the photograph, but not necessarily a subsequent use. The photographer's dilemma is that if he or she questions this practice with his client, he may jeopardize an otherwise fruitful relationship upon which he depends. "You weigh the options: how much is this costing me, and is it worth the consequences?"

Such anecdotes underscore a lingering weakness in Canada's Copyright Act, which does not recognize photographers as "authors" of their own work when someone else owns the negative – a situation that confuses ownership and authorship. Also, photographs belong to the party – either an individual or a corporation -- that commissioned them, unless there is an agreement otherwise. Once an image has been

acquired in this way, the photographer no longer has control over its use, nor the opportunity to derive royalties from the work.

Day-to-day relationships negotiated between photographers and their clients vary considerably. Some magazines, for instance, only buy first-publication rights, meaning that the photographer does, in fact, retain ownership. But they may also impose a moratorium on re-selling an image for a specified period of time. In other cases, the *quid pro quo* is that the client will offer to provide a lot of work in exchange for the right to use the images extensively. "There are ambiguously worded contracts," says one magazine photographer. "Publishers retain some rights, and may keep an electronic copy of the image and re-sell it, so everyone becomes a stock agency."

According to CAPIC and the Canadian Photographers Coalition, the state of Canada's treatment of photography puts it at odds with major industrialized countries, including the United Kingdom, the United States, France and Australia. Moreover, Canada can not ratify the WIPO Copyright Treaty unless it updates the provisions in the Act relating to the term of copyright in photographs. As the CAPIC brief puts it, "It is time to recognize that photography is a creative art form and that photographers are worthy of first copyright ownership."

Last year, a private member's bill proposing amendments to the Act was introduced in the Senate. And in its interim report on copyright reform, released in May, 2004, the Standing Committee on Canadian Heritage urged that the Act "be amended to grant photographers the same authorship right as other creators."

Explaining the rationale behind this recommendation, the report noted: "The Committee feels that photographers should be given copyright protection in their works equal to that enjoyed by other artists. Historically, photographs have been treated differently from other categories of works because they were perceived to be more mechanical and less creative than other forms. This idea is outmoded and inappropriately treats photographers differently from other artists."

Ratification by Parliament of the WIPO copyright treaty should also provide a boost for photographers, because it means an extension of the term of protection of all photographs from 50 years to "the life of the author plus fifty years." As Marcel Boyer, Ph.D. (CIRANO and Universite de Montreal) concluded in a 2003 report to Industry Canada on the economic impact of the WIPO treaties on creators, the extended term of protection (as well as other WIPO provisions) "can only benefit the publishers in Canada [and] it will increase the availability of the works of creators because they will be better protected against unreasonable exploitation."

Visual Arts

The Canada Council estimates that there are approximately 15,000 visual artists across the country. The organization that speaks for many Canadian visual artists – painters, sculptors, print makers, media artists, fine-art videographers, etc. – is known as Canadian Artists' Representation/Front des artistes canadiens (CAR/FAC). Founded in the 1960s, it has about 2,000 members nationally, and concerns itself with the issue of fees and payments paid to artists exhibiting their works in museums and galleries. A handful of other collective societies, mainly based in Quebec, also represent visual artists and crafts people, including SODRAC.

As with many creators, many visual artists supplement their incomes with more commercially-oriented contracts in order to subsidize their purely artistic work – projects that can raise tough personal questions about the balance between a creator's control over his or her work, bargaining power and financial remuneration.

In a practical sense, copyright law doesn't directly affect the work of certain categories of visual artists because they are, by definition, in the business of producing unique creations (installations, sculpture, etc.) that can not be reproduced in any meaningful way (except for being photographed or filmed).

Visual artists have some access to reprography royalties collected by Access Copyright, as well as royalties from the Public Lending Right, if they have illustrated books. Access Copyright has an arrangement with the CAR/FAC Collective to administer the reprography payments to visual artists. Such royalties derive from the copying of published fine art images by educational institutions, libraries, etc. According to CAR/FAC, about 25% of its members belong to this collective, earning an average of about $500 annually. CAR/FAC believes Access Copyright has tended to underestimate the share of licensing revenues owed to visual artists.

The greater concern, at present, has to do with the relationship between visual artists and museums or art galleries. More established or successful artists may gain exposure to broader audiences by showing their work in such institutions. Unlike commercial art dealers, most of these venues receive public funding from the various levels of government. A 1988 amendment to the Copyright Act established an "exhibition right" for visual artists whose work is displayed in museums and galleries that are not selling art. The existence of this provision for visual artists is unique to Canada, although galleries and museums in other countries do pay fees. Canadian museums, through their association, were vehemently opposed to the 1988 measure in principle; during a Parliamentary review of the bill, some curators stated publicly that a work of art is not complete until it is curated, and therefore artists should share their copyright with curators. The museum sector has continued lobbying to have the exhibition right replaced or eliminated, citing budgetary pressures.

Visual artists enjoy the same rights of authorship as any other creator recognized under the Act. But the exhibition right requires museums and galleries to pay artists a minimum fee for displaying their works to the public. Prior to the introduction of the exhibition right, most museums and art galleries did provide a CAR/FAC fee to artists whose work was displayed on a voluntary basis, thanks to pressure from CAR/FAC. The introduction of the right, in 1988, did not result in a significant increase in those fees; it primarily codified existing practice. Indeed, the fee for a major museum exhibition is approximately $1,200 – an amount that barely covers framing expenses.

Where the issue of the exhibition right fees become contentious has to do with art acquired by museums or galleries for their permanent collections. Typically, galleries and museums have asked artists to waive their exhibition right, as well as their moral rights in some cases, when they purchase a work. And, citing budget constraints, they tend to ask the artist to waive exhibition fees for these works. It's not unusual for artists to be told that public exposure – and, implicitly, the prospect of future sales to individual collectors -- will compensate them for whatever income they lose in the form of upfront fees, in effect, all but forcing artists to participate in the undermining of their own rights. As artist John B. Boyle has remarked, "This is Canada. People die of exposure."

According to CAR/FAC, there's a generational divide in artists' attitudes towards such arrangements. Young artists are more willing to waive their reproduction rights in order to gain exposure and establish their reputations. Yet such a shift in thinking illustrates the gradual erosion of these principles over the long term, and indicates how the next generation has internalized assumptions about their rights, or lack thereof.

In terms of digital issues, many museums and galleries are moving to expand their websites to include images of all the works in their collections, which are typically far larger than their available display space. Such projects are undertaken both for marketing purposes, but also to make publicly-funded art collections more accessible to a broader audience. Yet visual artists whose work is thus displayed tend not to be paid for this use. In one infamous example, artists whose work was in the National Gallery collection were ordered to waive fees for the use of photographs of those works in a CD-ROM. Some artists were even told that they could receive a copy of the CD-ROM in lieu of a fee. "You can't pay the rent with a CD-ROM," countered one well-known visual artist, when presented with this `offer.'

There is one other substantial copyright issue confronting visual artists, which has to do with so-called "remix culture," or the use of copyright material in new works. It is well beyond the scope of this report to examine the techniques of the artistic process and the evolution of new forms. But suffice it to say that pop culture, consumerism and the mass media are an integral part of our intellectual environment, and thus represent the raw material of the artistic process. Collages, video art, multi-media installations – all these approaches may involve, either deliberately or inadvertently, the unauthorized use of copyright works or trademarks.

A fine art photographer tells of coming across a poster montage, produced by another illustrator, which included a large reproduction of one of his own images, obtained, presumably, with the use of a scanner. There was no credit. He had never been approached for permission to use the picture in this context. This situation reveals how an author's economic rights are undermined by unauthorized copying, and illustrates how artists manipulate images from the ambient media environment to create a new works without giving the original creator appropriate attribution.

But there are many instances when the shoe is on the other foot, and artists face the erosion of their moral rights by virtue of emerging technologies, digital and otherwise, that can be used to alter works once they pass out of the control of the author. This was the issue at the heart of the Théberge case (see above). Critics of the Supreme Court ruling point out that the diminution of an artist's moral rights in the name of balance is tantamount to the loss of economic rights. In that case, the galleries had created a kind of fake version of his paintings by transferring the poster reproduction onto a canvas, and had done so without any approval from Théberge.

Because it deals with the question of the extent of an artist's control over his or her work, the Théberge case draws attention to the issue of whether copyright law should be amended to provide visual artists with a "droit de suite," or a right to receive a portion of the price paid upon subsequent re-sale of their work. The federal government's Section 92 report noted that a "droit de suite" may "discourage" the re-sale of artistic works, but pointed to two examples of other jurisdictions – California and the European Union -- that have recently implemented such measures. The reason is made explicit in the EU's directive setting out the justification for a resale right: "It helps to redress the balance

between the economic situation of authors of graphic and plastic works of art and that of other creators who benefit from successive exploitations of their works."

Live Theatre

Playwrights Guild of Canada, with over 450 members, represents more than 90% of working Canadian playwrights. Full membership is available to any Canadian who has had at least one professional production of his or her work within the past decade. Associate membership is open to playwrights whose work has been presented in an advertised staged public reading by Equity actors, or has been produced at a community theatre or recognized theatre festival.

PGC was founded in 1984, a merger of two earlier playwrights associations. One of these predecessors was a co-operative that started in 1972, serving as a kind of clearing house for scripts at a time when theatres decided to begin mounting more Canadian plays, but discovered there was no central source of information. Eventually, the Guild developed into a broader members-based organization, working to protect the rights of Canadian playwrights and promote Canadian theatre. Through negotiations with the Professional Association of Canadian Theatres (PACT), PGC has developed a series of standard contracts for use by playwrights presenting at PACT member theatres. On request, PGC will negotiate both Canadian and international professional contracts on behalf of its members. In addition, PGC administers members' "amateur rights" with respect to productions mounted in schools, community theatres and other non-professional venues. It continues to maintain a large archive of Canadian scripts that are available for purchase.

In recent years, PGC, working with l'association quebecoises des auteurs dramatiques (AQAD) and Access Copyright, with financial support from the Government of Canada through the Canadian Culture Online Program, has developed an electronic publishing service to distribute the scripts in its collection. The intent is to streamline the distribution of scripts and reduce expenses associated with copying and postage, and thus increase the royalty revenues to the author and the availability of the work. Currently, PGC maintains a fully searchable online catalogue of more than 2,500 titles. Individual users can go online and read over 50 of these works (the others exist only in hard copy and can be ordered from PGC). The plays posted on the Guild's website are protected from `cutting and pasting.' However, users can purchase the right to print out copies.

The `market' for original Canadian plays is small by comparison to the more commercial end of the industry, which tends to feature classics, traveling Broadway shows and so on. There are about 20 to 40 professional English productions of new Canadian work per year. Very rarely are these plays re-mounted. The non-profit theatre world is responsible for well over half of these productions. In addition, there are approximately 200 to 250 amateur productions per year in Canada.

As with visual arts, it is extremely difficult for a playwright to earn their entire income from theatre work. Many playwrights will also work in film, television and radio, write novels, teach or do other sorts of freelancing. A few are hired as playwright-in-residence for a professional company or university.

The numbers tell the tale: a playwright may earn only a few hundred dollars a year from his or her theatre work or royalties from the sale of published scripts. The typical fee for an amateur production is under $100. For full-scale theatrical productions, the royalty

is typically based on 10% of gross box office receipts, typically returning about $6,000 to $10,000 to the playwright. The Guild estimates that about half of its members belong to Access Copyright, which licenses the photocopying of published playscripts.

Unlike writing for television and film, the theatre world continues to be governed by some long-established norms that have an impact on the work of playwrights. For example, it is a well-established tradition that a playwright has the right to approve or reject any change to his or her script. In other words, artistic convention, in this art form, effectively protects moral rights, at least for the time being.

The contractual and financial relationship between the playwright and the theatre company, however, has become increasingly uncertain. In recent years, a growing number of theatre companies have sought to obtain "participation rights" from playwrights who have been commissioned to write an original work or where the theatre is mounting the premiere production of a work. A contract providing participation rights means that the theatre company is entitled to a share of that play's royalties over a specified period of time (typically five to ten years).

Participation rights are, in effect, a tax imposed on the playwright's earnings, ostensibly to recognize the originating theatre's contribution. The pressure for playwrights to assign participation rights has tended to come from larger commercial theatres, and follows a U.S. model. However, the very existence of participation rights should be called into question because a majority of theatres already receive funding from the Canadian government to develop and produce new Canadian works.

A related development, according to the Guild, is that other individuals associated with the mounting of a play – directors, dramaturges, choreographers, etc. – are also beginning to demand participation rights, citing their contribution to the creative process. As one playwright puts it, "Peripheral people are asking for a piece of the pie from what was traditionally considered the playwright's intellectual property."

Digital reproduction issues are not yet a major concern for playwrights, but this situation could change, depending on the direction of copyright reform. The Guild is concerned about the combination of an educational exemption with provisions that allow certain users to circumvent technological protection mechanisms. In effect, these two exemptions potentially would allow educational institutions to find ways of downloading electronic versions of scripts that are housed on the Guild's website, and also to transmit an exempted school production to other educational institutions or to students participating in a distance education course.

Such a development underscores an apparent contradiction in Canadian policy. On one hand, the Department of Canadian Heritage has identified as a funding priority the digitization of Canadian culture as a means of broadening access to the work of Canadian artists – in this case, play scripts. On the other hand, exemptions have the potential to deprive playwrights -- along with all other creators -- of even more royalty income, above and beyond the ongoing decline in revenues from the production of Canadian plays in schools because of existing performance exemptions enacted in 1997. Beyond the economic implications, additional exemptions have the potential to deprive the author of the ability to control unauthorized electronic copying and performance of his or her plays.

Film/Television

For many years, the lion's share of creative film and television work in Canada came from public institutions such as the CBC and the National Film Board. The sector has grown in the last twenty years due to a sharp increase in foreign film shoots in Canada, new funding from private and public sources, tax incentives, Canadian-content rules for new cable channels, co-production treaties, and so on. Much of this activity can be attributed to U.S. film companies coming to Canadian cities and rural areas to shoot on location, taking advantage of new studio facilities and highly-trained technicians and so generating post-production work. The low Canadian dollar has contributed heavily to the proliferation of so-called runaway productions from south of the border. The combination of these factors has spawned a broad range of Canadian players, from small independent outfits to large diversified media conglomerates like Alliance Atlantis.

More recently, however, the sector has experienced a downturn. "Canadian content productions", productions written, directed and performed by Canadians, have sharply declined as a result of the Canadian Radio and Telecommunications Commission (CRTC) 1999 "television policy" which removed expenditure and exhibition requirements from broadcasters for Canadian dramatic programming. During the same period, shrinking export markets, reduced distribution advances and decreased government support for domestic shows has also contributed to the decline of the indigenous production industry.

There has also been a drop in the amount of foreign production in Canada due to the soaring dollar, the SARS scare in 2003, and the increases in U.S. state tax credits and incentives to keep those productions at home. As a result, there are far fewer opportunities for creators who work in these fields. In response, screenwriters, performers, directors and technicians have united to form the Coalition of Canadian Audiovisual Unions (CCAU) to advocate for more government support for the home grown production and reinstatement of spending and broadcast requirements on networks to develop, produce and air Canadian dramatic programming.

Copyright has always been a contentious subject in film and television production, especially the former. By long-standing convention, "shell" companies, created by large studios to provide a legal framework for the production itself, are dissolved once a film is finished and released, with the ownership rights reverting to a distributor. This practice makes it extremely difficult to track royalties and any other rights negotiated between the producer and members of their creative teams, or to enforce payments. In Canada, with the exception of cable retransmission, there are no authors' levies established because the Copyright Act doesn't define the author of the audiovisual work. Where rights are established, it is easy to track them because the terms are laid out explicitly in negotiated agreements.

There are three categories of off stage creators who work within the television and film production industries: directors, screenwriters and composers, all of whom are represented by well-organized unions or collectives empowered by negotiated collective agreements or tariffs with production companies, studios, broadcasters, etc. (Actors will be discussed in a separate section.)

The Directors Guild of Canada has several categories of members, including assistant directors, editors and production managers – all of whom play a part in the creative process. Across Canada, there are about 500 directors in the guild, which has three standard agreements for productions, depending on the location of the shoot. These agreements are structured so that producers or distributors can sell the work.

The legal status of a director's authorship in cinematographic or audiovisual work is the focal point of most discussions about copyright in film and television production. In the United States, the industry, supported by legislation, has long adopted the so-called "work for hire" doctrine, which means that directors, screenwriters and composers are considered to be employees who have no copyright in the final product. In Europe, by contrast, authorship is formally vested in the director, or a director-writer team. To counter pressure from the powerful American film industry to export the work-for-hire doctrine (as was the case when the U.S. negotiated a free trade agreement with Chile), the Guild has sought an amendment to Canada's copyright legislation to define directors as co-authors of audiovisual works.

The Writers Guild of Canada (WGC), in turn, is the national association representing more than 1700 screenwriters working in English-language film, television, radio and multi-media production in Canada. Along with its Quebec counterpart SARTEC, the WGC is one of the only writers' unions to be certified and thus empowered to negotiate collective agreements. About half of its members are active, and most do not rely exclusively on screenwriting to earn a living. Many are also novelists, playwrights, speech writers and teachers.

Of all the creators working in film and television, Canadian screenwriters enjoy the greatest degree of protection for their intellectual property. Unlike colleagues in the U.S. and other countries, Canadian screenwriters retain copyright in their scripts and license their work to producers according to the rules set out in the WGC's negotiated agreements. All other rights rest with the screenwriter as per the collective agreements; this includes the use of the work for stage plays, merchandizing or 'novelization.' This arrangement also exists in France, while in the U.S., Australia and the U.K., by contrast, producers have copyright and screenwriters are treated as if they were employees.

In terms of the non-fee revenues flowing to screenwriters, however, there is an interesting contrast between what exists in Canada and the arrangement negotiated by the Writers Guild of America (WGA). Under WGA rules, American screenwriters are not entitled to copyright royalties (which are based on production revenues). But they do receive "residuals" based on their upfront fees (in most cases). These contractual payments are made by broadcasters and distributors when audiovisual works are aired in secondary markets. As well, the Digital Millennium Copyright Act provides for the "automatic assumption" of contractual agreements for writers, directors and actors when the rights for a film are transferred (i.e., sold to another company). That provision, in effect, ensures that the residual payment schedules entrenched in the various guilds' collective agreements survive. No such legal mechanism exists in Canada, although it is covered for Canadian screenwriters in the WGC Independent Production Agreement.

Though in possession of copyright, Canadian screenwriters generally collect little royalty income, which only begins to flow after certain revenue thresholds are met. Downstream revenues can be difficult to collect. Most screenwriters, indeed, see nothing beyond the up front fees, unless the show or film is a huge hit. "Even though we're retaining copyright, which is very important" says one screenwriter, "we don't see a great benefit from it. The fact that we don't get residuals or see much in the way of royalties has to do with our lack of power in negotiation as well as the poor economics of our industry."

In recent years, however, Canadian screenwriters have begun to access secondary use monies collected by the Canadian Screenwriters Collective Society (CSCS). To date,

the CSCS has collected between $300,000 and $500,000, to be divided up among its members.

Set up in 2000, the CSCS exists to recoup monies collected by similar societies in Europe, where copyright rules impose fees and levies on broadcasters, video rentals and blank media. (The CSCS also collects retransmission royalties from Canadian cable companies.) In other words, if a Canadian audiovisual work is shown in a European country, a "secondary use" payment will be generated. The difficulty, for Canadian screenwriters and producers generally, has been accessing these funds and negotiating reciprocal agreements between the CSCS and European collective societies. In Canada, where levies are not in place, there are also issues regarding how the revenues are to be divided up among the creators, because, as one screenwriter puts it, "producers, writers and directors are all claiming authorship of audiovisual works." Again, the problem comes down to a lack of definition in the existing language of the Copyright Act.

Canadians working in film and television, of course, are not immune to the unpredictable economic impact of the Internet on their respective sectors. Although the courts shut down third-party streaming of television signals some years ago, the illegal downloading of DVDs is theoretically just as serious an issue for Canadian film as for Hollywood, although Canadian films are considerably less exposed to the problem of mass unauthorized copying or downloading of "blockbusters." On balance, however, it could be argued that the domestic film industry's most serious distribution challenge remains the traditional one: its long-standing lack of access to Canadian screens.

Quite apart from these macro issues, Canadian screenwriters and directors face a range of other copyright-related issues that affect both their professional lives and their creative control. Screenwriters, for example, have encountered increasing pressure by producers to write additional copy for program websites, without adequate compensation. (This kind of writing is now covered by the WGC collective agreement.) Typically, when screenwriters decline to provide copy for websites, the producer or their webmaster will hire writers to work exclusively for the site. This practice is not considered to be a violation of the collective agreement, and has not generated grievances.

Disputes with broadcasters over the unauthorized use of material, such as audio files of radio dramas posted to websites without payment of royalties to the author are grieved by the WGC. This illustrates how creators can rely on a structured contractual relationship with a producer or broadcaster to address a copyright matter.

