

CANADIAN ELEMENTS OF PROTECTION OF AUDIO PERFORMERS' CREATIVE ACTIVITY

Study commissioned by the Department of Canadian Heritage*

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*Jean-Arpad Français**

“Art and creativity are the essence of diversity, and diversity is in itself a source of harmony. Absolute unison does not produce harmony, but harmony does need laws, rules, proportions and good taste, to regulate the different chords and discords”¹

1. PROLEGOMENA

Whereas certain post-modern societies abide by an organization model based on mass logic which in essence aims at objectives that are as consensual as possible for the purpose of attaining a conformist state of well being, one cannot help but notice, at various levels, well settled standardization trends. For instance, in specific areas harbouring a strong density of population, the typical extensive homogenous architectural developments will tend to give to the neutral or critical observer passing through the paradoxical feeling that she is crossing a desert². This “unison”, almost “absolute”, seems the opposite of harmony, if one adheres to the idea that diversity is the source of harmony. In this sense, art and creativity, from which stems diversity, may acquire an undeniable practical importance inasmuch as they constitute a means to prevent the expansion of a certain desertification of the cultural space³.

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¹ Lord Yehudi Menuhin, “Art and creativity: The Sources of Diversity” in *Art and Society – Topical questions: the “new technologies”, funding and artistic education*, UNESCO, 1999, <http://unesdoc.unesco.org/images/0011/001171/117110mo.pdf>.

² See R. Harris, *Creeping conformity: How Canada Became Suburban, 1900-1960*, Toronto, University of Toronto Press, 2004 (“The transformation of Canada into a suburban nation eventually led to a suppression of diversity”).

³ See also in similar terms, Final Declaration, UNESCO, *World Congress on the Implementation of the Recommendation Concerning the Status of the Artist*, CLT/CONF/206/9, Paris June 20, 1997:

“We are aware that the trend towards uniformity in patterns of thought and cultural productions, which are often based on maximum and immediate profitability, constitutes a threat to creative diversity”, <http://unesdoc.unesco.org/images/0010/001090/109018e.pdf>.

Diversity is perhaps what warrants the development of cultural policies which endeavour to take into consideration the creators and creation, and the role of law in the concert of “chords and discords” in which they participate⁴.

At the dawn of ratification by Canada of the World Intellectual Property Organization (“WIPO”) treaties on Copyright (“WCT”) and on Performances and Phonograms (“WPPT”) ⁵, it is worthwhile to carry out an audit of the scope of protection afforded to creative activity and the situation of performers in Canada. The Canadian *Copyright Act* (“CA”) ⁶ has integrated protections of performers in 1994⁷, 1997⁸ and today, contemplates further levels through the reform process initiated by Bill C-60⁹. The Act’s provisions complemented a common law protection regime¹⁰ and specific statutes: *An Act respecting the professional status and conditions of engagement of performing, recording and film artists* (“SAQA”) ¹¹ and the *Status of the Artist Act* (“SACA”) ¹², which enforcement pertains to *ad hoc* tribunals, viz. the “Commission de reconnaissance des associations d’artistes et des associations de producteurs” (“CRAAAP”) and the Canadian Artists and Producers Professional Relations Tribunal (“CAPPRT”). The purposes served by these statutes are to provide a framework for labour relations involving

⁴ For an example of cultural policy, see Final Declaration, *ibid.*; In Canada, with respect to copyright, see Government of Canada, *Government Statement on Proposals for Copyright Reform*, http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/reform/statement_e.cfm, following *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act, 2002* (“S. 92 Report”), <http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp00863e.html>; House of Commons, Standing Committee on Communications and Culture, *A Charter of Rights for Creators — Report of the Subcommittee on the Revision of Copyright*, Ottawa: Supply and Services Canada, 1985, 150p. at p. 53; The Minister of Communications and Minister of Consumer and Corporate Affairs, *From Gutenberg to Telidon, A White Paper on Copyright: Proposals for the Revision of the Canadian Copyright Act*, 1984, 113p. at p. 11; Keyes, A. A. and C. Brunet, *Copyright in Canada: Proposals for a Revision of the Law*, Ottawa: Consumer and Corporate Affairs Canada, 1977, 245 p. at p.116; Canada, Royal Commission on Patents, Copyright, Trade Marks and Industrial Design, *Report on Copyright* (the Ilsley Report), Ottawa: Queen’s Printer, 1957.

⁵ WCT, concluded in Geneva on December 20, 1996, came into force on March 6, 2002 following its ratification by 30 countries; 56 member States as of October 2005; WPPT, concluded in Geneva on December 20, 1996, came into force on May 20, 2002 following its ratification by 30 countries; 55 member States as of October 15, 2005, <http://www.OMPI.int/copyright/fr/treaties.htm>.

⁶ R.S.C. 1985, ch. C-42. See E. Mackaay & Y. Gendreau (dir.), *Canadian Intellectual Property Legislation*, Toronto, Carswell, 2006.

⁷ *An Act to implement the Agreement on the World Trade Organisation*, S.C. 1994, c. 47.

⁸ *An Act to amend the Copyright Act*, S.C. 1997, c. 24. See Y. Gendreau, “The Protection of Neighboring Rights of Performers in Canada in the Light of the 1996 WIPO Treaty (Translation)” in ALAI Conference, *Creators’ Rights in the Information Society*, Budapest, Sept. 14-17, 2003, Budapest, KJK Kerszöv at p. 809 (“ALAI Budapest”).

⁹ Bill C-60, *An Act to Amend the Copyright Act*, first reading, June 20, 2005, House of Commons of Canada, First Session, Thirty-eighth Parliament, 53-54 Elizabeth II, 2004-2005, http://www.parl.gc.ca/38/1/parlbus/chambus/house/bills/government/C-60/C-60_1/C-60_cover-F.htm. Bill C-60 is theoretically born-dead as a result of dissolution of the House of Commons on November 29, 2005.