Directors who have made films for the National Film Board face a variation on this problem. Under an agreement with ACTRA, the NFB is digitizing its extensive catalogue of film, and providing free downloads from its website as part of an attempt to make Canadian productions available to Canadians. The NFB's long-term plan is to create a subscription-driven site, and would be equipped with a so-called "digital rights management" system that could provide secure downloads, collect revenues and monitor royalties. ACTRA has negotiated an agreement so that its members will receive a portion of the proceeds. But NFB directors don't always own copyright or control digital rights. And because Canada has yet to ratify the WIPO treaties, there's no penalty for the act of tampering with technological protection mechanisms designed to prevent unauthorized copying. In fact, this shortcoming has discouraged Canadian movie distributors from converting to digital projectors, a technology now coming into use in the U.S. With such equipment, the studios can distribute secure digital versions of films directly to theatres,

thus eliminating the substantial cost of printing and shipping film. But without anti-tampering law, theatrical distributors will not make the necessary capital investment.

Performers

In Canada, professional and part-time actors are represented by ACTRA and Canadian Actors Equity Association (CAEA).

ACTRA members work in the full spectrum of fixed performance media, from commercials to television series, film, radio dramas, video games and various digital platforms including the Internet. On audio recordings, ACTRA contracts cover musical and spoken word performances, digital voice clips on toys and telephony recorded messages, even recorded museum tours.

CAEA is an association representing performers, directors, choreographers and stage managers in English Canada engaged in live performance in theatre, opera and dance. (Its sister organization in Quebec is the Union des Artistes.) The association traces its origins to actors' unions established in the U.S. in the 1920s, but came into its own as a full-fledged Canadian union in the 1960s. CAEA collective agreements, such as the Canadian Theatre Agreement, cover a range of issues relating to the workplace and working conditions, and the organization also administers benefits, handles disputes, etc.

ACTRA's members rely primarily on their collective agreement, but this allows performers to negotiate additional terms beyond those set out in the contract. Although an audio performer has copyright in his or her performance, an actor ceases to have any copyright ownership rights in a performance once it is "fixed" with the performer's authorization and used for the agreed purpose. The provisions and protections inherent in the collective agreement, therefore, help to compensate for the fact that performers are not entitled to any form of copyright royalty when authorized copies of an audiovisual work are sold, communicated to the public in a broadcast, on the Internet or in a movie theatre.

ACTRA, however, is part of a growing international campaign by actors' guilds to have performers' rights recognized under copyright law as being equivalent to those of the screenwriters and directors of audiovisual works. This debate is taking place within multi-lateral fora, such as WIPO, with performers organizations seeking an international treaty as a starting point. In Canada, under the present Copyright Act, audiovisual performers do not have the benefit of a full catalogue of economic rights in a performance, as authors have traditionally enjoyed. Although the 1997 amendments to the law enshrined the concept of neighbouring rights for sound performances, which provides a right to remuneration for the broadcast of recorded performances, these rights are not exclusive rights that would allow a performer to negotiate the use of his or her performances. Since those changes were enacted, performers have begun to receive royalties from radio and TV stations that broadcast their music, and sound performers share in private copying royalties.

ACTRA and CAEA contracts are highly detailed and include a grid for many categories of performances. It is not within the scope of this report to provide a detailed description of these contracts. But in general, an ACTRA performer is paid a fee and the producer obtains a limited right to use the performance in order to promote and distribute the work. There are options in the agreement that provide actors with enhanced rates with

secondary distribution deals, as well as compensation or additional fees for spin-offs, such as merchandise rights.

As with many creators working within the film industry, ACTRA members are generally affected by unauthorized copying of digitized movies – either pirated DVDs or downloaded versions. But ACTRA members are also confronting the advent of digital technology in more specific ways. These include video-game versions of films which require actors to produce voice-overs and performance capture for the digital versions of their characters; the growth of entertainment-related websites with voice-overs; and the next generation of online advertising which is interactive or adopts a broadcast style, and therefore makes use of actors in an online environment. ACTRA's fee grid has been amended to address these new types of performances.

A more challenging issue has to do with the growing popularity of low-cost digital filmmaking. There's nothing new about low-budget 'indie' films. But with the advent of affordable digital cameras and editing suites, there's been a sharp increase in this kind of filmmaking in recent years. But as production budgets decrease as a result of digital technology, there's a downward pressure on actors' fees in such projects, and thus an increased risk that producers of such films will use non-unionized talent. ACTRA has traditionally offered discounted rates for low-budget productions, and these typically entitled performers to a larger share of the profits, should they materialize. ACTRA has also addressed the growing presence of digital filmmaking within the movie industry.

Writing

The Canadian writing community is perhaps the most diverse of all the creator groups, and encompasses novelists, non-fiction writers, academics, children's authors, journalists, and poets (playwrights and screenwriters have been discussed above). In the latter category, contracts come from a range of sources: magazines, newspapers, websites, corporate and government communications contracts, speech-writing, ghost-writing, newsletters, and in-house publications. Another set of published work is produced by teachers or instructors who write – either on their own or in collaboration – textbooks or teaching materials. As with most other creator communities, there's great diversity in the amount of income generated from writing – from poets who earn tiny stipends from literary publishers to those freelancers who generate lucrative fees from steady corporate contracts.

In addition to the above-mentioned guilds, freelance writers may (or may not) belong to a range of organizations, some of which are certified by CAPPRT, and some of which aren't. In most (although not all) large media organizations, writers and editors belong to a union (e.g., Southern Ontario Newspaper Guild, the Communication Energy and Paperworkers).

Academics who publish books or journal articles belong to formally constituted faculty associations, and draw their salaries from universities or colleges. Similarly, teachers who write textbooks may belong to their own professional unions. But these organizations tend not to be oriented towards copyright issues or creators' rights; indeed, faculty unions have a history of participating in anti-copyright activism by universities. Several membership-driven organizations exist to represent the much larger non-unionized segment of the writing community, although they focus on a range of activities

from political advocacy to professional development. The Writers' Union of Canada is predominantly comprised of book writers.

The Periodical Writers Association of Canada represents some, but not all, magazine and newspaper writers, and a large number of writers making their livelihood from specialized corporate, government and non-fiction book writing. There's also the League of Canadian Poets, the Canadian Science Writers Association, the Canadian Association of Journalists, the Canadian Author's Association, provincial writers' organizations, and CANSCAIP, a networking organization for individuals who write and illustrate children's books. PEN Canada, part of the international Poets, Essayists and Novelists network, represents published authors concerned about domestic freedom of expression issues, refugee writers and the persecution of international writers. Canadian Journalists for Freedom of Expression (CJFE) plays a similar role.

In terms of copyright, there's a spectrum of practices. In Canada, reporters, except in specific cases, are salaried employees (these include those who write for media web sites) who cede copyright to their employers as part of the employment contract, except in very specific circumstances (e.g., authorship of a major series). Similarly, text book publishers are only willing to pay academics and teachers who contribute to textbooks on a piece-work basis, and they hold no rights in the overall work. (Teachers who write entire textbooks do receive royalties, of course.) For the most part, academics and teachers who write earn their living from their day jobs.

For trade book authors, copyright conditions are subject to long-standing and fairly stable practices in the book industry, and these are enshrined within contracts negotiated between writer and publisher. The publisher buys exclusive book rights based on an advance against earnings. Then the two sides negotiate a royalty scale and a range of secondary rights that depend heavily on the project and the bargaining power of the author. Rights usually revert to the author when the book goes out of print, and authors are rarely entitled to any royalties from the sale of remaindered copies. Authors don't benefit from the sale of used books. Some writers will retain international rights, while others will have these included in the initial contract. There are also rights related to adapting a work into audiovisual format and merchandise spin-offs. These are usually retained by the author. It is impossible to generalize about what authors earn from their books, as the combination of advances and royalty income runs the gamut from a few hundred dollars for a small print-run chap book to millions for a mass market bestseller.

The contrast between textbooks and trade books is worth noting. For the latter, creators' earnings reflect market conditions. Because copyrights are respected, the more successful a work is, the larger the creator's income is. With textbooks, there's no direct connection between a creator's contribution and the commercial viability of a given title, which raises a key point: if textbook publishers operating in Canada actually heeded the copyrights of their authors (which is what they are demanding of consumers when these firms pursue legal action against copyshops, etc.), there would be a thriving freelance textbook writing community, and perhaps better quality texts as a result.

Magazine freelancers generally sell first publication rights, although in some cases (e.g., with assignments for some professional associations, corporations, government), they surrender copyright entirely. But in general, freelancers have been able to reserve secondary publication rights, allowing them to re-sell their work to other publications or organizations that wish to re-print articles for some internal purpose. As is well-known, freelance rates have remained largely stagnant for many years, typically ranging from

about 40-cents to $2 per word in Canada. Reprint fees vary: the benchmark rate is about a third to one half of the original fee, but the final payment depends heavily on the freelancer's negotiating skills, the intended circulation of the reprint, and their motivation to extract a fee. Non-profit groups commonly seek permission to re-print articles for advocacy purposes, but they frequently refuse to pay, citing lack of resources.

Lastly, Canadian writers have access to two other income sources deriving from their work. One is the Public Lending Right, a federally-administered program which makes payments to Canadian writers who have published at least one book. It exists as a program of the federal government to compensate authors for the circulation of their works in public libraries, but isn't a benefit of copyright per se. The second is Access Copyright, a much broader collective society that negotiates blanket reprography licenses with educational institutions, libraries, governments and other organizations. Using rates based for the most part on sampling and to a lesser extent on record keeping by licensees, Access Copyright distributes revenue from licensing among both creators and publishers based on formulas negotiated by the creators and publishers associations represented on its board.

The rapid evolution of digital media have had a complex impact on writers, and this impact depends heavily on what they write, and the media in which they publish.

Magazines and Newspapers

In the mid-1990s, freelance writers experienced what can best be described as a wave of panic among magazine publishers concerned about the prospect of creating parallel publications online. Reacting to both the advent of media websites and the Heather Robertson class action against Thomson Corp., almost all publishers asked their freelance contributors to sign contracts which required them to waive electronic rights to their articles in perpetuity, often for little or no compensation (5% of the original fee is typical, and this formula fails to recognize the added value inherent in the electronic rights). These contracts stood in sharp contrast to highly informal relationships between writers and magazines that had customarily acquired only first publication rights. As has been widely reported, lawyers for some large media companies drew up contracts demanding that freelancers hand over a wide assortment of rights, and then presented them to writers on a take-it-or-leave basis.

In some cases, writers who refused to sign are blacklisted. One Alberta freelancer recalls pitching a column to the Globe and Mail. She was sent a contract that stipulated that her article can be archived indefinitely. The writer struck out the clause, signed the contract and returned it, only to be told she couldn't do the column. Such experiences underscore the point that certain types of creators – freelance writers in this instance – lack bargaining power and are therefore forced to accept disadvantageous deals.

"There was a sense that you didn't work for the Globe unless you signed this contract," says a former Globe magazine editor, now a writer. Initially, the editorial staff adopted a casual attitude, and some resented forcing their contributors to accept these agreements. Eventually, the newspaper's management made it clear that no one could contribute without a signed contract. While a number of freelancers opted to boycott the Globe, many other didn't. "Most writers didn't have an issue, because the Globe was paying well enough that [the contract] made sense." In any case, they couldn't afford to turn down the opportunity to write for one of Canada's pre-eminent publications.

For PWAC and many freelancers, this "rights grab" has several dimensions. One involved moral rights: because the contracts were so broad, freelancers would lose the ability to control changes to their work. Another involved the retention of rights. These contracts shifted the rules by forcing writers to surrender various rights that they could exploit by re-selling articles into other markets. Lastly, those contracts – because they entailed such a nominal fee for web use – didn't allow freelancers to share in the advertising and e-commerce revenue generated by the content on media websites. Moreover, the contracts appeared to pave the way for media firms with several mastheads to "re-purpose" articles without paying the author for these re-uses. As a 1996 PWAC income survey of its members showed, the average freelancer earned $26,000, with only $16,000 derived from the Canadian periodical market. Fees paid by mainstream Canadian magazines haven't risen appreciably since the 1970s.

Nearly a decade later, the controversy over these contracts has subsided to some extent with some notable exceptions of large media companies continuing to test the industry's tolerance for rights-grabbing contracts (e.g., a 2004 version of the CanWest freelance contract, which included a provision that the "Freelancer hereby irrevocably grants and assigns to CanWest all rights of every kind in and to the Content (including copyright), and agrees that CanWest shall have the right to exclusively use and exploit the Content in any manner and in any and all media, whether now known or hereafter devised, throughout the universe, in perpetuity."

Some writers have discovered that, with the passage of time, publishers are somewhat more willing to negotiate terms. What's more, the magazine industry, though highly concentrated and vulnerable to newsstand competition from U.S. publications, has proven to be resilient, with the arrival of many new periodicals expanding the market for freelancers. Moreover, the anticipated mass migration of magazine readers to the Internet did not occur. Many, but not all, magazines now publish some kind of an online version of their content or are tied to a portal or business-to-business site. These sites generate some revenue through advertising, subscriptions or e-commerce, and, as with music, provide consumers with a sample that may translate into hardcopy sales or subscriptions. In the general interest sector, the websites appear not to have undermined the paper versions.

The Internet has, however, facilitated a tremendous amount of unauthorized digital copying of magazine and newspaper articles written both by freelancers (who usually hold copyright) and staff reporters (who, in most cases, don't). HTML or PDF files of relevant articles -- or links to them -- can be found on a proliferation of websites maintained by corporations, advocacy organizations, government institutions, even politicians. In other cases, writers have discovered other articles posted online which contain lengthy segments of their own work included without credit.

The sheer magnitude of this practice of unauthorized postings – presents further proof that many Internet users, including those working for government agencies, regard online material as free for the taking. Of course, magazine and newspaper articles are routinely photocopied for various purposes – sometimes with authorization, sometimes not. In the past, it was not uncommon for companies or organizations to contact writers to seek permission to reproduce an article for marketing, education or advocacy purposes. Such inquiries often generated some kind of reprint fee, depending on the organization's wherewithal and the negotiating skills of the writer.

Although there's no hard data, it would appear that such reprint requests to the writer are in decline, while website postings are very much on the rise. With paper reproductions, of course, it was nearly impossible for writers to determine whether copies of their articles were being made by an organization for the various purposes cited above. Some groups are diligent about obtaining permissions, and others don't bother.

In the era of "ego-surfing," it's become far easier for writers to determine whether organizations or companies are posting their material on websites without permission. But this 'trackability' doesn't necessarily translate into extra revenue. Occasionally, an organization or a company, when contacted, will agree to pay a reprint fee, thus recognizing copyright. The more typical response is the removal of the article. This reaction is also an implicit recognition of the writer's copyright. It remains to be seen whether copyright collectives can develop systems to track unauthorized Internet posting on behalf of writers who assign such organizations the right to authorize digital reproductions of their work.

Databases

The related issue has to do with proprietary electronic databases, which may include a great deal of material produced by freelancers. The ultimate outcome of the Robertson case will provide a crucial judicial ruling regarding the issue of whether companies that create and sell databases are liable for unpaid royalties due to freelance – and even staff -- writers whose work has been included in their products. And even though many publications have altered their contracts with writers to include sweeping rights to re-publish material in such databases, there are still many cases where magazine publishers sell articles by freelance contributors who have not agreed to assign their rights to third-party database companies, which, in turn, license their products to companies, governments, libraries, educational institutions, etc.

Canadian copyright law affords protection to "original" databases – i.e. where the selection and arrangement of the underlying work is distinctive in some way -- but the Federal Court has ruled that it does not extend to "non-original" databases. The line between original and non-original is fuzzy. Different jurisdictions have taken various approaches – the European Union and Australia have more explicit protections for both sorts of databases, whereas in the U.S., the law remains limited to original databases. While the database issue was raised in the federal government's Section 92 report, released in 2002, there has been no subsequent mention of database protection in the context of the next set of copyright reforms.

The federal government's policy pronouncements on the issue of databases, moreover, are directed entirely towards the needs of the companies and institutions compiling those databases, as opposed to the rights of those who have contributed to them. That omission is addressed directly by a wide-ranging study on database law commissioned in 2002 by the federal government, written by Robert Howell, a professor of law at the University of Victoria. (His conclusions do not reflect federal policy)

Under existing copyright law, Prof. Howell says, the copyright in a database has no bearing on the copyright of the underlying materials, which remain intact. But, he adds, "[c]ase law would suggest that copyright should be denied" if the database is a compilation of infringing works that have been included without the consent of the original owner. "The inclusion of illegal material in a compilation or database," he writes, "may enhance the distribution of such material so that protecting the database might

further the purpose or consequence of illegality." The policy implications are obvious. As Prof. Howell asks, "To what extent might the operator of a database or compilation be liable for contributing to, or `authorizing', copyright infringement by users of the database, with respect to unauthorized subject matter included in the database?" Unfortunately, the federal government's latest policy documents are silent on the issue.

Books

Book publishers increasingly ask for electronic rights, but these are often not defined properly. They can mean a verbatim digitization of the author's text, but they can also provide the rights foundation for a multi-media project that alters and enhances the original work. Moreover, the as-yet-unrealized potential of print-on-demand technology has the potential to alter the well-established tradition of rights reverting to the author after a book goes out of print. There's some concern among writers and their representatives that publishers might attempt to retain exclusive rights in perpetuity if print-on-demand becomes viable. The Writers Union of Canada has sought to include a standard clause in book contracts which provides that a title goes "out of print" and rights revert when the publishers' sales fall below a fixed number of copies of the text. It has also recommended against contracts with blanket prior permissions for electronic adaptations, because of the near impossibility of predicting the market value of such subsequent uses. TWUC prefers licensing of electronic rights as the opportunities arise.

The practical reality, however, is that books have yet to establish a parallel existence on the Internet or in digital format. It still appears that most people still prefer to read a "hard copy," despite the advent of CD-ROMs, electronic books and tablet readers, and the availability of web-based texts.

Poetry

Many poets have grave concerns about the Internet. A publisher of fiction or non-fiction may post a few pages of a book on the corporate website for promotional purposes without undermining hardcopy sales. But a literary publisher, using precisely the same technique, can inadvertently end up putting a significant portion of a poet's collection onto the Internet, sometimes without seeking permission. Poems, as one poet points out, are short, easily copied and often find their way onto the Internet stripped of the author's name. Indeed, apparently "anonymous" poems are becoming an increasingly common sight on some teachers' websites. (Similarly, poetry is routinely photocopied for classroom use, simply because it's so easy to do. It is unknown whether sufficient compensation for this use reaches those poets who are registered with Access Copyright.)

As with some musicians, there are poets who regard the Internet – and specifically their own websites -- as a potentially attractive way to reach audiences, especially since it is so tough to get published. Not surprisingly, younger poets are more receptive to this approach – generating "psychic income," as it were – while older or more established poets fear the prospect of losing their works to unauthorized digital copying.

Textbooks

The other exception is textbook publishing, a market that has long been the target of unauthorized copying. This is a field quite unlike the rest of the book industry. As mentioned above, many textbook authors are paid flat up-front fees, rather than with a combination of advances and royalties, as is the case for trade book authors. Thus built on

a foundation of low-cost "content," the textbook industry has become exceptionally concentrated, and directs its sales and marketing efforts not at the end-user, but rather to the education bureaucrats overseeing curriculum and professors responsible for preparing reading lists. In other words, it is a highly mediated industrial sector that does not function according to the traditional economic laws of supply and demand. Though in the business of conveying ideas to students, the textbook industry has little structural regard for the rights of the individuals who are responsible for formulating those ideas into text.

For almost two decades, the textbook industry has been fighting a guerilla war to maintain its market share in the face of unauthorized copying. In the 1980s, copy shops set up on the outskirts of most campuses and offered to make illegal reproductions for students. Campus bookstores increasingly promoted the sale of used textbooks. And instructors, in recent years, have taken to creating "course packs" – essentially home-made anthologies comprised of excerpts from various sources. With heavy use of computers and the Internet among university and college students, scanned versions of textbooks and other readings are now readily available on some p2p file-sharing sites.

From the perspective of creators, the textbook sector's hard-fought battle to curb illegal copying must be carefully analyzed, because it has had a disproportionate impact on the policy debate over the educational use of Internet. This is an area where there's been a deliberate blurring of producer and creator interests.

Publishers fail to respect their author's rights to participate in the spoils of a successful title. But unauthorized textbook copying, in turn, is a market response to the textbook industry's cynical marketing, copyright and pricing strategies. Students do not have a lot of money, yet they are compelled once or twice a year to spend significant sums on new textbooks – at least some of which are written by their own professors. Over time, many students have also come to understand some of the tricks of the trade. Many publishers will issue marginally updated "editions" of existing texts in an attempt to keep their customers away from the used book market. Similarly, most students now recognize that they may be forced to buy an extremely expensive textbook, but will only use a fraction of its content, and do so for a very short period of time. In response, they will buy one textbook or course pack, scan it and make many copies for their colleagues.