¹⁰ See Y. Gendreau, *supra*, referring to civil law provisions, for instance, “when their performances were used in an inappropriate way” and to the case of *Pagliari v. Avantis*, (1997) 84 C.P.R. (3D) 149 (C.A. Qué.); see also S. Gilker, “Les artistes exécutants et interprètes et le nouveau Code civil du Québec” (1995) 8-1 C.P.I. 91.

¹¹ R.S.Q., c. S-32.1. See Y. Gendreau, *supra*.

¹² S.C. 1992, c. 33; R.S.C. 1985, c. S-19.6. See Y. Gendreau, *supra*.

independent artists and “[...] to respond to a same preoccupation: establish and implement a specific labour relation regime, adapted to the particular context of cultural workers”¹³.

The reason as to why the elements of protection of performers’ activity were based on labour law in the first place should not necessarily be explained by the lack of copyright provisions pertaining to such subject matter but rather by virtue of the fact that performance is among all things a live act.¹⁴ By reason of the springboard effect of technological discoveries enabling the recording of sound and its playback, artists who, “competing with the use of their own performance, [...] have logically aspired to earn their living not only with the proceeds of live performances but also with the remuneration for each use of the product of their work”¹⁵. Surprisingly, in some cases, the mere existence of a social protection regime pertaining to labour law has been the cause of a delay in the recognition of a right of intellectual property in the performance¹⁶.

¹³ L.A. Léger, “Lois sur le statut de l’artiste – Une approche constitutionnelle ou l’art de l’ubiquité” (1993) 5 *C.P.I.* 7 [original text in French]; see Y. Gendreau, *ibid.*

¹⁴ Performance is not defined in the WPPT although the latter grants rights in the performance. The French version, “performance” is split in two acts: “interprétation” and “exécution”. None are defined (see s. 6 WPPT).

Under Canadian law, “interprétation” is not defined. The CA (s. 2) refers to the “performer’s performance” or “prestation” in the French version:

“performer's performance” means any of the following when done by a performer:

(a) a performance of an artistic work, dramatic work or musical work, whether or not the work was previously fixed in any material form, and whether or not the work's term of copyright protection under this Act has expired,

(b) a recitation or reading of a literary work, whether or not the work's term of copyright protection under this Act has expired, or

(c) an improvisation of a dramatic work, musical work or literary work, whether or not the improvised work is based on a pre-existing work;

“Performance” is also split in the French version which includes “l’exécution” and “la représentation”. “Performance” is defined as follows (CA s. 2):

“performance” means any acoustic or visual representation of a work, performer's performance, sound recording or communication signal, including a representation made by means of any mechanical instrument, radio receiving set or television receiving set.

S. 15 CA provides the “performer” with a right in his “performance”. The French version translates “performer” in “l’artiste-interprète”.

Under French law, the *Code la propriété intellectuelle* refers to both “l’interprétation” (s. L. 211-4: term of rights, L. 212-2: moral rights) and “la prestation” (s. L. 212-3: right to authorize the fixation, the reproduction and the communication to the public).

Though, in the English version of the CA, the word “performance” is not substituted to another, it should be considered that in the French version of this paper, the link between the notion of “artiste-interprète” and “interprétation” justified to refer without distinction to both words: “prestation” and “interpretation”. These nuances are important since the reference to the notion of “interpretation” can be loaded philosophically as it will be stressed farther in this paper.

¹⁵ S. Pessina Dassonville, *L’artiste-interprète salarié*, Presses universitaires d’Aix-Marseille (PUAM), 2006, preface Professor Michel Vivant, foreword Professor Alain Supiot, n°67; see also M. T. Sundara Rajan, “The “New Listener” and the Virtual Performer: The Need for a New Approach to Performers’ Rights” in *In the Public Interest – The Future of Canadian Copyright Law*, M. Geist (ed.), Toronto, ON, Irwin Law, 2005 at pp. 309 and fol.; see also R. Khouzam, “L’évolution des droits voisins et le réalisateur de son : (re)définition d’un statut juridique” (2000) 13-1 *C.P.I.* 95.

¹⁶ S. Pessina Dassonville, *ibid.*, studying the situation in France.

It remains that the notion of “performance” or “*interprétation*”, its subject matter, its nature and its criteria have been studied very little¹⁷. These questions should not be overlooked. Indeed, it is important to establish the difference between a performance and a work¹⁸. If a performance could be assimilated to a work – “derivative”¹⁹, as the case may be²⁰ – there would be tenable justifications to deny performers specific rights²¹.

¹⁷ This is not only true in the Canadian context. However, see E. Lefebvre, “Les droits des artistes-interprètes sur leur prestation : de la convention de Rome au projet de loi c-32” (1998) 11-1 *C.P.I.* 33; R. Khouzam, *op cit*.

¹⁸ See S. Pessina Dassonville, *supra* and the reference to F. Gotzen, *Le droit des artistes-interprètes et exécutants dans la CEE*, Report commissioned by the European Commission.

¹⁹ Derivative works are not formally recognised in the CA. Nonetheless, they have been recognised in various instances: see J.S. McKeown, *Fox Canadian Law of Copyright and Industrial Designs*, Scarborough, ON, 3rd ed., 2000 at pp. 63-66.; see *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336, at para. 73:

I should note that while there is no explicit and independent concept of "derivative work" in our Act, the words "produce or reproduce the work . . . in any material form whatever" in s. 3(1) confers on artists and authors the exclusive right to control the preparation of derivative works such as the union leaflet incorporating and multiplying the Michelin man in the Michelin case, supra. See generally, McKeown, supra, at p. 64. In King Features Syndicate, Inc. v. O. and M. Kleeman, Ltd., [1941] A.C. 417 (H.L.), under a provision in the English Act similar to s. 3(1) of our Act, the plaintiff's copyright in the cartoon character "Popeye the Sailor" was held to be infringed by an unauthorized doll, i.e., the two dimensional character was reproduced without authorization in a new three-dimensional form. See also W. J. Braithwaite, "Derivative Works in Canadian Copyright Law" (1982), 20 Osgoode Hall L.J. 191, at p. 203. To the extent, however, that the respondent seeks to enlarge the protection of s. 3(1) by reading in the general words "recast, transformed, or adapted" as a free-standing source of entitlement, his remedy lies in Parliament, not the courts.

²⁰ One could make the argument that a derivative work exists in practice inasmuch as the contribution of the artist is sufficiently original and where the existence of a licence (implicit and non exclusive or general and non compulsory) on the pre-existing work is characterized. Indeed, the performance of the work is necessary if such work is to be given its full expression, beyond its passive existence in the form of a written partition (see *infra*). In this respect, one should point out that at s. 2 CA, it is indicated that a “performer’s performance” means “(c) an improvisation of a dramatic work, musical work or literary work, whether or not the improvised work is based on a pre-existing work” [our emphasis]. The French version does not refer to such an “improvised work”. However, logically, it should be understood that an improvised performance is a work notwithstanding whether it is inspired or not by a pre-existing work. If it is inspired by a pre-existing work, one could argue that the performance is also a work stemming from the added value of the “interpretation”. The question is not new and some commentators have indicated that, between the work and the “interpretation”, “the border remains porous” [original text in French], particularly if the criterion of performance is originality, A. & H.-J. Lucas, *Traité de la propriété littéraire et artistique*, Paris, Litec, 2nd ed., 2001 at p. 628. At Canadian law, originality is not a criterium for the protection of the performance, see D. Vaver, *Intellectual Property Law*, Concord, ON, Irwin Law, 1997 at p.23. Professor Vaver, though writing that “[e]ven though performers are like authors, and indeed, when spontaneously improvising, can be authors [...]”, reminds us that justifications for protection outside such cases are different. Nonetheless, the recognition of moral rights in favour of performers may be troublesome in the sense that it may contribute to strengthen the idea of a “porous” border between work and performance, between author and performer. See M. T. Sundara Rajan, *supra* at p. 327, apparently concurring:

Like the improvement in term of protection for performances, the introduction of moral rights for performers signifies an attempt to bring greater recognition and status to their creative work. If term represents a quiet revolution, however, moral rights are a noisy explosion of festivities. No aspect of copyright law is more expressive of the special, and

Furthermore, it is only when a performance acquires legal autonomy, by joining a category such as that of goods, that it can then enter the legal market and become the subject matter of reservations and transfers of ownership in an intangible movable good, in the civil law context²².

Moreover, it is useful to identify the criteria of performance in order to determine whether it is eligible for copyright protection. In this respect, some consider that a performance should display some originality bearing the hallmark of the performer²³. The scope of this hallmark would in return determine that of originality²⁴. Conversely, certain categories of participants in the artistic process may not convey any originality in their contribution and, as such, may not be eligible for copyright protection²⁵.

somewhat mystical, nature of creative authorship; no aspect is more closely guarded as the exclusive preserve of authors. [...] The decision to extend these rights to performers means that, if only at a "spiritual" level, they have attained a degree of equality with authors.

²¹ Nonetheless, independently of any transfer, the accumulation by a person of rights pertaining to Part I CA (Copyright and moral rights in works) and of rights pertaining to Part II CA (Copyright in performances, sound recordings or communication signals) is not unusual at Canadian law. For instance, broadcasters, who benefit from the definition of work, which includes compilations, enjoy rights pertaining to Part I CA (on the basis of a right in the programmes or the "broadcasting day") at the same time as rights pertaining to Part II CA (as per the rights in the communication signal), see J.-A. Français, "De l'adaptabilité des droits des organismes de radiodiffusion à l'adaptation du droit d'auteur" (2004) 16-3 *C.P.I.* 659.

²² See S. Pessina Dassonville, *supra*; see also D.-C. Lamontagne, *Biens and propriété*, Cowansville, Yvon Blais, 2nd ed., 1995, N°108 at p. 47; see also *Bishop v. Stevens*, [1990] 2 S.C.R. 467 at p. 479: "Once a work has been recorded, the recording takes on a life of its own".

²³ See S. Pessina Dassonville, *supra*; see E. Lefebvre, *supra*; see R. Khouzam, *supra*, who begs the question whether the contribution of the sound engineer justifies a protection; see J.S. McKeown, *Fox Canadian Law of Copyright and Industrial Designs*, Scarborough, ON, 3rd ed., 2000 at p. 255: "it appears that in most cases the performer will be distinguished by putting the stamp of their [sic] personality on their performance of the work", further referring to the *Guide to the Rome Convention*, Geneva, WIPO, 1981 at p. 21: "Finally, if the convention includes, in a single group, a wide category of persons who communicate works to public, this does not mean that in practice their situations are identical. Some artists put the stamp of their personality on their performance of a work [...]. But it is clear that he must "perform" ... extras of theatre or cinema and those who assume a mere mechanical role (stagehands for example) [are excluded] since their part in the show bears no personal stamp and is marginal or secondary". As indicated previously, recognition of moral rights to performers (s. 5 WPPT) may strengthen this approach (see *supra*). It is worthwhile mentioning s. 8 of the *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, done at Rome on October 26, 1961 ("Rome Convention") allowing a State to determine conditions as to the exercise of rights in situations involving several performers such as in the case of a band. The fact that Canada has chosen not to implement s. 8 may be seen as a decision to not interfere with the relationships among members of a group of performers.

²⁴ The Hon. Sheila Copps, during the 3rd reading of Bill C-32, addressed the House in the following way: "when Shania Twain sings the voice of Shania Twain is what makes that song unique. Up until the passage of this bill Shania Twain was never recognized as the creator of the record or the CD that bore her name. Historically, because of copyright reform almost a decade ago, we paid the person who writes the Shania Twain song but we never paid the singer. Bill C-32 will change that", 35th legis., 2nd sess., March 20, 1997, Hans. 9283 [original speech in English], www.parl.gc.ca/english/hansard/148_97-03-20/148GO3E.html.

²⁵ See J.S. McKeown, *supra* at p. 255.