In spite of its mistreatment of its authors, the textbook industry has succeeded in asserting its own commercial interests to policy-makers. Through a combination of legal tactics against copyright abuse and the use of reprography licenses negotiated by Access Copyright with universities and copy shops, textbook publishers have managed to recoup some foregone revenues due to photocopying and course-packs by offering legitimate and convenient access to photocopying.

Increasingly, large academic publishers are seeking to create, package and sell digital versions of their material, both in recognition of the high level of computer use among students in post-secondary institutions, but also to cut production costs associated with printing, paper and shipping large texts. Academic publishers are still experimenting with ways of distributing this content (CD-ROMs, password-protected websites, etc.). But there is already a lot of activity in the so-called "distance education" field, where students can take courses outside the classroom and access learning materials electronically, for example, from secure websites. Proponents of distance education argue that it would be more convenient if such technological processes were exempt from copyright, even though they expect publishers and creators to continue producing

educational materials to disseminate to the ever growing ranks of students studying in remote locations.

Aware of the music industry's unhappy experience with the Internet and file-sharing, academic publishers are eager to foster a legal environment that allows them to protect their content from unauthorized copying. The major players are multi-nationals, and will point to various recent laws in the U.S. required by the WIPO treaty that provide such protection, including penalties for tampering with encryption systems. Canada has yet to enact such legislation, and so the Canadian divisions of academic publishers are not producing digital learning material, out of a fear that these files will turn up on p2p sites accessible to any university or college student.

The bottom line is that publishers are failing to win creator support for the cause of copyright in the educational field because they themselves so systematically disregard creator copyright.

Educational Use of the Internet

This is the background context for the battle over the so-called educational exemption for use of the Internet – a contentious issue that has held up the Canadian copyright reform process. Material reproduced for education is subject to copyright law, with some exceptions (performances in classrooms, displays, etc.). Educators pay a licensing fee to copyright collectives for such material photocopied for use in classrooms or assignments. The revenues are distributed to copyright holders.

When the federal government published its first consultation paper on digital copyright issues, in 2001, the question of educational uses didn't warrant a mention. After a year of discussions, Ottawa issued the so-called "Section 92" report – the commencement of a mandated five-year review of the 1997 Copyright Act amendments. With regard to the educational uses controversy, the report observed that "[c]oncerns with respect to access were raised by many stakeholders during the Government of Canada's recent consultations on digital issues. These concerns reflect the fact that the traditional environment for teaching and education is evolving rapidly with the introduction and use of new information and communication technologies. Ensuring appropriate access could include expanding existing exceptions, introducing new exceptions or clarifying and streamlining existing rights clearance approaches."

The education lobby – colleges, universities, provincial ministries, teachers' federations, student groups, school boards – want Ottawa to pass legislation that exempts educational uses of the Internet from the provisions of copyright law, citing a public interest justification. They were seeking an extension of the "fair dealing" rules.

The education coalition's position was an attempt to fill what its members considered to be a legal void. Internet use in educational institutions is ubiquitous. Students and teachers download a tremendous amount of accessible material, some of which is in the public domain – e.g., government information -- and not subject to any kind of reserved rights, or is material which the owners want to make available without any fee. But there's also a great deal of content on the Internet that is copyright protected, not just files on p2p servers, but material on commercial websites (e.g., media sites). As the Heritage Committee's Interim Report put it, "These Internet materials frequently reside outside the repertoire of copyright collectives."

A coalition of groups coalesced on the other side, including writers' organizations concerned about various issues, especially the potential loss of royalty revenue and the

problem of electronic versions of their work being altered without authorization. The creator grouping, however, was spearheaded in large measure by industry lobby groups representing the Canadian arms of the multinational textbook publishers and the major record labels. They advocated measures, modeled on U.S. legislation, that would make educational institutions responsible for controlling the use of online digital materials.

The Standing Committee summarized the dynamic this way:

"Copyright holders wish to encourage use of the Internet for educational purposes, and see the Internet as an important medium through which their works can be disseminated to the educational community. Copyright holders argue, however, that users of the Internet cannot assume that the material posted on the Internet is meant to be 'free', in the sense of being both publicly accessible and available without cost. Copyright owners argue that merely making works available for the public to access through the Internet does not amount to a waiver of copyright. In addition, authors raised the issue that moral rights are not adequately protected on the Internet." It is clear from the committee's summary that creator issues – e.g. moral rights and the low income of writers – are secondary to the larger interests of "copyright holders" in the debate over the educational exemptions.

Education groups and rights holders were locked in a political stand-off for almost two years, thus delaying the rest of Ottawa's copyright reform agenda. "The education side wants to make all Internet materials free except that which is locked up," an educational textbook publisher told a reporter. "We'd rather make the free content the exception."

A creative solution, advanced by Access Copyright and adopted last spring by the Committee, represents a middle position that creators can comfortably support. It calls for amendments to the Act that would allow Access Copyright – which currently earns about $20 million a year in revenues from educational institutions -- to negotiate blanket licenses with school boards to cover copyright materials found on the Internet. A similar approach has been proposed for distance learning. "This licensing regime would / ecognize that certain types of copyright material may be posted or accessed on the Internet without expectation of payment," the Committee added.

Music

In terms of popularity, economic viability and critical acclaim, the Canadian music sector is one of this country's great cultural success stories. In the last forty years, Canada has produced a large and vibrant music industry with a broad range of talent and many international stars. While the particular evolution of Canadian music has many ingredients, there's little question that Canadian content rules governing broadcasters have played a critical role, by comparison to the various categories of policies geared to other cultural industries (e.g., tax incentives, block grants, postal subsidies, etc.).

As in other creator sectors, Canadian musicians and composers earn their income from various sources: commissioning fees, royalties based on CD sales, royalties from the broadcast of their music on the radio, television or other media; levies on blank media, and, in the case of performers, from revenues generated by "neighbouring rights" (i.e., a performer's right to a fixed version of their performance, which is remitted by broadcasters).

A range of organizations, unions and collectives represent all or some of the commercial interests of this broad category of creators.

The most prominent of these is SOCAN, the Society of Composers, Authors and Music Publishers of Canada, which has approximately 70,000 members, of whom about 25,000 are active. Formed in 1990 following the merger of two predecessor organizations whose roots go back to 1925, SOCAN collects licensing fees from anyone playing or broadcasting live or recorded music. It grants music users permissions in the form of licenses based on tariffs set by the Copyright Board. These rates apply to a broad range of users, including radio and television stations, educational institutions, theatres, adult entertainment clubs, karaoke bars, skating rinks, theme parks, planes and ships. SOCAN also manages reciprocal agreements with international performing rights societies.

The other leading music collectives include SODRAC, which tends to be more active in Quebec (although not exclusively so), and the Canadian Musical Reproduction Rights Agency (CMRRA). The Canadian Private Copying Collective, in turn, collects and distributes the blank media levy established under the 1997 Copyright Act amendments. (The CPCC has collected $59 million since 1999, with the proceeds split between producers of sound recordings, performers and authors, i.e. lyricists and composers.) This collective represents a compensatory solution to the music industry's concerns over previous copying technologies, such as cassettes and, more recently, write-able CDs.

The Songwriters Association of Canada, with 1,200 members, represents a broad range of songwriters, from novices to stars like Sarah McLaughlin, working in all categories of contemporary music. SAC maintains a song depository (which currently contains over 10,000 works) that serves to provide proof of copyright ownership. The organization also involves itself in negotiations intended to improve the contractual arrangements between songwriter-performers, publishers and record labels – a relationship that has witnessed a long and troubled history since the birth of recorded music (e.g., folk musicians whose songs were popularized by rock groups, with little or no financial compensation). It is not within the scope of this report to examine the precise state of these contractual arrangements as they currently exist in Canada.

The Guild of Canadian Film Composers was founded in 1980 in order to develop a formal contractual agreement between producers and musicians commissioned to write scores for audiovisual works. It took almost two decades to accomplish this task, however. In 1999, CAPPRT ruled that the Guild could negotiate a standard contract with producers; it was formally certified as an artists' collective bargaining entity in 2003. (Under the provisions of their collective agreement, most film composers working in Canada within territory specified by the Status of the Artist Act – including U.S. composers hired by runaway U.S. productions – are subject to the terms of the contract.

As with directors, film composers continue to strive to have their creative work formally recognized at the level of public policy. Under the terms of various tax incentive mechanisms designed to encourage the industry to hire Canadian talent, the work of composers is treated as an business expense, rather an intellectual property asset, with underlying rights.

The Canadian Music Centre, founded 45 years ago, is a repository of scores, primarily but not exclusively, written by contemporary classical composers. It holds the works of 635 composers, and comprises about 16,000 pieces of music. When a composer joins, he or she permits the Centre to promote the work, which includes an authorization

to make copies of scores in the repository in order to respond to rental or purchase requests from orchestras and other musicians seeking to perform the composition. (This model is similar to what the Playwrights Guild of Canada has established.)

For the past few years, the Centre has been making digital copies of the scores in its collection, and is now about half way through its repertoire. The Centre's intention is to be able to make its database of digital scores available electronically, via a website, to further promote its members' music. At the moment, however, they have not taken this step because there's no way to guarantee that the scores will not be copied. Existing encryption technologies and other anti-copying measures are inadequate. The situation is yet another vivid illustration of how the public can be denied access to creative work because there's no mechanism for paying creators and respecting their rights.

Still, the main financial issue facing contemporary classical composers is the fact that there are so few performances of their work. Classical composers derive their music income from commissions, and earn the lion's share of their revenues up-front. Most also teach in a private or university setting; only a handful are successful enough to survive exclusively on commissions. Shoring up copyright protections is but one step in addressing the larger problem, which is that artists are entitled to be paid for their work, not just the ancillary activities that allow them to make ends meet.

Rounding out this list is the Canadian chapter of the American Federation of Musicians, which has a membership roster of about 17,000 artists, three-quarters of whom are freelancers (its full membership is 130,000). The AFM is a 108-year-old trade union in the U.S., but has the status of a professional association in Canada. It represents all musicians hired to work for the CBC, for example. For musicians who play in clubs or at events such as weddings, the AFM provides services such as contract protection, immigration assistance, etc. Though typically not recording artists, such musicians often have their work recorded or broadcast without their permission, through live-to-air simul-casts on radio or cable stations. Often, the broadcasters ask the bands for a waiver, which essentially takes away the musicians' right to collect any future royalty revenue that may be generated by such uses.

Among its other duties representing the interests of its session musician members, the AFM negotiates and administers special payments which incude a pro-rata share of industry profit as well as royalties for "new use" arising from the subsequent use of existing recordings in advertising jingles, films, television series, international television deals, and so on. For professional session players, such special payments can account for an extremely significant source of income, representing as much as 60% of annual income for prominent U.S. musicians.

The relationship between recorded music and technology is a vast topic. Sound recording and mixing technology have revolutionized all forms of music. Musicians and songwriters have used a range of musical technologies to invent new styles. And successive generations of consumer electronics -- some successful, others not -- have made recorded music universally accessible.

As with television, the combination of broadcast technology and home recording devices have produced significant challenges to the music industry. But as radio survived television, the music industry, in the past, learned to co-exist with private copying on media such as cassettes, in the way that Hollywood, though initially threatened by home copying, discovered how to capitalize on the mass consumer acceptance of VCRs.

The music industry's confrontation with the dilemma posed by Internet copying is a well-publicized story, and one that is not limited to the Canadian context. In recent years, retail sales of CDs have plunged, from 67.3 million in 1999 to 55.2 million in 2002 (projected), according to a study conducted for Industry Canada. Over the same period, sales of blank CDs has jumped from 45.5 million unit to 155 million, while sales of CDR/RW writers has seen a comparable increase. The reasons cited include high price points and consumer downloading from file-sharing sites, as well as the rapid adoption of the technologies that enable such copying – CD burning, MP3, high-speed network access. Another explanation for the declining sales is the production of fewer CD titles.

Most observers note the generational aspect of this trend, with younger listeners being far more willing to make unauthorized digital copies than an older generation of consumers. But there is also a strong measure of inconsistency in attitudes towards unauthorized copying. Young consumers accept technology-driven economic trends, such as the rapid obsolescence of computers, and the $1 royalty cell phone users readily pay for ring tones (ring tones, as a consequence, now bring in billions in royalty revenues each year). But they balk at paying for recorded music found on the Internet.

One well-known Canadian recording artist cites the apparent, and difficult to comprehend, disconnect among many music consumers. "My fans come up to me at concerts with their burned CDs and ask me to sign them," she says. "They don't get it. They are just helping themselves…The temptation is just too great."

To counter this practice, the major record labels have enlisted the support of internationally known recording artists, shut down Internet radio, and launched enormous lawsuits against file-swappers, making use of new anti-piracy laws in the U.S. The Canadian Recording Industry Association attempted to pursue a similar legal action, seeking to force ISPs to disclose the names of subscribers suspected of swapping large numbers of music files; the claim was rejected by the Supreme Court of Canada.

As is well known, there's no consensus within the music world about such hard-ball legal tactics. Many musician/songwriters hope these legal actions will serve as a deterrent. But groups like SAC and SOCAN distanced themselves from the CRIA case and many critics condemned the music labels' strategy as an attack on its own fans.

Moreover, there is no agreement on the precise nature of the threat posed by Internet copying, which is now extensive (one estimate from the U.S. is that 40 million people downloaded music in 2002.) Those who defend file-sharing point out that Top-40-style downloading represents only a portion of this activity, as many Internet users are looking for music that is either in the public domain or no longer commercially available.

Lastly, there are some songwriters, artists and musicians who believe that posting music on the Internet represents an online promotional/marketing tool that can lead to sales of their albums and therefore compensation for their creative work. Some small independent labels have pursued this approach to circumnavigate structural impediments in the industry – e.g., increasingly Top-40-oriented radio play lists centrally programmed by huge broadcast conglomerates, and lack of exposure in retail music chains where shelf space is increasingly dominated by the artists represented by the major labels.

One Canadian songwriter tells the story of trying to persuade her record company, one of the majors, to take a more innovative approach to marketing her latest album as a way of countering sales lost to the Internet. Her strategy involved a combination of value-added packaging, sales through non-traditional retailers, Google-based advertising links, e-commerce sales from her own website, and lifestyle marketing through consumer

magazines. But her label rejected this approach as too "outside the box," so she released the CD independently. The move has "absolutely" paid off, but it also means that she's had to take a much more hand's-on role in the business end of her craft, she says. "The days of being able to sit at home and write songs are over, for everybody."

The most recent piece of the Internet music puzzle has to do with the advent of fee-based download sites, such as I-tunes, where consumers can buy songs for 99-cents. In that case, the record companies negotiated the rate directly with Apple, leaving the creators out of the discussion. Two-thirds of the fee goes to the label and one-third goes to Apple. Songwriters and publishers receive a small fraction of the fee remitted to the record label – an amount similar to the approximately 8 cents received as a mechanical royalty for a song contained on an actual CD sold. This amount is administered by the publisher, 50% of which is remitted to the songwriter or applied to the songwriter's account in the event of an un-recouped advanced.

In Canada, songwriters see a greater opportunity to influence the economic structure of these new music distribution sites. At present, Puretracks.com has been established as a domestic fee-based downloading site. As of the fall of 2004, there's no agreement in place over the fee structure, and songwriters hope to have greater input into the licensing agreement Puretracks negotiates with CRIA and the Canadian Music Publishers Association, which is also representing songwriter interests. In the meantime, the Canadian Music Publishers Assocation have filed for a tariff with the Copyright Board to have a percentage of the download pie set, so that they would be paid directly from Puretracks or similar businesses and not be bundled with the record companies share of royalties to then be subsequently accounted from the record companies to the publishers.

What remains to be seen is whether these kinds of sites will become economically viable for the music industry, and also accepted among consumers, especially with the advent of legislation intended to promulgate the making available right that is designed to limit file-sharing. The broader point is that the legitimacy of such arrangements rests on respect for creator rights; if the deals negotiated between these filing-sharing services and the music labels fails on this score, the whole system will collapse.

In terms of the federal government's copyright policy moves in this area, Ottawa has been promising to ratify the WIPO treaties for several years. Based on the Status Report on Copyright Reform submitted in March 2004 by the ministers of Canadian Heritage and Industry, WIPO and other related legislative changes now being discussed include the implementation of an exclusive making available right for producers and performers; measures to discourage tampering with technological protection measures and rights management information that identifies copyright material; the introduction of exclusive distribution rights for audio performers (these already exist for producers and authors); and a legislated recognition of moral rights for audio performers.

But an economic impact report recently commissioned for Industry Canada casts some doubts about the benefits of the WIPO treaty for domestic performers. "Performers and sound recording makers share interests in common in creating and supplying recorded music, though the economic position of the former is mostly considerably weaker than that of the sound recording makers, who often have the superior bargaining position," concluded Ruth Towse, associate professor of cultural studies at Erasmus University in Rotterdam. "The underlying motive of the WIPO Treaties is the promotion of international trade in copyright material. The likely effect is that implementation could

increase revenues to performers and sound recording makers, but the revenues are likely to accrue mainly to non-Canadians."

Part III

As the federal government moves towards the next round of copyright policy reforms intended to modernize domestic legislation, Canadians need to scrutinize the impact of the previous set of amendments, which are now seven years old. The question is whether these legislative changes have undermined creators' economic and moral rights in their intellectual property, and therefore impoverished the public realm. Such an analysis can be broken down into four parts: the consequences of the exceptions included in the 1997 amendments; the effectiveness of copyright collectives in compensating creators for foregone income due to legislative exemptions; the state of moral rights in Canada in the wake of the Théberge and Desputeaux rulings; and, finally, the issue of whether labour relations legislation directed at artists can be regarded as a means of providing creators with additional control over their works.

Exemptions

"The single copy exemption," says a former chair of The Writers' Union of Canada, "is a 30 million copy exemption." That verdict sums up how many writers have come to view the long-term impact of the menu of exceptions appended to the Copyright Act in the 1997 reform package, and then buttressed by the precedent created in the Law Society's Great Library case (which involved the making and distributing of copies of law reports by the library). Those exemptions were promulgated to achieve a variety of public policy objectives: enabling research and access to materials at libraries and museums; facilitating certain types of teaching practices; and providing support for individuals with various disabilities, to name a few. Such changes are also mandated in the name of maintaining a balance between copyright owners and users.

It is worth noting that the exemptions in the Act are overwhelmingly directed towards the written word -- articles, plays, tests -- although the list does include performances of live or recorded music in educational institutions and the recording of radio and TV broadcasts under certain conditions. The Section 92 review even raised the question of whether the exemptions should be extended to allow for the showing of films and videos in school settings. But the list of categories of copyright works *not* included under the 1997 exemptions is revealing: software, films and videos, database products such as CD-ROMs, etc.

The malleability of the stated policy principles can be illustrated by the fact that there may well be a defensible public interest in allowing, for example, the copying of computer programs for research or private study within a library. Moreover, many software companies now use so-called "shrink wrap" licenses – when the user unwraps the cover, they are deemed to have agreed to the conditions of the license, and these may even override any statutory exceptions. It remains unclear whether shrink-wrap licenses nullify the fair dealing rules. But the broader point is that clever technical measures ought not to be allowed to trump a practice as fundamental to the dissemination of knowledge as fair dealing.

It's probably not a coincidence that the software industry, dating back to the early days of Microsoft, has been zealous about protecting its own copyright in order to counter

the erosion of its economic franchise because of illegal duplication. Individual writers, who are most adversely affected by the new exemptions, simply don't have the wherewithal to defend their intellectual property with the same kind of vehemence.

Some authors point out that the proliferation of exemptions has thwarted a more market-oriented negotiation process that should evolve organically between copyright owners (via rights collectives) and users or user groups, as has been the case with SOCAN and the broadcast industry. "Once you start adding specific exceptions for specific purposes into the legislation, there is a natural tendency for users to resort to exemptions, which puts the onus on creators to prove their work shouldn't be exempted," says one journalist and historian. "Access Copyright has major relationships with educational institutions because of course packs, but receives very little revenue from libraries because they fall under the single copy exemption." As this writer points out, there's nothing to preclude collectives and users who require some kind of `discount' – e.g., those with perceptual disabilities – to work out an accommodation that achieves the same result, i.e., a voluntary license with little or no fee.

A journalist and critic cites her strange experience with that particular exemption. She discovered one of her books had been made into a "talking book" when she heard the recorded version had been nominated for a literary award offered by the Canadian National Institute for the Blind. It was the first she'd heard of the translation into audio form. No one had asked her for permission, nor consulted with her on editorial issues such as the choice of narrator, biographical details, etc. In fact, she was told she needed the assent of the publisher to obtain a copy. This anecdote illustrates that an exemption – even a well-intentioned one -- comes to be treated as more than just an economic benefit, and so encourages certain assumptions about what can be done with, and to, those copyright works subject to user-oriented provisions. "An exemption is not a license to take," says the author, who is aware of other such cases.