Finally, a metaphysical approach to “interpretation” is certainly useful to grasp the possible theoretical justifications for its copyright protection²⁶. An example of such an approach has been offered in the following terms:

Interpretation must define itself particularly with respect to works. A work is specific in the sense that its expression is limited to its form. It must, to acquire protection, display an original form, but this is sufficient. Intrinsically, a scenario, a musical composition, or the retranscription of dance steps are animated, but not incarnated. To reach the public, to be sensed by the public, a performer has to incarnate them and thus express their soul with his own sensitivity. It is precisely the performer who gives to the form its movement through sound and/or gesture and gives the work its body. Hence, a work has a soul, which in practice is revealed by no other than the performer. In other words, the interpretation is the incarnation of the work, it is the expression of the work's soul.

According to the Grand dictionnaire encyclopédique Larousse, despite the fact that the interpretation is as much the act of interpretation as the result of this interpretation, it is especially in relation to music that this word is best explained: “Act by which a performer, a group of performers or their leader, render perceptible to the public what otherwise only exists in a virtual state in the musical score”.

And the dictionary adds: “On the basis of the elements of the written musical work, the performer re-creates the latter through his own thought; this “re-creation” thus relies on a group of objective and subjective factors. Outside the musical notation per se and the signs related thereto, the indications pertaining to dynamism (intensity, nuances) and to agogic (tempo) constitute the essential objective basis of any interpretation. The work's structure (form and language) and its historical context are the cause of the phrasing and the style, beyond these primal frameworks, which maintain the integrity of the work, intervenes the performer's personality”.

What is the performer's objective function other than interpreting a work, in other words re-creating it from its passive formalisation, for example a musical score? The performer is the active medium through which the performance of the work enables the latter to be perceived by the public's senses.

We can readily draw two conclusions. Firstly, it is not totally heretical to use the term “creation” in relation to a performer's performance. Secondly, the emphasis is put on the importance of the role of the performer's personality in the creation process, contemporaneously to the primary creation.

Moreover, one may ask whether Nietzsche's reflection on interpretation lato sensu may be useful for our purposes. “Nietzsche has constantly insisted upon two characteristics of the interpretative activity, essential in his eyes: interpretation is always creative; (...) there cannot be only one possible interpretation, which means that the being is, himself, fundamentally equivocal”.

We shall adopt those two ideas. In addition, we need to stress that part of the doctrine seems to recognize that performers contribute to the intellectual creation, without being their authors but while playing an important role, as without them, numerous works (musical, theatrical, cinematographic, choreographic...) would not attain their full gleam. Further, this idea of re-creation is brought forward to explain that, though authors create, performers, through gesture, re-create.²⁷

²⁶ “metaphysics”: “systematic reflection on the fundamentals of a human activity. The metaphysics of law” (our translation), according to the dictionary *Petit Robert*; “the branch of philosophy that deals with first principles, esp. of being and knowing”, according to the Collins Dictionary.

²⁷ S. Pessina Dassonville, *supra* [references omitted] [original text in French].

From the necessity for a work to be incarnated stems a human dimension which survives the sound recording and which continues to impregnate the performance long after its fixation²⁸.

This human centred approach²⁹ is in contrast with utilitarian logic which may have guided the choice to grant or not rights in performers' performance following an economic analysis premised on the relation between the costs of a legal regime and the benefits which society would be able to reap following its inception³⁰.

Without excluding both approaches, it appears that the adoption of such rights in Canada is better explained by superior reasons tied-up to international relations and to the multilateral agreements to which Canada is a party, such as the *Agreement on Trade Related Intellectual Property Rights* ("TRIPS") associated to the *World Trade Organization* ("WTO") and the *North American Free Trade Agreement* ("NAFTA")³¹.

In 1997, Bill C-32 permitted performers to gain access to the protection regime devised in the *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Done at Rome on October 26, 1961* ("Rome Convention")³². Whereas these legislative amendments instituted a legal regime specific to performer's performances in a WTO country³³ and a legal regime specific to nationals of countries member of the Rome

²⁸ This principle has been implicitly recognized via the problem regarding the distinction between the musical work and its performance, which had led the Canadian courts to deny protection of a musical work when it was retransmitted for broadcasting purposes. According to the courts, it wasn't the musical work embodied in the musical score, which was retransmitted, but the performance thereof. Consequently, legislative changes followed such as to not limit the definition of a musical work to a musical score. See Y. Gendreau, "Exporting Copyright Models: The Canadian Retransmission Regime and the Internet" (2003) 16 *I.P.J.* 547 at pp. 551-552. This historical episode seems to accentuate the idea that the musical work exists outside the musical score only through performance.

²⁹ Not entirely naturalist or personalist, this approach seems rather humanist or within ontology. For a justification of copyright bases on human rights, see F. Dessemontet, "Copyright and Human Rights" in *Intellectual Property and Information Law*, J.J.C. Kabel (ed.), The Hague, Kluwer Academic Publishers, 1998 at p.113; C. Geiger, *Droit d'auteur et droit du public à l'information – Approche de droit comparé* (préface de Michel Vivant), collection Le droit des affaires – Propriété intellectuelle (Paris, Litec / IRPI, 2004), 442p.; see also from the same author, "Fundamental Rights, a Safeguard for the Coherence of Intellectual Property Law" (2004) 35 *I.I.C.* 268; "Right to Copy v. Three – Step Test – The Future of the Private Copy Exception in the Digital Environment" (2005) 1 *CRi* 7; see also J. Boncompain, "Droit d'auteur – Droit de l'homme (Droit d'auteur ou préemption?)" (1982) 2.1 *R.C.D.A.* 6.

³⁰ See R. Khouzam, *supra*; Economic Council of Canada, *Report on Intellectual and Industrial Property*, Information Canada, 1971, 252p.; S. Globerman & P.M. Rothman, *Copyright Revision Studies: An Economic Analysis of a Performers' Rights* (Ottawa: Canadian Bureau of Consumer and Corporate Affairs, 1998, 137p.; see also Australian Federal Bureau of Transport and Communications, *Economic Effects of Extended Performers' Rights - Paper prepared for the Department of Communications and the Arts*, Canberra, Department of Communications and the Arts, 1996.