Quite apart from the way exemptions encourage users to disregard broader intellectual property rights, creators must confront the question of the actual economic impact exemptions have had on both copyright owners and users. Can educational institutions, libraries, museums and archives demonstrate that they've been able to deliver the public policy goals set out in the 1997 reforms? And on the other side of the divide, what has been the economic impact, in terms of foregone royalty revenue, on those individuals whose work has been copied on the strength of an exemption? It is striking that the federal government didn't bother to address either of these questions in its Section 92 review of the Copyright Act. This analytic gap would appear to be a grave error in both directions, because Canadians, at this point, can not say for certain whether the exemptions are providing the desired policy benefit, or, as some observers suspect, if they have inflicted hardship on creators by expropriating part of the value of their work.

It is interesting to note, in light of such criticisms, that the federal government's earlier enthusiasm for the use of exemptions has, in fact, waned slightly in one particular area: inter-library loans of journal articles. Under the 1997 reforms, research libraries were given the authority to make electronic copies of journal articles and email these to other libraries as part of their inter-library loan service. The rider on the exemption, however, was that the article could only be delivered to the library patron in hard copy form, not electronically – a logistical detail designed to prevent unauthorized electronic copying, but one that irritates many academics, especially those from the U.S., where electronic delivery is allowed.

During the consultations in the latest chapter of the reform process, researchers and libraries lobbied to have the exemption extended to electronic delivery. But in the March, 2004 interim report on copyright reform, issued by the Standing Committee on Canadian Heritage, the committee members opted to side with journal publishers and authors by recommending that the solution lies in an extended collective licensing regime, not an enhancement of an existing exemption.

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The State of Canadian Collective Management

A collective society, according to University of Ottawa associate law professor Daniel Gervais, "is an organization that administers the rights of several copyright owners. It can grant permission to use their works and set the conditions for that use." More generally, though, collectives are a means of creating markets where they would otherwise not exist, because authors and publishers, individually, could not license uses in response to countless demands for reproductions.

These operate under a handful of legal models and governance structures, and are subject to competition laws designed to prevent monopolistic behaviour. They collect royalty revenue through a range of methods, from tariffs set by the Copyright Board to voluntary fees, negotiations with users, and so on. Canadian collectives now deal with a wide variety of copyright situations, including photocopying, public performance of recorded music and representations of works of visual art. There's also considerable variety in the ways in which collectives secure permission to represent the rights of creators; some, as has been described above, have little visibility, while others – especially those that deal with broadcast media -- are well known and represent a very large proportion of the creators and copyright owners operating in a given media.

The fundamental question creators have with respect to collectives is whether they are successful at distributing royalty revenues to individual artists. A report prepared for the Department of Canadian Heritage in 2001 by Prof. Gervais offered a snapshot of the economic clout of selected Canadian collectives relative to other jurisdictions. In 1998, SOCAN's revenue per capita stood at $2.53, compared with $2.50, $3.66 and $4.20 for musicians/songwriters' rights collectives in the U.S., France and Germany, respectively. With reprography collectives, Canada's per capita ranking was slightly closer to the middle of the pack, standing at 52 cents, compared with 28-cents and 34-cents for the U.S. and Germany. The Scandinavians, however, achieved per capita rates from 92-cents to $5 (all figures in U.S. dollars).

The following list itemizes creator collectives' that have disclosed financial data:

- Canadian Private Copying Collective, formed in 1999 to distribute revenues from levies on blank media to songwriters, recording artists, publishers and record companies. Between 2000 to 2003, CPCC has made distribution payments of $26.4 million, and has generated $24 million and $26 million in revenue in 2002 and 2003. Over the same period, however, its expense/revenue ratio has almost tripled, due to high legal costs.
- Neighbouring Rights Collective of Canada is an umbrella organization established in 1998, and overseen by ACTRA, the AFM and other creator groups. Its distributions to publisher and performer collectives grew respectively from $1.1 million in 1998 to $3.7 million in 2001 – more than three-fold increase in four years.

- Access Copyright, formed in 1988 (as CanCopy) by publishers and creators to collect reprography royalties. Its membership now includes over 6,000 writers, photographers, illustrators, as well as 550 newspaper, book and magazine publishers in English Canada. In 2003, Access Copyright collected $26.9 million, up slightly from 2002. Distribution grew from $18.9 million, in 2002, to $20.5 million. The expense/revenue ratio jumped significantly over this period, from 16.7% to 22.9% (due to the costs of designing and implementing a new rights management system). Last year, creators received about 26% of Access Copyright distributions in Canada (publishers did share some of their 74% share with creators through private arrangements, with the gross creator share at just over 30% of all distributions).
- Copibec, the Quebec sister collective to Access Copyright. It maintains a simple 50/50 distribution formula between publishers and creators in almost all cases.
- ACTRA Performers' Rights Society, founded in 1983, collects and distributes fees, royalties, residuals and other revenues owed to about 5,000 ACTRA members. Its collections have risen steadily, from over $2 million in 1998/99 to more than $7 million in 2002/2003. A 5% service charge was recently applied to payments, to assist with payments, collections, and overhead.
- Society of Composers, Authors and Music Publishers of Canada (SOCAN) was founded in 1990 from the merger of two predecessor collectives. Its 70,000 members include composers, songwriters, lyricists, and publishers. Revenues for 2003 equaled $180.7 million, up 8.9% from 2002. Of that, $129.6 million came from domestic sources. Distributions are divided equally between music publishers and authors (composers and lyricists), with figures published annually. Its expense/revenue ratio is 15.9%, which is slightly less than 2002. Overall, SOCAN distributed $150.2 million in royalty payments in 2003, an 18.6% increase over the previous year. The growth is partly due to new revenues sources, including those from private copying. The average distribution per lyricist/composer was $2,783 in 2003, compared to $2,442 in 2002.

On the surface, it would appear that collective revenue is increasing at a healthy pace in Canada. But the gross figures don't tell the full story because there's some evidence that a significant proportion of the money for some collectives isn't filtering down to creators. Access Copyright is a particularly vivid example: when CanCopy was initially set up, writers and publishers negotiated a 65-35 split in the collective's revenues for magazines, and a 60-40 split for trade books, with a roughly equal sharing of revenues anticipated. Over time, the ratio has shifted: individual writers affiliated with Access Copyright receive at least 50% of the total payment allocated to the copying of a particular book or publication. However, payments to most unaffiliated creators (including most textbook authors) reach them through their publishers, who are obligated to pay in accordance with their contracts with those creators. In recent years, splits may have been roughly 70-30, although Access Copyright does not collect precise data.

A related issue has to do with the financial structure of the collective 'sector' itself. While collectives have generated new sources of income for creators, the

revenue/expense ratios indicated above show that several of these organizations struggle to control their administrative costs – an operational issue that obviously has a direct bearing on creator royalty incomes. Since the 1997 reforms to the Copyright Act, there has been a significant expansion of collective management in Canada; today, some 36 copyright collectives operate in Canada, including several pairings of French and English-language collectives serving the same "market" (e.g., music, reprography, etc.). "Canada has by far the largest number of CMOs, especially in relation to the country's population," Gervais writes. "The number of collectives is probably too high and it seems unlikely that all can survive in a limited market." The federal government, in its Section 92 report, contends that it has undertaken "concrete measures" to streamline the collective sector.

This is the backdrop to the pressing question – a "critical juncture" in Gervais' words -- of how collectives can adapt themselves to provide digital licensing as a means of controlling the transmission of copyright works over the Internet.

Some collectives already offer limited licensing for digital material. For instance, in March, 2004, the Playwrights Guild launched a "virtual library and bookstore" as an online source of English Canadian drama delivered to the public through Access Copyright. Users can browse unpublished plays and purchase licenses via the Access Copyright website. And while it does not yet authorize digital use or storage in its comprehensive or blanket licenses that cover its repertoire, Access Copyright does offer digital licenses on a "transactional basis" for activities such as scanning works under license.

Ottawa, meanwhile, has established a $3 million Electronic Copyright Fund to "simplify the licensing process" on the part of collectives and provide resources for the digitization of Canadian culture. And the government, in a status report on copyright reform presented by the ministers of Heritage and Industry in March, 2004, identified the need to protect electronic "rights management information" from tampering as a means of identifying copyright material in digital form -- an important step in helping collectives administer royalties from authorized digital uses.

In Gervais' view, Ottawa's key move in this direction would be to pass legislation that allows collectives to introduce "extended licensing" – i.e., a measure that allows a collective to extend its licensing authority to all national and foreign rights holders in a given category when it reaches a certain threshold of voluntary members. Effectively, Gervais argues in a paper commissioned by Canadian Heritage in 2003, such a rule "accelerates" the acquisition of rights and thus the granting of permissions. Such a move would benefit newer and smaller collectives, he states, but also rights holders. "[They] have the advantage of better protection of their rights, and by presenting a unified front they increase their clout in negotiations with users. Finally, non-represented rights holders also have their rights protected and can benefit from the remuneration they deserve, since their works are being used for the benefit of the general public."

Despite that, the federal government's latest pronouncement on copyright reform – the Interim Status report issued in March, 2004 – is silent on the evolving role of collectives and the use of extended licensing.

Moral Rights

As indicated earlier, Canadian copyright law draws on two sets of legal and political traditions – English and French – and for this reason has accorded legislative recognition to moral rights, albeit in a watered down form. The current Copyright Act includes 13 clauses which set out Canada's policy on moral rights. Under the provisions of the law, these provide authors with the right to use their name or a pseudonym or to remain anonymous. The law also states that distortions, mutilations or unauthorized modifications represent an infringement of moral rights where done without the author's permission and, with certain exceptions, in a way that prejudices the author's reputation. Finally, the Act establishes the same penalties that are provided for copyright infringement.

In keeping with their philosophical origins, moral rights may not be assigned under Canadian law, but, strangely enough, they can be waived. In other words, though a creator is considered under international human rights covenants to have an indivisible connection to their work, Canadian law allows authors to actually surrender their very authorship, possibly for financial compensation (France and Germany do not permit the waiver of moral rights.) Similarly, moral rights expire when copyright does, which is another apparent contradiction between Canadian law and the fundamental construction of the concept of moral rights.

One of the pivotal questions is the relationship between moral rights and the economic rights arising from copyright. Reputation, according to Normand Tamaro, is the link between the two. In myriad ways – a reporter's presumed credibility, the authenticity of an artist's paintings, etc. – reputation is inextricably bound to the earning power of a creator. Rightly or wrongly, reputation opens doors, paves the way for new commissions, attracts serious consideration from critics, and so on. In both the Théberge and Desputeaux rulings, however, the commercial interests on the part of gallery owners and the publisher, respectively, were afforded sufficient legal recognition as to significantly dilute the creators' moral rights.

During the current copyright reform process, there has been some debate within the government and among stakeholder groups about the need to shore up some of the Act's moral rights provisions, for example, by extending such protection to performers. But some creators and intellectual property experts question this approach, arguing that the federal government, in the wake of the Théberge and Desputeaux decisions, desperately needs to look at the big picture before further tinkering with the Act's moral rights provisions. As Tamaro asks, "We may wonder how important the author's reputation is after the Théberge and Desputeaux decisions."

The case for undertaking such a high level review of basic principles is made that much more pressing because of the advent of digital technology. Given that so much creative work can be now replicated in malleable electronic formats, the risk of unauthorized alteration has never been greater. Take the case of an illustrator who "sells" a painting to a publisher, who maintains the image in a JPG file. At some point, an ad agency approaches the publisher, seeking permission to reproduce the painting in an advertisement. The publisher agrees, and passes along the JPG file, whereupon the agency's designers electronically alter the file by inserting in it an image of a consumer product. Even if the author freely sold the image and waived moral rights to it, has his or her reputation been affected by this modification? "Common sense," in Tamaro's words, would say the answer is clearly yes. But Canadian law, in its present condition, suggests otherwise.

Status of the Artist Legislation

As is clear from the foregoing sections, there's a great deal of variation in the type of representation creators and artists enjoy – ranging from actors supported by an active and well-organized union, to freelancers who consider themselves small businesses and belong to no organizations at all. Some creators' unions are quite new. Other creator groups enjoyed more clout in the past, and have seen their influence diminish over time, for various reasons. Lastly, many creators belong to other collective or professional organizations – e.g. teachers' unions – because they need to have "day jobs" to subsidize their creative work.

The challenge of creating effective labour legislation specifically tailored for independent artists is not new, and the issues remain fundamentally unchanged. Many creators are self-employed, maintain one-to-one relationships with a range of clients, and function as small businesses. The traditional concepts of labour law – a physical workplace, occupational safety, bargaining units, a formal salary-based employee-employer relationship, seniority, etc. – do not apply to the way many independent creators conduct their professional lives (the long-established exceptions, as noted above, are those involved in theatre, television and film). Rather, they work in studios, home offices, and coffee shops. And they may place a high value on their independence.

In the past, various attempts have been made to create an improved labour relations environment for different types of creators. During the 1980s, the Writers' Union of Canada attempted to negotiate standard contract provisions – a.k.a. minimum terms agreements -- with the Association of Canadian Publishers. But the ACP pulled out at the last moment, saying it had been advised that such a move constituted a breach of the provisions of Canada's competition act that restrict monopolies. Instead, the ACP offered up only a voluntary code of practice, which TWUC declined to endorse. Subsequent attempts to negotiate minimum terms agreements with individual publishers have also failed. Similarly, at various times, the Periodical Writers Association of Canada has attempted to gain acceptance for the establishment a standard freelancer contract, but with little success in having it adopted and used by publications.

In 1995, the House of Commons gave royal assent to the Status of the Artist Act. At the time, the latest national census had estimated that artists accounted for about a quarter of the cultural labour force, and represented the fast-growing occupational category in the overall labour force. Canada's official recognition of the problem of low artist incomes dates back to the 1951 Royal Commission on the National Development of Arts, Letters and Sciences (the so-called Massey Commission). But the Status of the Artist legislation per se traces its origins to a 1980 UNESCO declaration, which led, in Canada, to a series of taskforces recommending various solutions, including favourable tax treatment, stronger copyright protection and collective bargaining for artists' groups (as proposed in 1990 by the Standing Committee on Communications and Culture).

The 1995 legislation had two parts: the Act established a (short-lived) council comprised of individual artists, and its mandate was to advise the government on how to improve working conditions for creators. But the council lacked strong links to established arts groups, and was eventually disbanded.

The second part of the Act allows artists organizations to apply for certification to the Canadian Artists and Producers Professional Tribunal. In theory, artists' organizations that obtain certification have the legal right to negotiate so-called "minimum terms

agreements" for independent artists *working within federal jurisdiction* (e.g., broadcasters, National Arts Centre, government departments, Canadian museums, etc). Such contracts apply to all creators, whether they are full or part-time, and whether or not they belong to the certified organization.

According to a recent consultant's review of the legislation conducted for the Department of Canadian Heritage, 15 artists' organizations had been certified by the Tribunal as of March 2001, seven of which had negotiated a total of ten first agreements between them. These fifteen included Canadian Actors Equity, Canadian Association of Photographers and Illustrators in Communications, PWAC, the Writers Guild, ACTRA, Playwrights Guild, the American Federation of Musicians, TWUC, and Canadian Artists Representation.

One of the latest is the Guild of Canadian Film Composers, which obtained certification under the Act in May, 2003, allowing it to negotiate collective agreements with producers such as the NFB, the CBC and television broadcasters in all parts of Canada except French Quebec. The certification covers all composers, arrangers, orchestrators, and music editors, whether or not they belong to the GCFC.

The consultant's review identified the Act's limited scope as its key weakness, a point made by most critics of the legislation. Creators work mostly under provincial jurisdiction, and thus the producers they usually deal with, are beyond the reach of the Act. The Canadian Conference of the Arts, in a submission, noted that the law doesn't propose solutions to broader economic issues facing artists – e.g. favourable tax treatment for copyright income. In Ireland, according to the report, all artist income is tax exempt, while Quebec exempts the first $30,000 of income from royalties earned on copyright material.

More significantly, the Act covers only a "modest" amount of cultural activity, and the Tribunal has turned down attempts to extend the law's coverage. For example, PWAC sought, unsuccessfully, to have newspapers included – in effect, to establish PWAC as the bargaining agent for freelance writers selling electronic rights to daily publications for use in databases.

In some sectors, like television production, private broadcasters like CTV and CanWest Global, as well as independent producers that provide programming from the CBC, have argued that they are provincial entities, beyond the reach of the federal statute. A loophole? The AFM believes so, arguing that private broadcasters, airing the work of independent producers, come under the jurisdiction of the CRTC and should therefore be subject to the federal status of the artist rules.

Ottawa has recognized the law's limitations, but hopes it will become a model for somewhat broader status of the artist legislation at the provincial level. To date, Quebec has enacted such a law, which pre-dates the federal Act, and Saskatchewan's version offers a more limited approach. The Liberal government of Dalton McGuinty, in Ontario, included Status of the Artist legislation in its 2003 election platform. Currently, arts groups, including Canadian Actors' Equity Association (CAEA), are participating in a working group to develop draft Status of the Artist legislation for Ontario.

There are many people in the arts world who feel that Status of the Artist legislation is an attractive solution to some of the most persistent problems facing creators -- poor earning capacity, loss of control over intellectual property, lack of clout with producers, etc., all of which could conceivably be addressed with minimum terms contracts. These would provide a floor, in terms of fees, moral rights, and so on. And by

virtue of establishing minimum conditions, they would take some of the inherent inequity out of the negotiations between freelance creators and large organizations or companies.

And groups such as the CAEA have put a "high priority" on getting such laws in place because of the deleterious impact of Canadian Revenue Agency (CRA) rulings that deem some performers to be employees, for tax purposes, rather than independent contractors.

As an article in the September, 2004 CAEA newsletter put it, "In the past tax laws respected the principles of the Status of the Artist Act. Historical agreements with Revenue Canada and Human Resources Development Canada support arguments that the CRA had promised to treat performing artists as independent contractors – artists who have voluntarily walked away from benefits over the past 30 years in order to retain independent contractor status.

"In light of recent decisions by the CRA and the potential liabilities to artists, a strategy for dealing with this branch of the government must be developed, not just at Equity but with all arts organizations across the country."

It's obvious that Status legislation is most likely to succeed in sectors that generate large revenues, and have a limited number of producers. There are a finite number of theatres or television production companies. The same can be said of daily newspapers, almost all of which are accustomed to negotiating terms with unions representing their editorial employees. At the same time, the universe of organizations that commission freelance writing is vast, and a certain amount of it functions outside the logical parameters of copyright law (e.g., many freelancer write for newsletters or compose speeches, activities where the subsequent economic value of the copyright is negligible).

The issue at the heart of this discussion is whether a creator's ability to profit from the copying of their work is best enhanced by such legislation, or by a more comprehensive approach to collective rights management, or by some combination of the two sets of policy tools. Furthermore, the prospect of such legislation raises a host of important questions that need to be considered carefully:

- Should independent creators be required to join certified artists' associations and pay dues (either directly or through deductions)?
- How far should legislation extend, if it is to reach beyond federal jurisdiction – to producers that receive direct grants from some government body, to producers that enjoy other kinds of benefit (e.g. Canadian ownership rules), or to all producers?
- In terms of the political sustainability of such a law, what is the impact of wide-spread non-compliance, either deliberate or due to lack of knowledge?
- How will minimum terms agreements affect economically marginal producers – e.g. small circulation magazines or publishers – that often provide entry-level creators with an opportunity to develop their craft, but little financial reward?
- What are the financial implications – in terms of added responsibilities, such as negotiating contracts, pursuing appeals and monitoring producers -- of certification for chronically-impoverished artists' organizations?
- Do such rules encourage or discourage established or new producers to hire young or less experienced creators, or creators working in emerging media?

- If such rules are to extend to the private sector, what would be the anticipated response of multi-national producers, in terms of their Canadian divisions?
- Can such laws be targeted so they apply only to producers whose overall revenues, from both sales and government grants, exceed a specified level?
- What impact would Status of the Artist legislation have on existing copyright collectives, if such a law would encourage creator unions to take over rights management for their members?
- Are there mechanisms – regulation, public education campaigns, etc. – that would boost artist membership in rights collectives, such as Access Copyright, in order to increase creator income from various categories of licensing fees?
- Given that many governments require collectives to give at least 50% of distributions to creators, is the current "balance of power" on the boards of Canadian copyright collectives adequate, or should the government re-jig the rules governing collectives in order to guarantee that a greater share of the licensing revenues finds its way into the hands of creators?