³¹ On the impact of such agreements, see Y. Gendreau, "The Protection of Neighboring Rights of Performers in Canada in the Light of the 1996 WIPO Treaty" in ALAI Budapest; Y. Gendreau, "Nouveau visage pour la loi canadienne sur le droit d'auteur" (1997) 76 *Rev. Bar. Can.* 384; see also I. Bernier & A. Malépart, "Les dispositions de l'Accord de libre-échange nord-américain relatives à la propriété intellectuelle et la clause d'exemption culturelle" (1994) 6-2 *C.P.I.* 139; on NAFTA and copyright, see V. Nabhan "L'Accord de libre-échange nord-américain et sa mise en œuvre en matière de droit d'auteur" (1993) 6-1 *C.P.I.* 9; From the same author, "The free trade agreement and copyright – Canadian Perspective" (1994) 161 *R.I.D.A.* 99.

³² http://www.wipo.int/treaties/en/ip/rome/trtdocs_wo024.html.

³³ S. 26 CA:

Convention³⁴, the reasons of the latter regime was presented during third reading of Bill C-32, the Honourable Sheila Copps addressing the House as follows:

(1) Where a performer's performance takes place on or after January 1, 1996 in a country that is a WTO Member, the performer has, as of the date of the performer's performance, a copyright in the performer's performance, consisting of the sole right to do the following in relation to the performer's performance or any substantial part thereof:

(a) if it is not fixed, to communicate it to the public by telecommunication and to fix it in a sound recording, and

(b) if it has been fixed in a sound recording without the performer's authorization, to reproduce the fixation or any substantial part thereof,

and to authorize any such acts

2) Where a performer's performance takes place on or after January 1, 1996 in a country that becomes a WTO Member after the date of the performer's performance, the performer has the copyright described in subsection (1) as of the date the country becomes a WTO Member.

(3) Where a performer's performance takes place before January 1, 1996 in a country that is a WTO Member, the performer has, as of January 1, 1996, the sole right to do and to authorize the act described in paragraph (1)(b).

(4) Where a performer's performance takes place before January 1, 1996 in a country that becomes a WTO Member on or after January 1, 1996, the performer has the right described in subsection (3) as of the date the country becomes a WTO Member.

(5) The rights conferred by this section subsist for the remainder of the calendar year in which the performer's performance takes place and a period of fifty years following the end of that calendar year.

(6) Subsections 13(4) to (7) apply, with such modifications as the circumstances require, in respect of a performer's rights conferred by this section.

(7) Notwithstanding an assignment of a performer's right conferred by this section, the performer, as well as the assignee, may:

(a) prevent the reproduction of

(i) any fixation of the performer's performance, or

(ii) any substantial part of such a fixation

where the fixation was made without the performer's consent or the assignee's consent; and

(b) prevent the importation of any fixation of the performer's performance, or any reproduction of such a fixation, that the importer knows or ought to have known was made without the performer's consent or the assignee's consent.

³⁴ Ss. 15, 16, 17, 19 and 20 CA. See Y. Gendreau, ALAI Budapest, *supra*. Ss. 15(1) and 19 CA are reproduced herewith:

15. *(1) Subject to subsection (2), a performer has a copyright in the performer's performance, consisting of the sole right to do the following in relation to the performer's performance or any substantial part thereof:*

(a) if it is not fixed,

(i) to communicate it to the public by telecommunication,

(ii) to perform it in public, where it is communicated to the public by telecommunication otherwise than by communication signal, and

Mr. Speaker, our culture defines who we are. It is what makes Canada unique in the world. Bill C-32 is not only about culture, it is about creating jobs and growth for Canadians. It is about strengthening Canada's cultural industries and strengthening the very things that allow us to tell our very unique story.

Nine hundred thousand Canadian jobs depend on the cultural sector and nearly 5 per cent of our gross domestic product comes from culture. Over the last five years the cultural sector has grown faster than the economy as a whole. But this success did not happen by magic. It took incredible talent, risk takers, artists and millions and millions of Canadians who wanted to hear and see and read our story.

What is copyright? Copyright is protecting people's creative work. It means that creators have the right to be paid when their work is used for commercial purposes.

According to Statistics Canada the average Canadian artist is among the lowest paid in the economy, earning only about \$13,000 per year.

[Translation]

Just a few weeks ago, I was pleasantly surprised to meet world-renowned author Antonine Maillet. She told me that she could not live on her royalties alone, that she had to give lectures to make ends meet.

[English]

This bill is about fairness and making sure that Canada's creators are paid for the work they create, for their intellectual property. This bill has struck a balance which safeguards

(iii) to fix it in any material form,

b) if it is fixed,

(i) to reproduce any fixation that was made without the performer's authorization,

(ii) where the performer authorized a fixation, to reproduce any reproduction of that fixation, if the reproduction being reproduced was made for a purpose other than that for which the performer's authorization was given, and

(iii) where a fixation was permitted under Part III or VIII, to reproduce any reproduction of that fixation, if the reproduction being reproduced was made for a purpose other than one permitted under Part III or VIII, and

(c) to rent out a sound recording of it,

and to authorize any such acts.

19. *(1) Where a sound recording has been published, the performer and maker are entitled, subject to section 20, to be paid equitable remuneration for its performance in public or its communication to the public by telecommunication, except for any retransmission.*

2) For the purpose of providing the remuneration mentioned in subsection (1), a person who performs a published sound recording in public or communicates it to the public by telecommunication is liable to pay royalties

(a) in the case of a sound recording of a musical work, to the collective society authorized under Part VII to collect them; or

(b) in the case of a sound recording of a literary work or dramatic work, to either the maker of the sound recording or the performer.

3) The royalties, once paid pursuant to paragraph (2)(a) or (b), shall be divided so that

(a) the performer or performers receive in aggregate fifty per cent; and

(b) the maker or makers receive in aggregate fifty per cent.

the interests of the users so that all Canadians can continue to be exposed to Canada's story.

*We have listened carefully, and this is a copyright act that respects those values. That is how Canadian culture will flourish and that is how jobs will continue to be created in the cultural industries. We need an act that deals with the realities of today, not 1924 when the act was first adopted.*³⁵

As of today, the transposition in the domestic legislation of the WIPO treaties of 1996 requires to take into consideration the objectives of the WPPT, viz. “to develop and maintain the protection of the rights of performers and producers of phonograms in a manner as effective and uniform as possible”³⁶ and to recognize “the need to introduce new international rules in order to provide adequate solutions to the questions raised by economic, social, cultural and technological developments”³⁷.