The Guild of Canadian Film Composers grappled with several of these questions as it moved towards certification as an artists' organization last year (2003). The members had traditionally "distanced" themselves from unionization, and the GCFC will not become a union, even though it now collects some dues and pension contributions from producers. It will move from promoting suggested model contracts to collective bargaining for minimum terms agreements. As for copyright, the GCFC has pursued what it considers to be a ground-breaking bargaining strategy. It negotiated agreements with SOCAN and SODRAC "that acknowledge the GCFC's right to represent composers' rights for works not represented by the other copyright collectives," according to Paul Hoffert. "If a broadcaster opts for a modified blanket license from SOCAN for a TV program, and SOCAN grants the performing rights back to the composer for the musical works in that program, the GCFC now represents those works for collective bargaining with the broadcaster."

Conclusion

If one had to summarize the current state of copyright in Canada, from a creators' perspective, the following over-arching observations emerge:

(i) Canadian artists now function in a highly digitized global environment, which offers unprecedented creative opportunities, but also significant risks in terms of unauthorized copying and alteration of their works;

(ii) Canadian legislators have been conspicuously slow in modernizing the Copyright Act to address the impact of new technology, and have failed to fully assess the long-range implications of previous reforms;

(iii) The user-oriented exemptions added to the Act in 1997 have damaged the ability of creators to profit from their work, and may well contradict federal policies designed to encourage collective rights management;

(iv) A series of recent Supreme Court judgments has undermined creators' rights, while providing additional legal heft to users' rights;

(v) The proliferation since 1997 of Canadian copyright collectives has created a costly administrative burden on rights holders. What's more, due to legislative inaction, this sector still lacks the resources, both financial and legal, to extend its reach into digital licensing;

(vi) Efforts to introduce labour relations laws for artists, with mechanisms to protect their intellectual property, have been half-hearted, and appear to be utterly disconnected from the copyright reform process.

(vii) There's a corrosive disconnect in public attitudes: most Canadians believe artists deserve to be paid for their work, yet there's still widespread unauthorized copying – a contradiction that may be explained by the public's suspicion that current copyright laws ultimately fail to benefit creators.

Taken together, these conditions force us to ask whether Canada's copyright law is balanced in favour of creators or users. Are policy-makers attempting to attain some kind of equilibrium under the law or, alternatively, correct some perceived imbalance? "Balance," after all, is a concept that buttresses much official deliberation about copyright reform in Ottawa. One of the "overarching objectives," notes the Section 92 report, "[is] to recognize the balance between the legitimate interests of creators to be paid for the use of their works and the needs of users to have access to those works."

As a policy objective, balance is a slippery and perhaps unattainable goal. And it is very much in the eyes of the beholder, as the saying goes. The pursuit of balance, in fact, raises as many problems as it purports to solve. Is balance measured in purely economic terms, or by some other yardstick – e.g., improving access to copyright work for certain individuals and institutions. If balance is the stated goal, moreover, how does the government satisfy itself that balance has been achieved? And are there alternative policy levers, outside copyright law, that could be deployed to provide such balance?

Consider the last question in relation to legislated exemptions. Ostensibly, most of the exemptions now in the Act are designed to provide individuals or institutions with some monetary and administrative relief in order to achieve a public good. Schools or institutions serving the blind need not pay royalties to make copies of certain works under certain circumstances, nor do they have to spend valuable time chasing after permissions. The stated goal is that such exemptions provide support for activities deemed to be valuable to society -- such as academic inquiry or the provision of materials for individuals with perceptual disabilities. Laudable ends, but the assumption that remains unexplored is why the onus is on individual creators to subsidize public policy? If the Canadian government determines that there is a national cultural benefit in, for example, providing drama teachers with free access to scripts for plays that can be performed in a classroom or school auditorium, should it not allocate funding directly to boards to offset the royalties owing the playwrights? Or put another way, should a Canadian playwright be held personally financially responsible for ensuring that Canadian school children have unfettered access to drama curriculum?

Such questions become increasingly bizarre if one tries to transpose these policy trade-offs onto other information technologies, such as software, or manufacturing sectors that rely on the exploitation of various categories of intellectual property. For instance, no health policy expert would dispute the assertion that the medical system would benefit if there were fewer cases of heart attacks and strokes. But do Canadian legislators seek to

enact exemptions to the drug patent laws that would require pharmaceutical manufacturers to forego revenues on treatments that prevent such illnesses? The answer is obvious, as are the consequences of such logic.

There is one final dimension to the problem of balance, argues Normand Tamaro, and that has to do with the state of the "equilibrium" between creators and producers, who together comprise the copyright owners `faction' in the intellectual property debates. This report began with the observation that creator and publisher interests are not parallel, although they have come to be seen as a unified whole in the push and pull process of copyright reform. If creators and publishers both played on the proverbial level playing field, we might be more accepting of this reductive characterization of copyright politics. But as this report has shown, creators are at a significant disadvantage in the relationship, and thus the reform agenda on the copyright owner side is more driven by the corporate needs of media conglomerates, textbook publishers and the entertainment industry. There's no disputing that the digital issues which dominate the current agenda are critical to both creators and producers, but it's hard to ignore the reality that the policy problems of immediate concern to individual creators – i.e., the combined impact of exemptions, and pivotal court rulings about moral rights, fair dealing and the copyright status of databases – have been largely overlooked.

Tamaro further argues that the very notion of balance in Canadian copyright law is built on a false construct -- the product of a highly flawed Federal Court ruling from 1954, in which the presiding judge overlooked existing jurisprudence and relied on a possibly plagiarized argument to declare the nascent Canadian cable industry exempt from copyright rules designed to protect creators. In a brief prepared for the CCC and DAMIC, Tamaro shows that the legal DNA of this judgment can be found in subsequent judicial and policy decisions -- the combined effect of which makes Canada regrettably unique in its pursuit of balance *within* a law intended specifically to protect one class of intellectual property -- authors 'rights. As Tamaro points out, the Supreme Court of Canada, no less, issued a decision in 2004 in which Justice Ian Binnie referred to the "limited nature" of intellectual property – a remarkable formulation, considering the central role of creativity and information in the development of Canadian society, and the lengths to which corporate copyright owners have gone to protect their intellectual property assets.

We are poised at a fleeting moment, between judicial decree and political edict. If Canadian artists, performers and writers wish to prevent Justice Binnie's words from becoming a self-fulfilling prophecy, they now need to forcefully assert the case for individual creator rights in the current debate over copyright reform.

CCC-DA*MI*© Research Project on
Artists' Working Conditions

Report from Québec

Presented to:
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CCC-DA*MI*© Research Project on
Artists' Working Conditions

Report from Québec

Contents

1.0 Executive Summary

In this report, we highlight the main aspects of interviews that were conducted between late May and mid-June, 2004. The interviews were divided as follows: twelve artists' associations, seven collective societies, and three interviews with four government representatives who, due to their respective positions, have a connection with the issues under study.

This study addresses mainly two subjects: copyright and contractual practices. The material has been organized so that the results are divided by reference group and by subject, and they are presented in the following order: artists' associations, collective societies, and government representatives.

What conclusions should be drawn from these directed interviews? The common denominator, of course, is the artist. Equally obvious is the diverse character of artists' experiences. It is clear that there are common threads, but the reality is far from monolithic. Issues involving copyright and contractual practices are directly linked in all sectors and are both significant and critical. They cannot reasonably be disconnected from each other. We have taken this into account by organizing the material so that examples can be used to illustrate what artists' representatives report without resorting to anecdote. A contract, taken in its entirety, is a sort of snapshot of the relationship between creators and users. It structures uses and practices that are directly connected to what is happening in the field and gives a sense of the current state of affairs. Although copyright is of primary interest in this report, it is embodied in these contractual relations, and we will sometimes note practices that, without being about copyright per se, seem relevant. Below are the points that we consider central in this report.

- The impact of new technologies in the sectors under study: a reality with a variable geometry

Currently, new technologies are the lens through which copyright is often seen. This reveals a real concern within the milieux under study and also an acute sense of disparity between emerging uses and existing legal provisions. New technologies do not have the

same impact in all sectors, however. Time is also a variable in the sense that future development of higher-performance or more accessible technologies will change the landscape or affect sectors that, for the moment, are more or less untouched. Without minimizing the impact of new technologies, we can say that they are not of concern in every field, although they are the window through which issues linked to copyright are glimpsed by the public.

- Moral rights: uses vary by sector, and distinct practices are reported

Although patrimonial rights constitute the bread and butter of artists because they are economic in nature, moral rights are also modified by contractual practices. While there does not seem to be a systematic waiver of moral rights, their scope is definitely being diminished. There is greater pressure on moral rights in environments where business activity is intense; following to the dictates of commerce, users try to obtain the maximum flexibility, and artistic works are becoming like mere merchandise. The properties that are on the market thus are less closely tied to moral rights.

- The idea that a contract is automatically fair should be reconsidered.

The idea that a contract is automatically fair assumes that it constitutes a voluntary agreement between two parties. A balance between the parties is also presumed, and a contract that reflects it. Given this premise, it is not surprising that statutes on the status of the artist set out mechanisms to provide a balance in individual contracts, where the rules are dictated by the parties. Act S-32.1 and the federal *Status of the Artist Act* contain an obligation to negotiate with a view to obtaining a collective agreement or scale agreements. Act S-32.01, which applies to literature, visual arts, and arts and crafts, sets out a number of components that must be written into the contract. These provisions depart from the general rules concerning contracts and certainly have a protective function. The existence of these provisions, and the fact that they must be written into a contract, act as a formal framework that governs individual contracts but has not, however, led to in-depth changes.

- Collective societies and artists' associations: two modes of appropriation

It seems clear that the most effective modes of intervention in contractual matters are collective mechanisms. It appears that the most effective models for artists are organizations, be they collective societies or associations that negotiate collective agreements, that have sufficiently strong bargaining power for thereto be real negotiation.

Although collectives and artists' associations are organizations based on different premises, they are both tools enabling artists to strike a better balance in their contractual relations.

- Establishing the value of copyright: a persistent difficulty

It is interesting to note that uses related to new technologies are often part of a group of uses in which large sums of money are not now in play. The importance of establishing value for such use tends to be underestimated. The fact that there is *de facto* access, free of charge, to certain works erodes the value of these uses.

2.0 Introduction

This study was conducted jointly by DA*MI*©[1] and the Creators' Copyright Coalition (CCC). DA*MI*© was responsible for research in Quebec, while the CCC was responsible for the rest of Canada. Resolutely assuming the task of listening to the voices of creative artists and performers, this study deals with issues related to copyright and contractual practices.

Thanks to the DA*MI*©–CCC partnership, the situation can be analyzed on a nationwide scale, even though each study is somewhat autonomous – for instance, with regard to provincial legislation on the status of the artist that distinguishes Quebec from the rest of Canada.[2] In addition, the differences linked to the civil law and common-law judicial systems mean that contractual practices take place in two distinct normative spheres. This being said, far from being barriers, these differences, once recognized, can easily be integrated into the analysis.

2.1 The Objective of the Study

This qualitative study takes account of both the diversity of practices and the common issues. Twelve artists' associations and seven collectives were interviewed, as were several government representatives, who gave us a general perspective on the situation.

As mentioned above, two aspects are studied specifically – copyright and contractual practices, which, one might say, are two sides of the same coin. This division might lead one to believe that the categories are mutually exclusive, but of course this is not the claim set forth here. Rather, the decision to organize the material this way makes it possible for us to look at questions linked to copyright via exceptions, recent jurisprudence, infringement, and challenges posed by new technologies. The portion of the study dedicated to contractual practices envisages copyright, whether individual or collective, within the contract. Elsewhere, contractual practices reveal uses that, although they are not directly related to copyright, demonstrate how certain related notions are handled. The way in which the parties to a contract seize on certain notions, detail them,

[1] Droit d'auteur/*Multimédia-Internet*/Copyright.
[2] Except for the statute promulgated in Saskatchewan.

or distance them from their copyright niche is a subject that has not been closely enough studied, in our opinion. The interviews conducted revealed this, stripping away theoretical notions to show concrete practices.

The realities expressed reflect the multiplicity of practices. Given the space available, we try to highlight both the uniqueness of the respective artistic fields and the connections between them. We are dealing with artists, and as problematic as their activity may be to define, it shares some common characteristics.

One of the difficulties with the type of synthesis that follows is oversimplification. The risk is that we might lose sight of the reality on which the work below is based. This seems important to say at the outset, especially because the interviews reveal a complex reality that belies common perception. Examples will be used to illustrate remarks where relevant.

2.2 Context of the Study

The *Copyright Act* is currently under review. The Quebec statutes on the status of the artist were recently amended.[3] These are not the only reasons for undertaking a study such as this, however. It seemed opportune, at this time, to bring gather information about the realities of working artists in different fields and paint a portrait of the situation.

The impact of new technologies is also very relevant, since we are addressing issues related to copyright and to the contractual framework of professional practices. It was important to take a closer look at this phenomenon, which sometimes overshadows other issues. We shall see its importance in different sectors.

The *Théberge*, *Desputeaux*, and *CCH* decisions also have changed the rules of the game in copyright. The interviewees were asked to comment on these cases, and their remarks are included below. It is appropriate to say a few words here about these cases.

The *Théberge* decision[4] ruled that transferring an image from a paper poster to a canvas, a technique called ink transfer, is not a reproduction in the sense of the *Copyright Act.* It also ruled that the *Copyright Act* must strike a balance: "The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just

[3] *An Act to amend various legislative provisions concerning professional artists*, S.Q. 2004, c. 16.
[4] *Théberge* v. *Galerie d'Art du Petit Champlain inc*., [2002] 2 S.C.R. 336.

reward for the creator . . ."[5] The notion of balance has also been taken up in recent cases in the copyright field.

The *Desputeaux* decision[6] ruled that the paternity of a work may be decided through arbitration. It is not a question of public order that would be placed beyond the reach of arbitration.

In the *CCH* decision,[7] the Supreme Court interpreted the term "research" in section 29 of the *Copyright Act* as follows: ". . . the Law Society did not infringe copyright by providing single copies of the respondent publishers' works to its members through the custom photocopy service. Although the works in question were 'original' and thus covered by copyright, the Law Society's dealings with the works were for the purpose of research and were fair dealings within s. 29 of the *Copyright Act."*[8] Furthermore, according to the Supreme Court, the Law Society was not authorizing infringement of copyright by making self-service photocopiers available to users of the library.

On the extent of the fair dealing exception, the decision reads, "The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively."[9]

Thus very important decisions have been handed down by the highest court in the land, and their impact has yet to be fully assessed. Another decision by the Supreme Court was handed down after the interviews took place: *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers.*[10] In this case, the Court had to decide the extent of the responsibility of Internet service providers with regard to the payment of royalties for musical works protected by the *Copyright Act*. It was decided that since the ISP is only an "agent," it is not making a communication to the public by telecommunication.

[5] *Id.*, para. 30.
[6] *Desputeaux* v. *Éditions Chouette (1987) inc.*, [2003] 1 S.C.R. 178.
[7] *CCH Canadian Ltd.* v. *Law Society of Upper Canada*, [2004] 1 S.C.R. 339.
[8] *Id.*, para. 6.
[9] *Id.*, para. 48.
[10] 2004 S.C.C. 45.

3.0 Methodology

The research methodology was qualitative. A total of twenty-two interviews were conducted, divided as follows: twelve with artists' associations, seven with collectives, and three interviews with four government representatives. Except for the last category of respondents, the interviews took place in person. Michel Beauchemin, coordinator of DA*MI*©, identified the organizations to be interviewed.

The preliminary contacts and appointments for meetings were made by e-mail and telephone. Most of the interviews took place over a three-week period: the weeks of 24–28 May, 31 May–4 June, and 7–11 June.

Two separate interview guides were written, one for artists' associations and one for collective societies. It did not seem realistic to have only one guide, given the distinct roles of the two groups. The number of questions and the questions themselves varied from one interview guide to the other; the main difference being in the more detailed line of questioning covering contractual practices for artists' associations.

With each group, if one of the questions from the interview guide was not relevant, it was simply put aside. For artists' associations, the interviews generally lasted around two hours; for collectives, approximately an hour and a half. The interviews were recorded. It was explained to the interviewees that the interview guide was used as a guideline for the interview. Except for the first interviews, which were pre-tests, the interview guide was sent to participants beforehand.

The three interviews conducted with four government representatives were shorter and more informal. The interviews took place by telephone and lasted about 45 minutes. They were not recorded. The purpose of these interviews was to obtain an assessment from a few government respondents who are or have been in contact with representatives of creative artists and performers. Having targeted the individuals, we simply asked them for their evaluation of the situation in their respective fields, given the issues raised in this study.

The organizations and individuals interviewed are listed in Appendix 1. The interview guides are in Appendix 2.

4.0 Results

The results are presented in the following order: artists' associations, collective societies, and government representatives. The order of presentation of the results for the artists' associations and collective societies follows the plan in the interview guide.

4.1 Results – Artists' Associations

Representatives were interviewed from the following 12 artists' associations listed here in alphabetical order: APASQ, AQAD, ARRQ, CAPIC, CMA, CMC, the Guilde des musiciens, RAAV, SARTEC, SPACQ, UDA, and UNEQ.

Each of these associations exist for the purpose of serving a group of artists whose practices distinguish them from other groups, although several associations can be grouped in categories such as : audiovisual, recordings, and theatre.[11] It should be noted that for associations covered by Act S-32.01[12] a single association is accredited per field, these fields being the visual arts, arts and crafts, and literature. Only literature is an exception to this rule, and the legislative modification is recent.[13] The vast majority of associations interviewed were accredited both provincially and federally.[14]

Artists represented by associations are not all authors in the sense of the *Copyright Act*.[15] The notions of "author" and "artist," which, of course, are not equivalents offer their own share of difficulties. There are four statutes – two federal and two provincial – which are complicated by the constitutional division of powers. These statutes form a sort of normative framework that is not inevitable and was not intended to produce, *a priori*, a coherent set of standards. If we add to this the fact that artists are

[11] *An Act respecting the professional status and conditions of engagement of performing, recording, and film artists,* R.S.Q., c. S-32.1, lists the following production areas in section 1: ". . the stage, including the theatre, the opera, music, dance and variety entertainment, multimedia, the making of films, the recording of discs and other modes of sound recording, dubbing, and the recording of commercial advertisements." Recently, the legislator amended the statute to add multimedia to the areas listed above: *An Act to amend various legislative provisions concerning professional artists*, *supra* note 3, s. 6.
[12] Section 10, *An Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters,* R.S.Q., c. S-32.01.
[13] This is section 1 of *An Act to amend various legislative provisions concerning professional artists*, *supra* note 3, which states: "10.1. In the field of literature, the Commission may also recognize an association of professional artists who create dramatic works. This recognition shall cover only the public performance of works that have already been created, whether or not they have been performed in public before."
[14] *An Act respecting the status of the artist and professional relations between artists and producers in Canada* R.S.C. 1985, c. S-19.6; hereinafter *Status of the Artist Act*.
[15] R.S.C. 1985, c. C-42.

covered by other statutes in which their particularity is obscured it becomes obvious that the status of the artist as a whole is fragmented. The reflection on the social safety net flows from this same situation. Though we will not attempt to cover all of this territory, copyright and contractual practices are situated within this general landscape They form an example of how the rights conferred on artists by the state are administered via contracts, and how the parties make their own law, the contract being the instrument through which their intentions are expressed.

Certain sectors organize their contractual relations under collective agreements or scale agreements. For others, individual contracts are the rule. There are also areas where contractual freedom prevails. Collective contracts differ from individual contracts in that the former establish a stronger negotiating position. The individual contract very often leaves the parties in an unequal power relationship, with the artist proving to be the party with little or no negotiating leverage. In certain fields, the individual contract is beyond the scope of general rules, so certain elements have to be written into the contract. This does imply a higher level of formality, and these particular requirements do have the goal of redressing the imbalance between the contracting parties. But we will see below what the respondents say about the effectiveness of these measures.

These preliminary remarks are intended to situate the issues raised by the study of the conditions in which artists live. Next, I briefly describe the associations interviewed for those who are less familiar with them.

APASQ

(*Association des professionnels des arts de la scène du Québec*)

This association represents mainly designers (sound, lighting, sets, costumes) in theatre, opera, dance, and variety. It has 212 active members and licensees.

AQAD

(*Association québécoise des auteurs dramatiques*)

This association represents playwrights, librettists, translators, and adapters in the fields of theatre and dramatic-musical theatre. It has about 170 members and trainees.

ARRQ

(*Association des réalisateurs et réalisatrices du Québec*)

This association represents film and television directors in all languages other than English in Quebec. It has about 450 members.

CAPIC

(*Canadian Association of Photographers and Illustrators in Communications*)

As its name indicates, CAPIC is a group for photographers and illustrators in communications. In Quebec, the association represents only photographers, because another association represents illustrators. CAPIC has 115 members in Quebec and 500 nationwide.

CMA

(*Conseil des métiers d'arts du Québec*)

The CMA is an association of professional artisans.[16] It has 800 professional members and a total of 1,200 members.

CMC

(*Canadian Music Centre*)

This Canada-wide organization promotes contemporary Canadian concert music. The CMC has about 175 accredited composers in Quebec and 650 nationwide.