Bill C-60 arose in a context in which the improvement of the artist's condition remains questionable³⁸ and in which this issue has become all the more pressing as a consequence of the typical effects of the information society³⁹.

³⁵ 35th legis., 2nd sess., March 20, 1997, Hans. 9283, www.parl.gc.ca/english/hansard//148_97-03-20/148GO3E.html.

³⁶ First declaration in the WPPT preamble.

³⁷ Second declaration in the WPPT preamble.

³⁸ Following the meaning of the *Recommendation concerning the status of the artist*, adopted by the General Conference at its twenty-first session, UNESCO, Belgrade, October 27, 1980, <http://unesdoc.unesco.org/images/0011/001114/111428mo.pdf>; see UNESCO, *World Congress on the Implementation of the Recommendation Concerning the Status of the Artist*, Final Declaration, June 16-20, 1997, <http://unesdoc.unesco.org/images/0010/001090/109018e.pdf>; International Labour Organization (“ILO”), *Conditions of Employment and Work of Performers*, Geneva, 1992.

³⁹ See ILO, *The Future of work and quality in the Information Society: The media, culture, graphical sector, Report for the discussion at the Tripartite Meeting on the Future of Work and Quality in the Information Society: The Media, Culture, Graphical sector*, Geneva, 2004. See the 5es *Rencontres Européennes des Artistes* held in Cabourg from Dec. 9 to 11, 2004, initiated by Adami (*Société civile pour l'administration des droits des artistes et musiciens interprètes*), the French collective managing performers' rights. Participants, reflecting on digital networks, agreed on the need to:

- *guarantee a fair remuneration for artists on the Internet;*
- *ensure a large diversity of accessible repertoires;*
- *develop a pedagogical information on the value of protected contents intended for the public;*
- *avoid strategies which may harm the relationship between the artists and their public;*
- *respect artists collectives and unions which defend performers' rights.*

www.adami.fr/portail/affiche_article.php?rubr_id=11&rubr_niv3=247&rubr_niv4=324&arti_id=1419. See also M. T. Sundara Rajan, *supra* at p. 321:

Countries which have signed onto the WPPT with a view to ratifying the Agreement thereby face a formidable challenge. There is an undeniable need to recognize the changing face of culture in the Digital Age, and this undoubtedly includes an exploration of the new significance of performers' rights. The WPPT brings this question into focus. However, it provides for the expansion of performers' copyright while offering limited guidance on the broader social policies which the new rights aim to implement and enforce. It is left to national governments to attempt to justify these rights in the context of their own policy needs at the domestic level, whether or not they are compatible with either the legal framework or cultural context of the country in question.

Although all agreed on the difficulty of the task, a certain number of studies have attempted to circumscribe the socio-professional status of performers⁴⁰. Among the different conclusions of said studies, it is worth noting that in Canada, artists have levels of income in reverse proportion to their level of education, whereas 41% of artists hold a university degree or certificate⁴¹. One also notes that the majority of musicians and singers are independent workers and that their average income is less than 75% of the average income of the overall labour force⁴². In the music sector, the number of musicians and singers has sustained an increase of 18% from 1991 to 2001, this rate corresponding to three times the growth rate of the overall labour force. From 1971 to 2001, the number of artists in Canada has increased in a proportion of 85% in comparison with a 38% growth of the overall labour force. Despite the fact that it remains difficult to evaluate precisely the contribution of artists to the Canadian economy, one notices that the areas, which may involve a musical creative activity, have generated about 11% of the contribution of copyright industries to the gross domestic product (“GDP”), a share which amounts to 4,405 million dollars⁴³. Finally, the number of musicians and singers would amount to 30,000⁴⁴. These figures, however, do not take into account amateurs⁴⁵. The comparison with other studies sheds some light on the degree of precision of each other⁴⁶. For example, a French study has identified relatively precise sub-categories, drawing elementary participation profiles of the labour force and further refining the levels of average earning and employment rate, the number of employers and the types of activities. One can paint a picture of the situation

⁴⁰ Hill Strategies, *A Statistical Profile of Artists in Canada*, report funded by the Canada Council for the Arts, the Department of Canadian Heritage and the Ontario Arts Council (2004), www.canadacouncil.ca/NR/rdonlyres/DFEB430-78C0-4E37-A258-9431562AE5DA/0/artists_in_canada.pdf; CCC-DAMIC Research project, *On the living conditions of the Canadian Artists*, 2005, 48 pages, Canadian Report by J. Lorinc, “Creators and copyright in Canada”; Québec Report by M. Beaulieu, 2005, 73 pages; Study by the Ministre de la culture du Québec, *Pour mieux vivre de l’art – Portrait socioéconomique des artistes* (2001) et *Plan d’action pour l’amélioration des conditions socioéconomiques des artistes* (2004); *Rapport final du Groupe de travail sur la chanson québécoise*; M. Ménard, *Le marché du disque classique – État de la situation* (2003); R. Towse, *Creativity, Incentive and Reward*, Edward Elgar, Cheltenham, R-U, Northampton, MA, É-U, 2001; M. Kretschmer, “Artists’ earnings and copyright: A review of British and German music industry data in the context of digital technologies” (January 2005) 10-1 *First Monday*, http://firstmonday.org/issues/issue10_1/kretschmer/index.html; *Counting the notes - The National Music Council report on the economic contribution of the music business*, 2002, www.musiced.org.uk/features/counting_the_notes.pdf.

⁴¹ Hill Strategies, *supra*.

⁴² The average earning of independent workers is \$15,035.00 and 17,433.00\$ for employed workers, *ibid*.

⁴³ The method followed herein identifies very succinctly sub-sectors involving performers as per the report on *The Economic Contribution of Copyright Industries to the Canadian Economy*, by Wall Communications Inc. for CH, www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/economic_contribution/index_e.cfm?nav=0. The identified sub-sector is “Theatrical and Music” (category n°71 of Statistic Canada SCIAN code).

⁴⁴ Hill Strategies, *supra*. This figure seems incomplete as it excludes other categories (F032: Conductors, Composers and Arrangers, F132: Other Performers, F034: Dancers, F035: Actors) who are performers under the CA. Furthermore, this figure seems to exclude music teachers in the elementary, secondary and post-secondary. It would also exclude category F125, comprising sound engineers and amateurs. A summary of the conclusions of the study is available at: http://www.canadacouncil.ca/publications_e/research/artists_artistes_canada.htm.

⁴⁵ For an analysis of the music amateur sector, see “La musique en amateur”, (June 1995) 107 *Développement culturel*, Ministère de la Culture, France. This sector includes the semi-professionals and the “aspiring” professionals. It also indicates that 30% of amateurs belong to a choir, 8% to a brass and reed band, and 8% belong to a musical group or orchestra.

⁴⁶ See *Counting the notes - The National Music Council report on the economic contribution of the music business*, 2002, www.musiced.org.uk/features/counting_the_notes.pdf.

that offers more tones and shades, and reveals a series of gradations within a spectrum which two extremes are precarious and stable employment conditions⁴⁷. In return, the binary stereotype of, on the one hand, the precarious and, on the other, the “stars” appears as a mere streamlining attempt, which may need further analysis throughout the potential process of devising adequate solutions⁴⁸.

Further, 44% of musicians and singers, and 61% of conductors, composers and arrangers are paid workers⁴⁹, although no information is provided regarding the type, the nature, the location and the conditions of employment. Neither is it indicated to what extent some categories of performers perform in choirs, choruses, ensembles, groups, or orchestras. In other words, the collective dimension of certain units of performers remains ill-defined⁵⁰.

A study in Québec was undertaken on the basis of additional sources of information, notably information provided by professional artists associations and by tax forms⁵¹. The study endeavoured to draw a “true socio-economic portrait of artists in order to determine, among other items, their employment status, the composition of their total revenue, their average income, and the discrepancies of earnings among the professions”⁵². It will be borne in mind that a majority of revenues is salaries (50,5%) and self-employment earnings (21,4%) although these data do not discriminate between revenues derived from artistic performances and from other complementary sources of revenue. Further, the self-employed artist has an average revenue inferior to that of the other independent workers, whereas the paid artists have an average revenue superior to that of all Québec taxpayers. Finally, a majority of artists will draw one tenth of the total volume of revenues of this profession whereas a minority shares six tenth of this total volume of revenue. The Government of Québec, noting that “many artists and creators live in a precarious way or have two jobs in order to live decently”, has put into place an Action Plan which is currently being pursued⁵³. All in all, the study indicates that it cannot be

⁴⁷ Ministère de la Culture, France, “Les musiciens interprètes” (June 2003) 140 *Développement culturel*. It appears that:

[w]hereas the economy of the music domain is nowadays mainly a music recording economy, the record industry paradoxically provides less and less jobs to musicians and live shows represents 75% of its activity. Strongly structured by the opposition between pop music and academic music, the profession is dominated by flexible employment, which translates in many different situations, ranging from the most “precarious” to the most “stable” ones. The intermediary array of situations shows in practice a search for stability, which is expressed through recurrent work relationships established with a limited number of work providers.

See also Ministère de la Culture, France, “Éléments pour la connaissance de l’emploi dans le spectacle” (sept. 2004) 145 *Développement culturel*, where the usefulness of an ongoing refined processing of data is underpinned since it allows for “a significant development of knowledge in show business employment and to forge the tools to improve it”.

⁴⁸ See R. Towse, *Assessing the Economic Impacts of Copyright Reform on Performers and Producers of Sound Recordings in Canada*, Report commissioned by Industry Canada, http://strategis.ic.gc.ca/epic/internet/inippd-dppi.nsf/en/h_ip01072e.html.

⁴⁹ Hill Strategies, *supra*.

⁵⁰ See the categories of performers identified in the collective agreement cited in the Schedule.

⁵¹ Study of the Ministère de la culture du Québec, *Pour mieux vivre de l’art – Portrait socioéconomique des artistes* (2001).

⁵² *Ibid.* at p. 3.

⁵³ *Plan d’action pour l’amélioration des conditions socioéconomiques des artistes* (2004); Note the creation of a Permanent Committee and Secretariat: see *Pour mieux vivre de l’art*, Bulletin d’information, volume 1, numéro 1, December 2004.

ascertained that the status of the artist has improved while this socio-economic category remains incompletely understood.

Although artists do not all belong to professional associations⁵⁴, the labour tribunals' decisions are useful to advance the understanding of artists as a category of workers and gather additional relevant information on their work conditions⁵⁵. It should be noted that these decisions do not apply to paid workers⁵⁶. They may however contribute to the understanding of the notion of performer⁵⁷.

In addition, in the absence of a definition of performer in the CA⁵⁸, it should be asked whether the definitions included in the federal and Québec laws on the status of the artist may trigger some questions, if not difficulties⁵⁹: are these definitions adapted to the context of the CA's reform process⁶⁰? Is the fact that the laws on the status of the artist apply exclusively to

⁵⁴ Reference will be made to the Musician Guild of Québec, www.guilededesmusiciens.com; the American Federation of Musicians of the United States and Canada (AFM), Union des artistes (UDA), www.uniondesartistes.com; the Alliance of Canadian Cinema, Television and Radio Artists Performers (ACTRA), www.actra.ca; Orchestras Canada, www.oc.ca; the Canadian Operas Association, www.opera.ca; the Association of Canadian Choral Conductors, www.choralcanada.org.

⁵⁵ For instance, see CAPPRT, Decision n°20, Jan. 16, 1997, www.capprt-tcrpap.gc.ca/epic/internet/incapprt-tcrpap.nsf/print-en/tn00072e.html, especially regarding the Conductor who is considered as a self-employed worker.

⁵⁶ See ss. 5 and 9 SACA; see ss. 1 and 2 SAQA.