Guilde des musiciens du Québec

The guild represents musicians who play instrumental music in all areas of artistic production. It has 3,600 active members and about the same number of licensees for an estimated total of 7,200 members.

[16] *An Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters, supra* note 12, states the following at section 2, paragraph 2, regarding artistic activities: "'arts and crafts': the production of original works which are unique or in multiple copies, intended for a utilitarian, decorative or expressive purpose and conveyed by the practice of a craft related to the working of wood, leather, textiles, metals, silicates or any other material."

RAAV

(*Regroupement des artistes en arts visuels*)

The association represents professional visual artists. The artistic practices are diverse.[17] RAAV has about 1,400 members.

SARTEC

(*Société des auteurs de radio, télévision et cinéma*)

The association represents mainly writers working in radio, television, and film – for example, writers of scripts for movies, serial dramas, television series, television films, and documentaries. It has about 1,000 members.

SPACQ

(*Société professionnelle des auteurs et compositeurs du Québec*)

SPACQ represents writers, composers, and writer-composers of musical works in all areas of artistic production. It has 210 members.

UDA

(*Union des artistes*)

The organization represents performers working in French (with the exception of musicians): actors, comedians, circus artists, variety artists, stunt doubles, singers, dancers, puppeteers, and others. UDA has 6,400 active members and 3,900 trainee members.

UNEQ

(*Union des écrivains et écrivaines québécois*)

UNEQ's members are literary and non-literary authors. "Literature" is defined in the Quebec statute.[18] UNEQ has between 1,200 and 1,300 members.

[17] *An Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters, supra* note 12, stipulates the following at section 2, paragraph 1: "'Visual arts': the production of original works of research or expression, which are unique or in limited copies and are conveyed by painting, sculpture, engraving, drawing, illustration, photography, textile arts, installation work, performance, art video or any other form of expression of the same nature."

[18] Section 2, paragraph 3, of *An Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters, supra* note 12, states the following: "'literature': the creation and the translation of original literary works such as novels, stories, short stories, dramatic

All of these associations, with the exception of the Canadian Music Centre and CAPIC, are recognized under the Quebec statutes on the status of the artist.[19] With regard to the federal statute on the status of the artist, all the associations except the Canadian Music Centre are certified.[20]

Structure

Artists' associations are either professional unions or non-profit associations.[21]

Number of Members

UDA and the Guilde des musiciens have the largest number of members. In both cases, the members are performing artists. The associations governed by Act S-32.01 all have memberships over 1,000. Of course, associations with larger numbers of memberships are related to the sectors that engage the greatest numbers of individuals. However, the members of SPACQ tend to join collective societies, and are dropping out of their professional association.

Membership Profile

For some associations, it is difficult to discern a membership profile. With others, majority groups or practices can be identified. This is the case for the UDA, which, of course, has a large cohort of actors who are also very multi-skilled. At SARTEC, writing for television is the most widely practised activity. In other cases, there are a wide variety of members within a single association. AQAD, for instance, has some members who do only translation; UNEQ's members include both non-literary and literary authors.

works, poetry, essays or any other written works of the same nature."

[19] The Web site of the Ministère de la culture et des communications lists the recognized associations and the sectors of negotiation.

[20] The Certification Register is available on the Web site of the Canadian Artists and Producers Professional Relations Tribunal.

[21] Section 9, paragraph 1, states as conditions for recognition the fact that the association "is a professional syndicate or an association having an object similar to that of a professional syndicate within the meaning of the Professional Syndicates Act (chapter S-40)": *An Act respecting the professional status and conditions of engagement of performing, recording, and film artists, supra* note 11. The requirements of Act S-32.01 and of the federal statute do not specify how the organization is constituted but state certain conditions regarding the association's regulations. See section 12 of *An Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters, supra* note 12, and section 23 of the *Status of the Artist Act*, R.S.C. 1985, c. S-19.6.

A number of associations reported that their membership has evolved over time. SPACQ, for instance, was founded by writer-composers of songs, but its membership gradually changed to include more members working in audiovisual. The realities of the marketplace may also exert an influence. For example, ARRQ noted that its membership includes increasing numbers of directors. The transfer of production from the public to the private sector, a phenomenon that has been underway for some time, is a notable reality within the association.

The geographic location of members has been mentioned. For example, CAPIC typically represents artists in urban centres, while UNEQ reported that less than half of its members live in the greater Montreal region. Male-female representation also contributes to the membership picture. The Centre for Canadian Music, which represents composers, noted its membership is not more than 15% women. At APASQ, the representation of women is slightly higher, and future cohorts will be composed of significant numbers of women. Age is an issue for RAAV, which expressed a concern for the lack of new young members.

The respondents did not identify all the possible variables that would enable analysis of their membership profile. However, the few factors highlight the plurality of realities experienced by artists' associations. As a consequence, the analysis shows a variety of differences. But although it is not possible here to give a complete portrait of each association, the fact remains that the few aspects discussed enable us to take stock and gain some sense of nuance.

Collective societies

In the music sector, SPACQ stated that professional associations are important in the establishment of collective management. It should be remembered that SPACQ was behind the creation of SODRAC. The UDA, commenting on the situation in Europe, mentioned that collective societies there are very powerful. Without making hasty comparisons, it must be noted that the connection between collective societies and artists' associations is founded in contexts and environments that tend to modulate such relationships.

The practice of collective management varies. In music, it is clear that writer-composers have made it what might be called their calling card. In other sectors, such as audiovisual, artists' associations only manage some of the uses of creators' work in collective agreements. The notion of collective management presupposes copyright, and not all of the associations interviewed have members who hold copyright.

In the theatre field, AQAD created SoQAD initially to administer the agreement concluded with the ministry of education. The fact that the association was not able to include stage performance rights within collective agreements was another reason for development of the collective society. There is an organic connection between the two organizations.

Associations that were recently affected by the introduction of "neighbouring rights," such as UDA and the Guilde des musiciens, have different strategies. UDA has created its own collective society, ArtistI. Gaining the support of members was a process in which education regarding new rights and management of those rights were among the early core concerns. The Guilde des musiciens, on the other hand, considered joining an existing collective.

The associations covered by Act S-32.01 all were concerned about management of works. RAAV created SODART; CMA received a management mandate, which it entrusted to SODRAC; and UNEQ was one of the founding members of COPIBEC. Membership in SODART grew gradually; visual artists did not join the collective en masse. In fact, some of them turned to SODRAC for management of their rights. About half of the members joined a management society. At UNEQ, management of reprography rights is well established, as this association dealt with these rights for ten years before COPIBEC was created. For arts and crafts, the issues related to copyright are just coming to light. CMA received 175 mandates from a total of 800 professional members when it solicited them regarding management of their copyright. There is some interest in this issue, but CMA knows also that the reality of reproduction and exhibition of arts and crafts works remains to be developed. CAPIC turns to Access Copyright for management of the rights of its members, but few have joined to date. It seems that image banks are a tool that competes with the establishment of collective management for members – who, it must be noted, are in commercial practice.

Collective management is well established in some sectors, but remains to be deployed in others. It was also reported that the royalties paid are generally considered insufficient, which was to be expected.

Globalization and New Technologies

When questions were raised that were linked to globalization or new technologies – phenomena that are connected even though they may evolve autonomously – a number of respondents spoke about the regulatory framework and cultural diversity. Beyond direct effects that vary from sector to sector, there is a systemic effect, and so the response has to be similar in nature. In this sense, national and supra-national regulations were identified as tools; and the importance of such a regulatory framework was emphasized a number of times. Cultural diversity is seen as a bulwark against the homogenisation that globalization entails, and it too operates at this level.

A number of associations in the audiovisual sector talked about co-production and the global phenomenon of reality TV. The audiovisual and music sectors seem to be the most threatened in the short term; writer-composers are the only people involved in the recording industry who are calm in the face of the new technologies, including the Internet.

Other associations, less directly affected, are staying on their guard, not losing sight of the fact that it is important to see these issues as being part of the big picture from which they would be unwise to believe themselves exempt.

The new technologies have greatly changed practices for photographers. Film is on the way to extinction, and digitisation requires major investments. Much time is devoted to work on computer. Work organization is also changing, and technology, while democratizing certain media, means that individuals take on additional functions, such as direction and camera. Practices are thus evolving as a function of new technologies.

Also mentioned was the difficulty of determining what constitutes an original. For example, set designers no longer produce cardboard models. Instead, they use computer modelling, and dematerialization introduces certain difficulties: the computer file can easily be reproduced.

E-commerce is being established here and there. For some, the new technologies are seen as an opportunity. The creation of a repertoire of plays on line (ADEL) takes advantage of this idea. For others, there are greater reservations. For example, a number of composers from the Centre for Canadian Music send their scores as computer files, but the sale of scores is still always done on paper, and there is hesitation about putting the scores on line. There are thus different attitudes among the associations.

On the marketing level, image banks are one of a very few lucrative sectors on the Internet. Previously, catalogues were used. They are still available, but one respondent estimated current on-line business volume at 40 percent. E-books do not enjoy similar popularity and seem far from making a significant breakthrough. In radio and television, some attempts have been made, but it appears that the type of use and the economic model remain to be developed.

According to a number of associations, globalization and new technologies oblige artists to form groups to constitute a force capable of carrying on a discourse regarding cultural diversity and the protection of the Canadian model of policies and legislation.

Copyright – Exceptions

One respondent in the music industry mentioned that the exceptions introduced for the education sector were not as hard a blow to the music sector as schools constitute a less important source of revenues than do other types of use. But this is not the case for other sectors like theatre, for instance, where there was a major loss. This is one of the perverse effects of exceptions: they do not affect all sectors equally, and even if they did, the principle of seizure, which is behind this measure, can not be justified. There is no reason, according to respondents, for the artist to be the one who pays the price.

Another respondent noted the introduction of exceptions seems to be a legislative technique that weakens the general scheme of the statute. Negotiation between a management collective and a user has proven to be a more satisfactory mechanism, allowing all uses to be taken into account and an overall agreement to be reached. The introduction of exceptions shrinks the revenue pie and reduces the power that collective societies acquire through volume of use.

Members of Associations and Electronic Rights: Knowledge of the Issues

In general, it seems that members have little knowledge of electronic rights and the related issues. On the one hand, artists are naturally, mainly concerned with their professional practice; on the other hand, the complexity of the issues probably does not augur well on the pedagogical level. However, this does not mean that artists know nothing about new technologies. On the contrary, many, in some sectors especially, are very up on the very latest.

Attention was also drawn to the fact that some creative artists, especially younger ones, belong to the movement called Copyleft, which opposes the private appropriation of works protected by copyright.

Uses on the Internet are generally not mentioned in collective agreements, and so they are covered by individual contracts. However, it seems that artists do not see the point in fiercely negotiating this use, which is thus often obtained at a low cost for up to fifteen years and may be automatically renewed. For photographers for whom Internet use is one among a group of uses, the Web is not currently a major object of negotiation. An example was also given of DVD movies to which are added, for example, a documentary on the shooting or an interview. In short, items considered added value for consumers. Very often, artists do not receive remuneration for this material, nor is it an issue in negotiations.

Protected Works and the Internet

Artists do not always know that their works are on the Internet. They find out by chance or they are told. Unauthorized uses are thus a long way from being exhaustively tracked. Texts are not necessarily found on line in their entirety. In general, artists react negatively when they find out, because the use of their works has escaped their control. The extent of the distribution of works may be a decisive factor in the way that this type of use is understood. For instance, for members of CMC, it is a form of dissemination. Musicians who want to be "discovered" place their entire catalogue on the Internet. The idea that the Internet offers a form of democratization was evoked as part of the reasoning behind artists' attitude to this new medium. SPACQ's writer-composers are aware that they are losing a source of income, but their share is so minimal compared to that of other players that they do not see the situation as catastrophic for themselves.

The technological measures taken to ensure security of works on line was raised. Image banks protect their images; the same thing could be done with texts, as has been done with plays put on line. There are fears and questions regarding technological measures, and therefore authors must become informed. One association requires them to send texts on paper rather than by electronic means.

The audiovisual sector seems to have been little affected to date, but it was felt that it is simply a matter of time. It was clear that the music sector is the one most identified with these issues.

The Théberge, Desputeaux, and CCH Decisions

The paternity of copyright and the possibility of its being subject to arbitration, are issues posed by the *Desputeaux* case, which had particular importance for one association because of the dispute-resolution mechanism that is used to solve difficulties of this nature. UNEQ and CMA appeared before the Supreme Court to defend this position, while RAAV considered it a question of public order and therefore beyond the reach of arbitration. Artists thus do not have a unified position.

The elevation of the notion of balance to the status of jurisprudential criterion is disturbing. The American influence is perceptible, according to respondents. Also noted was the expansion of fair dealing. These elements obviously do not please artists, as they see the justices' interpretation of the *Copyright Act* as limiting the scope of their rights.

For visual artists and commercial photographers, the *Théberge* ruling calls for an amendment to the *Copyright Act* to deal with the notion of reproduction.

Contractual Practices

At the outset, we must distinguish between associations falling under Act S-32.1, which covers theatre, recordings, and film, and those falling under Act S-32.01, which covers visual arts, arts and crafts, and literature. For those who are not familiar with provincial legislation on the status of the artist, Act S-32.1 sets out an obligation to negotiate that does not exist in Act S-32.01. In addition, modifications have been made to Division II of Chapter III of this statute that affect contracts between artists and exhibitors or distributors. Division II was previously titled "Group Agreements Respecting Minimum Conditions of Circulation." One section was modified and another was added,[22] and the title was changed to "General Agreement on Circulation Contracts." The essence of the modification lies in the fact that the government can regulate the circulation contract, and that the term used is no longer "group agreement" but "general agreement." Of course, the opinions gathered on "group agreements," as they were then called, are related to the Act before it was modified.

[22] Section 4 of *An Act to amend various legislative provisions concerning professional artists*. *supra* note 3, which modifies section 43, paragraph 1, is the following: "A recognized association or group and an association of promoters or a promoter that does not belong to such an association may conclude a general agreement that provides for the inclusion of compulsory elements, in addition to the elements and requirements already set out in Division I of Chapter III, in a circulation contract covering the works of the artists represented by the recognized association or group." The following paragraph is added:
"The conduct and the relations of the parties with respect to such an agreement must be governed by good faith and diligence."

Section 5 adds new law to section 45.1:
"The Government may, by regulation,
"1) prescribe the inclusion of compulsory elements in circulation contracts covering the works of artists represented by a recognized association or group and to be concluded between those artists and the promoters;
"2) draw up compulsory forms for circulation contracts covering the works of those artists.
"The elements and forms prescribed by regulation may vary with the artistic field, the artistic activity, and the nature of the circulation contract."

It should be mentioned as well that at the federal level, there is only one *Status of the Artist Act*, but this statute has a much narrower field of application, as it applies only to federal institutions and to broadcast companies, including distribution and programming, falling under the jurisdiction of the Canadian Radio-Television and Telecommunications Commission.[23]

These preliminary remarks are intended to give the reader a context for the statutes on the status of the artist. The statutes constitute an important framework when issues regarding contractual relations between artists and promoters or between artists and producers are addressed.

Among the artists' associations interviewed, all of those covered Act S-32.1 have collective agreements with producers. Thus, the mechanics laid out for negotiations work. The number of agreements varies, of course, from association to association. However, a modification to the statute made in 1997 allows a first collective agreement to be subject to arbitration at the request of only one of the parties. For a number of associations, this amendment enabled the resolution of the impasse in negotiation.

None of the associations falling under Act S-32.01 currently has an agreement with a presenter or producer. No doubt, due to the above-mentioned legislative modifications in relation to this aspect of things, the associations covered by this statute feel that the development of agreements with promoters has been problematic in the absence of legal provisions that could offer them a certain degree of power. It is not the intention to comment here on the recent amendments to the Act, but to explain the major differences between the associations falling under one or the other of the provincial statutes.

As mentioned above, all of the associations are certified under the federal statute, but not all have agreements. The type of activity that the association's members are involved with has a definite impact. Associations with strong connections with broadcasters generally have agreements that are called "scale agreements" in the federal legislation.[24]

[23] See par. 6(2) of the *Status of the Artist Act*, *supra* note 14.
[24] For the purposes of this paper, the term "collective agreement" is used generically unless the context indicates an agreement in virtue of Act S-32.1.

Difficulties Encountered during Negotiations

In a number of cases, obtaining a collective agreement does not seem to be shoe-in. It may be useful to note how long some negotiations lasted. SPACQ signed an agreement on commissioned musical works in films with APFTQ (Association des producteurs de films et de télévision du Québec) after twelve years of negotiations. At the time, APTFQ was negotiating other agreements; but the fact remains that the time span is an objective measure of how slow the process is. ARRQ has been negotiating for a television agreement with APFTQ for twelve years. The parties have been in arbitration for four years. ARRQ also has a movie agreement in effect which APFTQ said it would not sign today. One section of the agreement stipulates that the director is the author of the film. Although the director assigns his or her rights in the following section, there is no desire, it seems, even to state that the director is the author. AQAD signed its first agreement with TAI (Théâtres associés inc.) which covers large theatres in Quebec. Negotiations took seven and a half years and the affair was settled through arbitration. APASQ's negotiations with the Association des producteurs de théâtre privé lasted seven years; the arbitration process resolved the impasse. The renewal of APASQ's first agreement with ACT (Association des compagnies de théâtre) took three years. In this regard, renewing collective agreements can be difficult since the mechanism set out in the statute to obtain a first agreement is not extended to subsequent agreements. The first agreement between an association and a producer is therefore extremely important. Following a decision from the CRAAAP (Commission de reconnaissance des associations d'artistes et des associations de producteurs), AQAD had to confine itself to negotiating rights on commissioned works. APASQ met opposition due to this decision when it was negotiating with the same partners as AQAD. It was mentioned several times that the negotiations often hit a snag when copyright was discussed. The question of whether use of existing works could be included in the agreements was problematic. UNEQ, in its only agreement that is a scale agreement with the Department of Canadian Heritage, had real difficulties introducing provisions governing the use of pre-existing works. One must read section B of the agreement to see how arduous these discussions were and how much they slowed the negotiation process.[25]

[25] Here is part of the preamble to section B, which concerns use of a text already created by the author: "The parties agree:

Also mentioned was the fact that the negotiation process understandably entails costs which are an impediment for many.

At the time of this study, no producers' association had yet been recognized. Because of this, producers who are not members of associations do not fall under collective agreements. They must therefore proceed individually which can be cumbersome. UDA said that it had an annual volume of 500 letters of agreement with producers. This is a large number, and there is certainly a cost involved with this way of operating.

UDA deplores the fact that the minimum conditions become standard conditions. The producer wants the most for the least amount of money, even if exploitation is much more highly developed than previously. The range of rights granted is also an important issue. When a work is commissioned, writer-composers have managed to impose an exclusive licence rather than a assignment, which had been the norm.

The Guilde des musiciens, which manages about 250 collective agreements, the vast majority of them in Quebec, addressed another aspect of status of the artist legislation: the notion of producer. For example, in a situation in which the artist will be the producer and the other party will pay social benefits wearing the hat of "promoter," the collective agreement does not apply. In fact, the Guilde is signing fewer and fewer agreements.

On the visual arts side, the agreement with Artimage (a project of three major Quebec museums) enabled artists to receive royalties for the use of their works on the Artimage Web site. The agreement had a two-year term and was not renewed. It is still very difficult to negotiate with museums.

Benefits of Statutes on the Status of the Artist

In spite of what has been said about obstacles, resistance, and restrictions, agreements have been concluded. One association said that without Act S-32.1 obtaining agreements with independent producers would have been unthinkable. In some cases, the association would not exist without the provincial statute.

"The Department of Canadian Heritage takes the position that the *Status of the Artist Act* does not apply to texts already created. As a consequence, this part of the agreement does not constitute a scale agreement in the sense of the Act . . ." *Accord-cadre entre le Ministère du Patrimoine canadien et L'Union des écrivaines et des écrivains québécois*, December 2002 (our translation).

It was mentioned above that a lack of human and financial resources impedes the start of the negotiation process in some cases. One respondent also spoke of some inconsistencies. Recognized associations have a serious legal mandate and must exercise the power, conferred on them by law, to represent a group of artists. In this particular case, had there not been financial assistance from the Department of Canadian Heritage and a foundation, the revenues from Quebec would not have been sufficient. In the same vein, another association stated that it had received a grant from the federal government to negotiate an agreement with a federal government department. The underlying question thus posed is whether the funding of associations actually is adequate for the job. If the associations cannot obtain agreements, it is ultimately their members who are penalized.

There is an obvious division among associations that fall under Quebec statutes. Act S-32.01, beyond having a structuring effect has proven to be virtually inoperable for collective agreements. At the level of federal law, the fact that there is an obligation to negotiate is positive. However, the difficulties encountered by UNEQ with regard to the use of existing works is an irritant for the use of pre-existing works constitutes an important part of their members' activities.

Members' Knowledge of the Statutes on the Status of the Artist

For people who fall under Act S-32.1, there were some sectors used to negotiating by mutual agreement who saw their individual contractual relations transformed into collective ones. In other words, there was a major paradigm shift in some sectors while in others, where collective relations had already been developed, the change was not as radical. In some cases, members know little about what the association is and what it can do. Often, the collective agreement provides the gateway and the only link to the statutes on the status of the artist. The assistance that the association may provide to individuals is also a bridge to establishing communication.

When craftspeople decided to organize to manage copyright, the CMA solicited its members, and 100 of them expressed an interest in the first three months. The conclusion that can be drawn from this is that an awareness has developed that can be traced to the structuring effect of Act S-32.01.

Commission de reconnaissance des associations d'artistes et des associations de producteurs (CRAAAP)

The commission's slow pace of action was mentioned, although no cause for it could be discerned.[26] The fact that the commissioners are appointed ad hoc slows down hearings. A lack of resources may be responsible, but for whatever the reason, the assessment seems to be shared. Some respondents suggested that the commission was not ambitious with regard to its jurisdiction compared to the Canadian Tribunal, which, respondents felt, also had broader powers. It was noted that for those involved in dossiers that are the slightest bit complex, high costs were incurred – and the risk is even higher because many associations have a precarious financial base. Judicial guerrilla warfare may be a means of vanquishing an adversary and executing a strategy. One respondent noted that he had experienced this situation.

The Federal Statute on the Status of the Artist and the Canadian Artists and Producers Professional Relations Tribunal

The difficulties encountered by UNEQ during negotiation of a scale agreement with the Department of Canadian Heritage have been mentioned above. Following this experience, the association was somewhat sceptical about the federal statute, which was thought *a priori* to be more generous than Act S-32.01. The tangible results of this agreement are still not known. Did the dossier bear fruit corresponding to the amount of effort expended? This will be assessed before renegotiating. The narrow field of application for certain associations is one factor being evaluated. Nonetheless, the recognized Quebec associations have all sought federal certification. The Tribunal is seen as prompt, and is appreciated. Of course, people compare the Commission de reconnaissance to the Canadian Tribunal, and it suffers by it. It was mentioned that people have the impression the Tribunal does give artists the potential to benefit from the Act.

[26] Recent amendments to provincial statutes on the status of the artist set out an addition in the section on functions and power of the Commission:
"63.1. The Commission must carry out its functions and powers efficiently and with diligence.
"A decision must be rendered by the Commission within 90 days after a matter is taken under advisement.
"The chairman of the Commission may extend this period, taking into account the circumstances and the interests of the associations of artists, the associations of producers, and the producers concerned. The chairman shall inform the parties concerned of any extension granted." *An Act to amend various legislative provisions concerning professional artists*, *supra* note 3.

Collective Agreements: Copyright and Electronic Rights

Yes, there are provisions targeting copyright in certain collective agreements. There is also a contractual framework covering those who are not authors in the sense of the *Copyright Act*. Regarding electronic rights, these are not yet well developed. As for broadcasters, advertising revenues have little in common with traditional broadcasting, so this use is not well contained in collective agreements at the moment.

Types of Promoters and Producers: Specificities

In publishing, there tend to be generally fewer problems with large publishers. With small publishers, there are no rules. In visual arts, relations with the large museums have been tense. Craftspeople said that when their work is reproduced or exhibited, they have the same issues as do visual artists.

It was mentioned that during negotiations with producers' associations a group of practices must be considered, and that it can be difficult to take this "mosaic" aspect into account. The application of agreements is also problematic in this context.

Inequitable Contractual Practices

The Centre for Canadian Music noted that composers have little awareness of their rights. When composers sign a contract with a publisher or record producer, legal questions are low on their list of concerns, as they are, understandably, happy to see the door open to dissemination of their work.

At UNEQ, more or less the same thing was reported: the symbolic value of publication is such that concerns regarding rights are not very important for many authors. There are many who are prepared to pay and who in fact do pay to be published.

These are certainly not the only sectors in which recognition is a lever so powerful that it takes precedence when the obligations of the parties resulting from a contract are discussed.

The CMC also gave the example of the rental of orchestral scores. Orchestras often grumble about the amounts they have to pay. Rates are by the minute – they can afford to play only one movement! At the same time, composers are hesitant to increase the costs, because they feel the orchestras will not play their works.

In fact, while contractual practices are often not in the artists' best interests, the artists themselves come to fear being too demanding. They are worried about being shunted aside. This is a reality for some visual artists, as museums deal directly with artists and try to bypass the collective, which would be more demanding. For the artists, asserting their rights can result in their being left out. From this point of view, when contracts are made by mutual agreement, artists are at a clear disadvantage. Standard contracts are a response to difficulties posed by individual negotiation. We will return to this issue below.

There is much education to be done regarding rights. Writer-composers at SPACQ have many questions regarding music-publishing contracts. It was mentioned that most publishers of contemporary concert music are in the United States or Europe. The lack of proximity means that composers have little control over the publisher's work. They must take care of business themselves sometimes when they have not been paid.

This brings us to the payment part of the contract, which is often disadvantageous when the parties negotiate individually. Whether it is for honoraria or royalties, individual negotiation is hazardous. The association often intervenes after the contract is signed. ARRQ stated that the honoraria are "appalling." Licences granted without monetary compensation also exist.

To overcome these difficulties, UNEQ mentioned that it alerts granting agencies when publishers do not respect their obligations with regard to copyright. This procedure also shows the very limited effectiveness of the individual contract in protecting authors' interests.

Act S-32.01: Obligatory Mentions in the Individual Contract between Artists and Promoters

Even though the statute provides a framework for certain aspects of contracts and even when the stipulations on the elements identified in s. 31 of this statute[27] are in the

[27] Section 31 says, "The contract must be evidenced in a writing, drawn up in duplicate, clearly setting forth

contract, there is not necessarily any correction in the balance of forces. Nor does it appear that the prescriptions of the Act have been systematically integrated. In any case, it does not seem that this has been satisfactory.

Moral Rights

When it comes to moral rights, there are very wide variations in practice. In some sectors, the integrity and paternity of the work are taken for granted. In the theatre sector, for example, there is no practice of waiving moral rights.

Nor is there a waiver of moral rights by authors in the audiovisual sector. SARTEC's collective agreements provide a framework for, among other things, credits in the credit roll by importance and rank, and they propose various relevant credits. Among directors, adaptation of the work to the television format, which is variable, necessarily affects the integrity of the work to the point that it is no longer clear which is the original work. The final cut is an issue, and the director's authority is not full and complete.

Between waiver pure and simple, which does not seem to be widespread, and the contractual framework, the latter route seems to be favoured. For example, in some agreements commercial photographers allow for alteration of their photographs. In image banks, permission is always given. Use of a part of the photograph is even allowed. For example, the sky may come from one photograph, the tree from another, and so on. The new technologies allow for much greater manipulation of works this way. However, this type of practice is found in a commercial world of practices as opposed to "artistic" practices, even though it may be difficult to interpret this characterization. It is also noted that in advertising it is more likely that a fragment of an artistic work will be used or that the work will be reframed; visual artists tend to want the their work to retain its integrity even in contexts where customs seem more lax in this regard.

"1) the nature of the contract;
"2) the work or works which form the object of the contract;
"3) any transfer of right and any grant of licence consented to by the artist, the purposes, the term or mode of determination thereof, and the territorial application of such transfer of right and grant of licence, and every transfer of title or right of use affecting the work;
"4) the transferability or nontransferability to third persons of any licence granted to a promoter;
"5) the consideration in money due to the artist and the intervals and other terms and conditions of payment;
6) the frequency with which the promoter shall report to the artist on the transactions made in respect of every work that is subject to the contract and for which monetary consideration remains owing after the contract is signed." *An Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters, supra* note 12.

Commercial photographers are also commissioned to produce photographs that are the same as ones identified by the client. This, of course, puts photographers in an extremely delicate position; the practice is described as a "scourge."

Standard Contracts

When collective agreements exist, the use of a standard contract has developed for whatever is beyond the field of application of the agreement. Thus, it is not surprising that a standard multimedia[28] contract has been developed at SPACQ and SARTEC.

Understandably, it is to the benefit of associations governed by Act 32.01 to develop standard contracts. How much such contracts are actually used is not clear. However, they are useful tools for artists during negotiations. Two approaches were mentioned. AQAD, though governed by Act S-32.1, has developed standard contracts that parties in good faith should be willing to sign as these contracts take into account the realities of both sides. The standard contracts developed by RAAV function more as models. The writing of a standard contract that is not obligatory of course has a variable impact on practice. The result, nevertheless, is an articulation of the rights and obligations that takes account of the artist's reality. Such contracts certainly have an educational function and make artists more aware of their rights.

New Technologies and Emerging Practices

Some aspects of the situation have been mentioned. However, putting texts on line seems to be a niche that may develop as has already happened with ADEL.

Craftspeople have begun marketing their work via on-line stores making use of the new technologies.

Contracts by mutual agreement, such as a book publishing contract, may include the assignment of electronic rights. However, we do not know how negotiations are conducted or if this aspect is important enough to constitute a central element of the negotiations.

[28] *An Act to amend various legislative provisions concerning professional artists*, *supra* note 3, sets out in section 6 the addition of this field to section 1 of Act S-32.1 governing performing, recording, and film artists.

Dispute-settlement Mechanisms

Of course, collective agreements provide mechanisms for dispute settlement: joint committee, mediation, arbitration. AQAD has an agreement between co-authors that provides for a mediation and arbitration mechanism. SARTEC also has a mechanism for arbitrating disputes between authors.

Iniquitous Contracts and Illegal Use: Which Is the Greater Threat?

Although many respondents were not able to answer this question, those who did give an opinion said that contracts were a greater threat than illegal use of their works by users.

Social Safety Net: Taxation, Health and Safety, Group Insurance, Pension Fund

Associations that have collective agreements may integrate a social security fund, provide insurance, and regulate these mechanisms within the agreement. Of course, the size of the funds to be managed is a function of the sums generated by the agreements.

When there is no collective agreement, a basis must be developed for collecting funds. This could be, for example, a percentage on royalties charged.

The problems experienced by some artists concerning the CSST (Commission de la santé et de la sécurité du travail), for example, must be resolved so that the artists' issues are taken into account. It is understandable that acrobats, sculptors, and dancers may be more interested than authors in this type of issue. Thus, the development of a social safety net is a very important issue for some, while it is less of a priority for others. All agree that a coherent normative package must be developed, so that artists will benefit from social coverage to the same extent as all other citizens.

Effect of Royalty Payments on Employment Insurance and Social Assistance

Certain cases brought up by artists' associations reveal the difficulty with characterizing the income that artists generate through their economic activity. One writer-composer was asked to reimburse the social assistance funds that he had received for an entire year because he had received royalties amounting to about $100. Writers had similar experiences with fees paid out by the Public Lending Rights Commission. Other associations had similar examples.

Copyright Issues – the Future of Artists

Various elements were identified with regard to these general questions. Copyright is a central concern. Some said that they are uneasy about the fact that the *Copyright Act* provides protection to software, for example. It was felt that authors are not necessarily the primary concern of the statute and that this may end up helping those who want exceptions to obtain them. The dichotomy between author and rights holder also provokes anxiety. When copyright is assigned, authors no longer have an economic stake in their work. Rights holders are still, all too often, other entities. In the wake of the *CCH* decision, fair dealing and the expansion of users' rights are also of concern. The fact was emphasized that elsewhere in the world the "monopoly" of collectives is being contested, while artists had wanted to strengthen their bargaining position. This also constitutes a threat. New technologies and globalization are putting pressure on copyright, and the remuneration that might be attached to emerging new practices has yet to be seen. The important background issues are the survival of the regulatory framework and foreign ownership.

Recognition of the author's status; awareness of the laws, rights, and implementation of practices; the establishment of a framework for negotiating with promoters; and an adequate structure for management of rights were identified as major concerns by some respondents.

Social security is an extremely important issue for some associations. The contractual framework for use of all components of an artist's performance is similarly critical issue for some, but not all. And, according to one association, changes will have to be made in the culture for fair remuneration to become the norm.

4.2 Results – Collective societies

We interviewed representatives from seven collectives. In alphabetical order, they are: ArtistI, COPIBEC, SOCAN, SODART, SODRAC, SOGEDAM, and SoQAD. Music is the most widely represented, with SOCAN and SODRAC managing copyright, while ArtistI and SOGEDAM manage neighbouring rights. The visual arts follow, with SODART and SODRAC, which has a department dedicated to this field. Finally, COPIBEC and SoQAD are alone in their respective sectors in Quebec.

There are enormous differences between and among collective societies. Some represent only creative artists, performers, or their assignees, while others include publishers among rights holders. How they are organized, the size of their membership, and the income they generate are also very variable. In addition, the territoriality of collectives seems an interesting indication of the history of their development. Collective management did not develop in the same way in all sectors. The relative youth of a number of the collectives interviewed (most were created in 1990s) means that they are still in some stage of development, and thus the landscape and the relationship between author and user are changing. It is beyond the scope of this report to go into great detail on the development of collectives in Quebec, but the fact that many of these organizations are still in a development stage must be kept in mind.

Brief Profiles of the Collective Societies

What follows is some information about each collective, including a brief description of its respective activities.

ArtistI

ArtistI manages the rights of performers with regard to equitable remuneration and copying for private use. This collective was created following the 1997 amendments that provided for the inclusion of neighbouring rights in the *Copyright Act.* It has more than 600 members, most of them singers. It has signed four international agreements. The revenues managed by ArtistI are on the order of $500,000 to $750,000 per year.

COPIBEC

COPIBEC manages reproduction rights for works printed on paper for 15,000 Quebec authors and 700 Quebec publishers; formats include books, magazines, and newspapers. It also manages digital reproduction. Revenues in 2003–04 totalled $8 million. COPIBEC also has agreements with about twenty foreign collectives.

SOCAN

SOCAN manages the public performance right and the right of communication to the public by telecommunication as well as copying for private use. It represents writer-composers and music publishers across Canada and throughout the world via reciprocity agreements. SOCAN has 70,000 members in Canada. Revenues for 2003 were $180 million for all of Canada.

SODART

SODART manages all rights for visual artists. It has more than 360 members in Quebec, as well as some 650 members who joined only for reprography rights. With the Canadian Artists Representation Copyright Collective, CARCC, SODART shares management of the rights of more than 1,200 Canadian artists. It also has some 15 agreements with foreign collectives, totalling more than 22,000 members. Revenues generated in 2003–04 were about $250,000.

SODRAC

SODRAC manages the reproduction rights for music writers, composers, and publishers in Canada. It also manages copying for private use. SODRAC represents the repertoires of more than 65 countries in Canada. There are about 5,000 Canadian members.

SODRAC also manages the rights of creators of artistic works. It represents about 200 members from Canada and a total of about 25,000 artists at the national and international levels.

SODRAC's revenues for the fiscal year ending 31 March 2004 were $14 million, all rights combined.

SOGEDAM

SOGEDAM manages three specific rights: equitable remuneration, copying for private use, and right of fixation. Membership in SOGEDAM is composed of musicians, and the collective has about 40 members. SOGEDAM represents the repertory of Spédidam in Quebec. Apparently, this organization is currently dormant and no revenue will be recorded for the current year.

SoQAD

SoQAD offers a customized mandate to playwrights. It manages mainly stage performance and reproduction rights. The society has 190 members. SoQAD has an agreement with SACD for works performed on stage or broadcast in Europe. Revenues generated are around $90,000.

Corporate Structure

The collectives we met with are all non-profit organizations, except for SoQAD.

Membership Mechanism

Membership mechanisms are varied. For four of the collectives, it involves assignment of rights; in two other collectives, a mandate is used; and one collective asks for an exclusive licence. All collectives in the music sector operate through assignment of rights; thus, there is a coherent approach in that sector. We include here collectives that manage neighbouring rights.

Membership Profile

SODRAC's and SOCAN's members include writers, composers, and publishers. The COPIBEC collective also has both authors and publishers among its members. The other collectives' memberships are composed only of creative artists, performers, or their assignees.

During our interviews, we noted that the way in which categories were divided and what is understood by membership are often rather misleading simplifications. For example, a number of authors are self-published, which in no way demeans their status as

authors, but it shows that a single individual might wear a number of hats. Another example is playwrights, a number of whom also do translation and adaptation. There are few translators and adapters who are not also authors. In visual arts, artists' practices are widely varied, and in many cases they do not want to be confined to a single discipline. These examples illustrate the difficulties that are often posed by what is believed to be a watertight categorization.

Collective Societies and Artists' Associations

There are many links between collectives and artists' associations. In the great majority of cases, an artists' association was behind the creation of a collective, sometimes with other partners. This being said, the closeness of the tie between collective and artists' association differs from one pair to another. Of course, artists' associations have a role that is considered more political, while collectives are, in a sense, a mechanism for collection and redistribution of royalties. Collective management is a business. In general, the younger the collective, the closer the relationship with the artists' association; a greater distancing seems to occur over time. The fact that artists' associations are often behind the creation of collectives is explained by the fact that the associations defend artists and the revenues that the use of their works generates.

Perceptions

According to collectives, users' perception of them is generally negative. One respondent emphasized the practical aspect that the collective plays in payment of royalties.

It seemed that users' perceptions were the most negative in the field of visual arts. It might be presumed that practices in these fields are related to the comments that the collectives made. The scope of the collective's repertoire and the relative simplicity of acquiring rights are other issues that should perhaps be considered.

ArtistI reported that during the interval between joining and receiving a distribution of royalties, members had to be informed about the mechanics of managing the new rights, and why it seemingly too so long. The perception of the collective by its members thus since evolved.

Globalization and New Technologies

Issues related to globalization and new technologies are very broad and do not have the same resonance in every sector. In addition, these two realities affect many facets of copyright. We suggest here only a few paths for reflection that were reported by respondents. Nevertheless, the difficulty with simply identifying the issue as a whole quickly becomes obvious. The music sector is the one for which issues related to globalization and new technologies are the most tangible, at least at the moment.

Concretely, the decision regarding Tariff 22 had not been handed down at the time when we met with France Lafleur of SOCAN. The unfavourable decision handed down by the Supreme Court will delay collection of royalties. Collectives will have to file another tariff for Web sites. This is certainly not the best possible scenario for authors. Most of SODRAC's revenues come from sales of recordings, which have declined sharply; the collective expects to feel the effects during the current year. There has also been an impact with regard to private copying.

Collectives also use new technologies as part of their operations, and payment of fees on line has become a reality for many. Also emphasized was the need to form groups in the context of globalization and new technologies. Of course, there are already international copyright organizations and many exchanges, but the current context is intensifying this trend.

It was also suggested that one of the results of globalization is standardization of copyright, which is advantageous in some cases and disadvantageous in others. In the publishing sector, globalization is creating a concentration of firms, which has an impact on collectives. Rights holders also hesitate to assign management of electronic rights. The fear is that it will not be possible to control uses.

Finally, whether it is music, visual arts, or books, copies are now of very high quality, which had not previously been the case.

Tariffs and Scales

Some collectives have tariffs, while others have grids, but in all cases the use of works has a monetary *quid pro quo* that is evaluated in the light of various parameters. SOCAN's tariffs, for example, have been approved by the Copyright Board and are

therefore publicly available. The royalties to be paid by users for "equitable remuneration" and private copying is also established by the Copyright Board. Outside of these cases, the amounts asked by collectives are the result of agreements negotiated or established by the collective which indicates the cost to the user – although users may negotiate with the collective to determine the amount to be paid. On this level, collectives have a range of attitudes, many of them dictated by the laws of the market and the collective's negotiating power. This enters into contractual matters.

The grids and scales that are not public are often relatively inaccessible. The prices are available on request. Certain types of use may also be displayed on organizations' Web sites. Practices vary.

Collectives that are not obliged to file a tariff may nevertheless do so. Several collectives reported that that the act of going before the Copyright Board and filing a tariff can constitute a tactic in the negotiation process. Little was made by respondents of the cost linked to the process of taking a tariff from filing through to approval. There is no generalized practice among collectives for negotiating prices. For some, however, this is their daily lot and it can be difficult to obtain the price requested.

It is not really possible to make generalizations regarding difficulties linked to payment. However, SODRAC reported that lower revenues for record producers in recent years have had an impact on payment of fees. This is an aspect linked to the issues raised by new technologies.

SOCAN remarked that radio and television stations pay their fees. But there is more non-payment for general tariffs. On the other hand, COPIBEC, for which revenues from the educational sector comprise about two thirds of its revenues, does not have difficulty receiving payment. It is therefore likely that the type of user has an impact on the diligence in making payment.

Among the smaller collectives, SoQAD does not have difficulty receiving payment, and SODART has few accounts in arrears. There are thus no major problems in this respect.

Collectives have a variety of monitoring practices. When there are agreements, inspection mechanisms are integrated into the system. The mechanisms differ from sector to sector. In some cases, there is no perceived need for monitoring; in others, monitoring

mechanisms are organized and exist at several levels, ranging from shadowing to visiting specialty stores. Overall, however, collectives do not spend a great deal of energy developing monitoring mechanisms.

Agreements

Most collectives have agreements. As mentioned above, the threat of filing tariffs or the filing of tariffs may, for some, be part of a negotiating strategy. The scope of negotiating activities varies from one collective to the next. Some have a great amount of experience, while others have very few agreements and work mainly in the context of granting individual licences.

There was no statement to the effect that agreements are not respected. However, in the case of SoQAD, which has an agreement with the ministry of education, the schools are often unaware of the fact that there is an agreement between the collective and the ministry. It may therefore be ineffectual.

With regard to new technologies, in one case it was mentioned that no mechanism has been integrated into the general agreements, although the intention to work in this direction is there. In reality, it is through specific agreements that clauses aimed at new technologies are introduced.

The awareness of new technologies is also variable. The issue is therefore not a constant. With the appearance of new services, collectives try to set guidelines for uses. For example, when players that traditionally fit into the broadcasting sector develop new services, the uses governed by the agreements must be re-evaluated. In the field of reprography, it is clear that a number of users would like to access material electronically. University course packs were given as an example. There are fairly major modifications that need to be made.

Copyright

Loss of Revenues and New Technologies

Except for the music sector, where a drop in record sales has enabled counterfeiting to be quantified, sectors could not give estimates of illegal uses. It is not easy to assess such uses. SOCAN mentioned that when it filed for Tariff 22 it had

absolutely no idea what amount of money it might involved. This is therefore basically unknown territory, and the uses being made of the new technologies are evolving.

Digitization facilitates counterfeiting in the case of printed materials. The example was given of course packs that are scanned digitized and then circulated electronically. It is known, therefore, that the new technologies amplify counterfeiting, but this cannot be quantified. It seems that confusion reigns. People associate downloading with the fact that they are paying royalties on blank tapes or CDs and believe therefore that they are acting legally.

Exceptions

There is no doubt that the introduction of many exceptions to the *Copyright Act* in 1997 has affected rights holders. When it comes to quantifying exceptions, aside from the theatre sector where the loss of revenues linked to introduction of an exception is estimated at 25 percent there is no available estimate of the losses to creators. On top of the lack of income, time resources have had to be mobilized to interpret these exceptions. The unmanageable nature of many exceptions was also emphasized as well as excessive detail nature of some provisions and mechanisms.

Respondents mentioned the difficulties in interpretation posed by the use of artistic works in reports, critiques, or newscasts, for example. Ephemeral recording is also a battlefront that has been bitterly disputed and seems to be resurfacing.

Exceptions, an extremely sensitive subject for artists, always leads to a loss of revenues and a form of expropriation for rights holders. The introduction of numerous exceptions in 1997 is another breach in the positive recognition of creators' rights copyright. The interpretation of exceptions, which is discussed below, also causes great anxiety.

Process of Review of the Copyright Act

In some cases, it is the artists' association which founded the collective that makes representations on behalf of artists regarding the review process of the *Copyright Act*. Opposition to the expansion of exceptions and the maintenance of gains are important.

COPIBEC estimated that the proposal to broaden fair dealing to educational purposes could cause a loss of $25 million to both COPIBEC and Access Copyright. SOCAN has a lobbyist defending its interests. The collectives all feel that they must be present to make the interests of rights holders heard and, at the same time, they are feeling great pressure from users.

Extended licences

According to one respondent, the extended licence represents an interesting solution, notably for management of new electronic rights. Another respondent wondered how this could be applied. Respondents either were in favour or felt they were not concerned.

Copying for private use

One respondent in the music sector reported that the system works well. A survey is taken monthly on practices regarding reproduction for private use in Canada. This process, though cumbersome, provides documentation and evidence for presentation to the Copyright Board during determination of remuneration. Respondents generally felt that this system should be broadened to other sectors and include all supports used for reproduction.

The Théberge, Desputeaux, and CCH decisions

These decisions, on the whole, represent a rollback for authors. If there is a pattern in these decisions, this is it. The emergence of a users' right and the ruling not to interpret fair dealing restrictively are elements that change, or upend even, the economy of copyright. COPIBEC and Access Copyright intervened in *CCH* arguing that the possibility of obtaining a licence from a collective would prevent application of the defence of fair dealing, but this was rejected by the Court. Collectives alleged, as an Australian court had already recognized, that making self-service photocopiers available constitutes a violation of copyright, but the Supreme Court also rejected this argument.

Because the fair dealing exception is no longer to be interpreted relatively restrictively – a departure from the cardinal rules of legislative interpretation – it is not

known how the ruling will affect the revenues of collectives and rights holders. COPIBEC and Access Copyright are now experiencing the consequences of *CCH*: the federal government is refusing to pay royalties for all single copies of works based on the *CCH* ruling and the interpretation that the Court made of the exception to fair dealing.

Forecast for the future of copyright – development of your collective

The people questioned had differing points of view about the future. Most said that they are not pessimistic although they felt that things are difficult at present. The new technologies make controlling uses of creators' work difficult. Maximum protection is wanted for works as a whole, and yet use of works without remuneration is more and more of an accepted reality. There is a paradox there, and it is difficult to predict what will happen in the long run. One respondent, who stated her pessimism outright, emphasized that users' demands are constantly increasing. There is also more and more tension between users and collectives. Movements such as Copyleft are growing, and this is causing concern.

It is hoped that there will be no new exceptions enacted. It is felt that there may be too many collectives and that users will use this to justify and obtain exceptions from the government. Some fear was also expressed regarding the advent of neighbouring rights and the fact that this may hurt authors. It was mentioned that the culture of neighbouring rights is not yet established in Canada, although in Quebec rights holders are showing a growing interest in and better understanding of these new rights.

It is easy to see that various aspects of reform are being considered and that solutions are being actively sought. Not everyone shares the same point of view, but all seem to agree that the current period is a critical one.

Miscellaneous

Foreign markets, notably in France, are closed to writer-composers because performers cannot use material from Quebec to break into that market. This is a trend to be noted.

In the establishment of tariffs for the music sector, there are many comparisons with the United States and American practices. The low royalties generated for music in

film is one example. One respondent discussing the situation of musicians underlined two main problems with regard to neighbouring rights. Musicians are obliged to prove their repertoire, and the allocation negotiated between the different performers has never been ratified by musicians.

Most broadcasters pay a royalty of only $100 on their share of advertising revenues under $1.25 million in the case of public performance or communication to the public by telecommunication of performances of musical works or sound recordings. This constitutes another form of exception, introduced by legislators as "special tariffs".

It seems to be received opinion that copyright takes precedence over neighbouring rights. This concept, nevertheless, is present in the Canadian landscape.

4.3 Results – Government representatives

We conducted three telephone interviews with government representatives. We talked to Louise Dion of the Ministère de la Culture et des Communications, Hélène Lavallée of the Commission de reconnaissance des associations d'artistes et des associations de producteurs, and Josée Dubois and Lorraine Farkas of the Canadian Artists and Producers Professional Relations Tribunal (CAPPRT).

These interviews were shorter and less detailed than those conducted with collectives and artists' associations. These respondents' comments provide a diversity of perspectives.

Contribution of Statutes on the Status of the Artist

The Quebec statutes have undeniably had a structuring effect on their respective fields. Each statute, however, does not contribute equally. Act S-32.1 has generated many agreements, while Act S-32.01 has not. The Commission de reconnaissance (CRAAAP) has dealt much more frequently with Act S-32.1. Act S-32.01 had a greater effect on the culture sector as a unifying agent, one respondent told us. The contributions thus are not necessarily the same, but in each case the statutes were not seen as completely useless. The effects of each statute are different.

The federal statute has a limited range. The field of application of the Quebec statutes is broader. That being said, about twenty-five associations have been certified to date. We were told, however, that the federal legislation has no arbitration mechanism to reach a first scale agreement, as opposed to Act S-32.1 which does,[29] and this is seen as a shortcoming, since numerous negotiations have ended in failure.

However, it is noted that associations have evolved in their business practices. Based on the questions asked the Canadian Tribunal, we can perceive an evolution even if there is still educational work to do.

Process of Modification of the Quebec Statutes

With regard to the texts of the statute, both Quebec acts have been tested, one having come into effect in 1987 and the other in 1988. It should be noted that *An Act respecting the professional status and conditions of engagement of performing, recording and film artists* (R.S.Q., c. S-32.1) was amended in 1997. Thus, a number of issues have developed over time. The obligation to negotiate, the notion of producer, and commissioned work versus use of existing work were identified as major elements by one of the respondents.

It should be noted that amendments were made to both statutes in June 2004 through Bill 42.[30] The respondents did not comment on this legislation.

The Future of Statutes on the Status of the Artist

One of the respondents felt that an assessment must be made of how the model proposed by Act S-32.1 regarding collective agreements and the obligation to negotiate can be transposed to Act S-32.01. One respondent also felt that the occasional assessment processes means that the statutes are remodelled and evolve.

According to representatives of CAPPRT, the future of the Tribunal is uncertain and its continued existence apparently cannot be taken for granted. It was explained that

[29] Section 33, paragraph 1, has the following wording: "During the negotiation of a first group agreement, either party may apply to the Commission for the designation of an arbitrator if the intervention of the mediator has not been successful."
[30] *An Act to amend various legislative provisions concerning professional artists*, *supra* note 3.

the government is proceeding with an analysis of expenditures and structures, and in this light, there is the possibility of rationalization of tribunals. The respondents did not know what might happen, but they shared their uncertainty with us.

Status of the Artist and Copyright

Regarding the interconnection between copyright and status of the artist, for one of the respondents commenting on the Quebec laws, mentioned there are certain to be boundary issues, and the disputes show this to be so. One federal representative commenting on this situation felt that there is not necessarily a conflict, because, as she explained, the Copyright Board is an economic tribunal, while the CAPPRT oversees working relations.

New Technologies

It was mentioned that artists feel that the use of works in the new technologies has a value. In fact, the value linked to use of an intangible good, whatever that use might be, is something which artists are increasingly understand

Trends

One respondent felt that the relationship between culture and state interventions may have to be reviewed, and she looked to status of the artist. Should a less compartmentalized process be envisaged in the Quebec statutes? Would it be relevant to have only one? In addition, the fact that the provincial government has decided to favour an integrated approach to socio-economic conditions for artists is a positive sign.

Conclusion

The comments and thoughts given by government respondents, both provincial and federal, feed into the study. Of course, the points of view expressed here do not speak for everyone. Nevertheless, these respondents were all very well informed about the subjects that are under study here, and their points of view have the merit of presenting angles and approaches that give a broader perspective to the subjects under study.

5.0 Conclusion

The nature of copyright, a property right that developed on the margin of property law, is, as has often been repeated, a property right the object of which, while having a material existence, is related to the intangible. Falling within a distinct legal regime, copyright is, of course, the object of transactions and contracts which allow us to assess these practices. Contract law then takes up the baton. From this point of view, copyright, far from being unique, evolves in an economic universe and is integrated into the larger sphere of trade in which goods pass from hand to hand. However, there is the clear impression that copyright is not merchandise like other merchandise; although it is part of the economic universe, this on its own does not define it or establish its real stature. The present report seems, in large part, to embody these issues. It is thus not surprising that artists have the greatest success when they act together to draw the best advantage from the economic rules that underlie our laws and that are part of a larger societal environment..

It is not easy to summarize in a few statements all of the issues that the different respondents raised. In spite of the plurality of practices, however, there are a certain number of shared elements. There is no doubt that the introduction of exceptions constitutes a constant threat to all respondents. Should the *Copyright Act* be refocused? The notion that the author is the primary rights holder becomes all the more meaningful when there is an effective fee base and the remuneration attached to these fees is fair.

For the question of copyright to be more than theoretical, there must therefore be rights to be enforced, and the pre-eminence of the author must be a reality. The erosion of creators' rights may be explained by the advent of new technologies, which, of course, pose legislative challenges and make copyright more fragile.

The contractual relations maintained by artists are divided into collective and individual relations. There is no doubt, after listening to all the respondents, that collective relations are far preferable to individual ones judging by the results. The best way for artists to get what they want and deserve is to be in organizations structured for collective action.

Collective societies are on the same footing, and are an answer to the weakness of individuals negotiating their own contracts. They are a counterweight in negotiating uses, and their strength is proportional to their repertoire.

Although this assessment was probably shared by all when this study was initiated, it is confirmed by this report. It is therefore not surprising that though the professional association and the collective may sometimes have diverging interests, they are allies. The relationship between artists' associations and collectives is therefore complex; it may be antagonistic, it may be complementary.

Although there are numerous difficulties and arduous circumstances, solutions are nevertheless being sought – negotiated, contractual, legislative, and collective.

Appendix I

List of Artists' Associations

APASQ
(Association des professionnels des arts de la scène du Québec)
David Gaucher, president

AQAD
(Association québécoise des auteurs dramatiques)
Michel Beauchemin, executive secretary

ARRQ
(Association des réalisateurs et réalisatrices du Québec)
Lise Lachapelle, director general

CAPIC
(Canadian Association of Photographers and Illustrators in Communications)
André Cornellier

CMA
(Conseil des métiers d'art)
Louise Chapados, director, service development, project funding, and training

CMC
(Canadian Music Centre)
Mireille Gagné, general director, Québec

Guilde des musiciens
Gérard Masse, president

RAAV
(Regroupement des artistes en arts visuels)
Annie Molin Vasseur, sitting director general at the time of the interview

SARTEC
(Société des auteurs de radio, télévision et cinéma)
Yves Légaré, director general

SPACQ
(Société professionnelle des auteurs compositeurs du Québec)
Francine Bertrand-Venne, sitting director general at the time of the interview

UDA
(Union des artistes)
Anne-Marie Des Roches, director, public affairs
Sylvie Drouin, consultant, labour relations, and negotiations officer

UNEQ
(Union des écrivaines et des écrivains québécois)
Pierre Lavoie, director general
Ginette Major, assistant director general

List of Collectives

ArtistI
Richard Cayer, assistant administrative director

COPIBEC
(Société québécoise de gestion collective des droits de reproduction)
Hélène Messier, director general

SOCAN
(Society of Composers, Authors and Publishers of Canada)
France Lafleur, Vice-President Licencing and General Manager, Quebec and Atlantic Canada division

SODART
(Société de gestion collective des droits d'auteur en arts visuels)
Annie Molin Vasseur, sitting director at time of interview

SODRAC
(Society for Reproduction Rights of Authors, Composers and Publishers in Canada)
Claudette Fortier, Copyright and Business Development Advisor
Diane Lamarre, Manager, Visual Arts & Crafts Department

SOGEDAM
(Société de gestion des droits des artistes musiciens)
Eric Lefebvre, secretary

SoQAD
(Société québécoise des auteurs dramatiques)
Marie-Louise Nadeau, rights director, SoQAD, and assistant executive secretary, AQAD

List of government representatives

Louise Dion
Direction générale des affaires internationales et de la diversité culturelle
Ministère de la Culture et des communications

Hélène Lavallée
Secretary and legal advisor
Commission de reconnaissance des associations d'artistes et
des associations de producteurs

Josée Dubois
Executive Director and General Counsel
Canadian Artists and Producers Professional Relations Tribunal

Lorraine Farkas
Director, Planning, Research, and Mediation
Canadian Artists and Producers Professional Relations Tribunal

Appendix 2

Interview Guideline
Artists' Associations

General

1) Can you briefly describe the sector in which you work?

2) What is the structure of your association?

3) How many members are in your association?

4) What is the profile of your membership? Types of practices, subgroups, representation of these subgroups in the association, etc.

5) What is your relationship with collectives?

6) Approximately how many of your members belong to a collective? Do they feel that the royalties paid by these collectives are sufficient considering the exceptions that certain organizations and institutions enjoy?

7) Has globalization had an impact on your sector? Explain.

8) Have the new technologies affected your sector? How?

9) Given this context, have you created strategic alliances with other players? If yes, why?

Copyright

10) Have your members been affected by the exceptions introduced in the *Copyright Act* regarding the education sector, libraries, museums, and archives?

11) How would you describe the level of your members' knowledge of the issues linked to electronic rights?

12) How do your members view the fact that their works are illegally copied on the Internet?

13) What do your members feel about file sharing? How do they articulate the relationship between these networks and the creator's role?

14) In recent years, decisions regarding copyright have been handed down by the Supreme Court (*Théberge*, *Desputeaux*, *CCH* rulings). What do you think of them? Do they affect your sector?

Contractual practices

15) Do you have collective agreements with promoters or producers?

16) What are they? Agreements under the *Status of the Artist Act?* Under Act S-32.1 or Act 32.01?

17) What are the main difficulties encountered during negotiations with promoters or producers?

18) What contribution have the statutes on the status of the artist made in your sector?

19) Do your members understand the nature and effect of these statutes?

20) What is your assessment of the Commission de reconnaissance des associations d'artistes et des associations de producteurs?

21) How do you evaluate the contribution of the federal Status of the Artist Act?

22) What is your assessment of the Canadian Artists and Producers Professional Relations Tribunal (CAPPRT)?

23) If there are collective agreements between the members of your organization and a promoter or producer, are their mechanisms to protect their copyright? Do any of these mechanisms cover electronic rights?

24) Are there specificities with regard to types of promoter or producer? Public vs. private? Scope of the organization? (individual and/or collective agreements)

25) Are there contractual practices that you find inequitable? Can you give examples?

26) Do promoters respect Act S-32.01 by mentioning the elements that must obligatorily be recorded in individual contracts between artists and promoters?

27) Have you observed waivers of moral rights in licences or copyright assignments? Is this a systematic practice? Or is it rare?

28) Have you created one or more standard contracts? If yes, are they used? How frequently? Explain.

29) Have new practices developed with regard to the new technologies? What are they? Have they proved advantageous or disadvantageous for artists?

30) Have your members been forced to assign their electronic rights in a context where they had no choice, because it was a sine qua non condition for the contract? What were the consequences?

31) Have you set out mechanisms related to settlement of disputes of all types (between artists, between artists and promoters, between artists and producers)?

32) Do your members tend to see inequitable contracts used by promoters or producers as constituting more of a threat than illegal use of their works by users?

Other

33) Given the possibility of negotiating collective agreements, how do you situate the social safety net? (taxes, health and safety, collective insurance, pension fund)

34) Have members reported on the effect of payment of royalties on employment insurance and/or social assistance? What do you think of this issue?

Conclusion

35) What are the major issues in your sector regarding copyright?

36) How do you see the future for artists and their living conditions?

37) Is there anything that you would like to discuss that we have not addressed in this interview?

Collective Societies

General

1) Can you give a general description of your collective's activities?

2) What is the legal structure of your collective? For profit, not for profit?

3) How many rights holders does your collective represent?

4) By what mechanism do rights holders join your collective? Assignment, licence, mandate?

5) What is the profile of your rights holders? Are they authors, promoters, producers, performers? Can you tell us how your rights holders are distributed? How do you develop your repertoire?

6) What rights do you manage? (copyright, neighbouring rights)

7) What are the revenues of your collective? How do you analyze these revenues and their provenance?

8) How are you related to the artists' associations?

9) According to you, how is your collective perceived? How are all collectives perceived, in your opinion? By users? By rights holders?

10) Does globalization have an impact on your collective? Explain.

11) Have the new technologies affected your collective? How?

12) Given this context, have you created strategic alliances with other players? If yes, why?

Tariffs and scales

13) Do you have to file your tariffs with the Copyright Board? If yes, can you give your impressions of how rates are established?

14) If no, have you filed a tariff with the Copyright Board? If yes, tell us about your experience. If you decided not to file a tariff with the Copyright Board, can you say why?

15) Is your scale often negotiated downward?

16) Do you have difficulties with being paid? Have you totalled up these losses? About what is the amount?

17) Do you have monitoring mechanisms with regard to uses of the works in your repertoire? If yes, what are they? Have you had satisfactory results?

Agreements

18) Do you have agreements with users? What has been your negotiation experience?

19) Are the agreements respected? If you have had difficulties, what are they? How are measures aimed at new technologies integrated?

Copyright

20) Have you estimated the losses incurred from violations of copyright linked to new technologies? Is this a crucial issue for the survival of your collective? What is or will be your strategy?

21) Are there exceptions in the *Copyright Act* that affect you specifically? Have you estimated the losses incurred?

22) How do you perceive your role in the process of reviewing the *Copyright Act?*

23) What is your point of view of extended licences? What would the impact be in your sector? Are you in favour of an intervention by the legislator?

24) What do you think of a regime such as the one for copying for private use?

25) In recent years, decisions regarding copyright have been handed down by the Supreme Court (*Théberge*, *Desputeaux*, *CCH* rulings). What do you think of them? Do they affect your sector?

26) What is your view of the future with regard to copyright? How do you see your future development? In the short, medium, and long terms?

27)Is there anything you would like to discuss that has not been addressed in this interview?