⁵⁷ For instance, see CAPPRT, Decision n°20, Jan. 16, 1997, *supra*, indicating that arrangers (at para. 26: "An arranger is a person whose job is to transform an existing musical work so that it can be performed in another form. An arranger's duties include reharmonizing, paraphrasing and/or developing a musical work in order to give full expression to its melody, harmony and rhythm by presenting it as a full score and also includes the timing of recordings and the monitoring of tonality") and orchestrators (at para. 28: "someone who writes a musical score and does the instrumentation, i.e., chooses the instruments and indicates the music to be played on each") are authors of musical works and that copyists (at para. 30: "Copyists are musicians who transcribe individual scores from a master score") and music librarians (at para. 32: "musicians whose function is to manage musical scores. This function can be compared with that of the librarian who deals with books") are neither authors nor performers.

⁵⁸ See J.S. McKeown, *Fox Canadian Law of Copyright and Industrial Designs*, Scarborough, ON, 3d ed., 2000 at p. 254, indicating that "it would seem that this word should take its meaning from the context in which it is used in the statutory definition of 'performer's performance'. Presumably, the performer is the individual who gave the performance". There appears to be a hint of definition in the French version of the CA: "artiste-interprète": "tout artiste-interprète ou exécutant" (s. 2).

⁵⁹ From a legal standpoint, it has been held a principle that the definitions pertaining to a statute are impervious to those of another. See N. A. Dionne, "Définition de l'artiste et critère de qualification", in *Actes de la journée d'étude sur le statut de l'artiste*, ALAI Canada, Nov. 16, 1991. Re. certain conflicts between the CA and SACA, see E. Lefebvre, "Du droit d'auteur au statut de l'artiste : étude comparative des législations applicables dans un contexte de droit civil et examen comparatif des pouvoirs de leur forum décisionnel" in *Institutions administratives du droit d'auteur*, Y. Gendreau (ed.), Cowansville, Yvon Blais, 2002, p.161 at p. 184.

⁶⁰ See ss. 1 and 2 SAQA:

1. *This Act applies to artists and to producers who retain their professional services in the following fields of artistic endeavour: 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.*

2. *In this Act, unless the context indicates a different meaning,*

professional artists compatible with a copyright logic⁶¹? Would separating amateurs on the one hand, and professionals on the other, serve the original protection objectives? Doesn't it tend to confine the semi-professional, the "aspiring" professional, or the new generation of artists ("junior artists") in a system where they are confronted with those very constraints that the protection regime aims to eliminate⁶²? French law provisions, which exclude from protection some categories of performers, should be flagged⁶³.

Definitions also have a practical effect since they touch upon the division of the negotiating sectors between professional associations and copyright collective societies. As a result, some agreements confirm that the negotiating sectors of the professional associations may not encroach upon those of the collectives dealing with Part I CA⁶⁴, and which, according to the

"artist" means any natural person who practises an art on his own account and who offers his services for remuneration, as a creator or performer in any field of artistic endeavour referred to in section 1;

see ss. 6.(2)(b) and 18(b) SACA:

6.(2) This Part applies:

...

b) to independent contractors determined to be professionals according to the criteria set out in paragraph 18(b), and who:

(i) are authors of artistic, dramatic, literary or musical works within the meaning of the Copyright Act, or directors responsible for the overall direction of audiovisual works,

(ii) perform, sing, recite, direct or act, in any manner, in a musical, literary or dramatic work, or in a circus, variety, mime or puppet show, or,

(iii) contribute to the creation of any production in the performing arts, music, dance and variety entertainment, film, radio and television, video, sound-recording, dubbing or the recording of commercials, arts and crafts, or visual arts, and fall within a professional category prescribed by regulation.

18. The Tribunal shall take into account:

a) in deciding any question under this Part, the applicable principles of labour law; and

b) in determining whether an independent contractor is a professional for the purposes of paragraph 6(2)(b), whether the independent contractor

(i) is paid for the display or presentation of that independent contractor's work before an audience, and is recognized to be an artist by other artists,

(ii) is in the process of becoming an artist according to the practice of the artistic community, or

(iii) is a member of an artists' association.

⁶¹ *Ibid.*

⁶² See L. C. Landreville, "La mise en vigueur de la "Loi 90" et son impact sur le nouveau talent" in *Actes de la journée d'étude sur le statut de l'artiste*, ALAI Canada, November 16, 1991. S. 27 SAQA expressly addresses this issue: "In negotiating a group agreement, the parties shall take into consideration the objective of facilitating the inclusion of junior artists and the economic conditions prevailing in small production enterprises".

⁶³ For example, in France, the *Code de la propriété intellectuelle* grants performers rights "except to the complement artist ("artiste de complément)", considered as such according to professional usages", s. L. 212-1 *Code de la propriété intellectuelle*.

⁶⁴ See Agreements between *La Guilde des musiciens du Québec* and:

a) *American Federation of Musicians of the United States and Canada* (AFM)

b) *La Société professionnelle des auteurs and des compositeurs du Québec* (SPACQ)

CAPPRT, “have the effect of harmonizing the operation of the *Status of the Artist Act* and the operation of the *Copyright Act*”⁶⁵.

The question is whether collectives and professional associations can complement each other for the purpose of defending artists’ interests. Elements of the answer may be found while scrutinizing the policy rationales underlying the laws on the status of the artist⁶⁶ or the role⁶⁷ and the effects of collective management⁶⁸. All of these elements seem to share a common goal: to introduce some fairness and balance within the economic relations between creators and producers⁶⁹ and a principle of fairness in the legal treatment of the endeavours of performers whose social status is inferior to that of other categories of Canadian workers. For instance, the CAPPRT, relying on the *Human Rights Universal Declaration* (Paris, France, December 10, 1948), on the *UNESCO Recommendation concerning the status of the artist* (Belgrade, October 27, 1980) and on sections 2, 3 and 7 SACA, held that:

[53] *From these various documents, the Tribunal concludes that the Government of Canada subscribes to two key principles: that artists have the right to be compensated for the use of their works and that artists’ associations have the right to represent the interests of artists in obtaining such compensation.*⁷⁰

Copyright has been at the core of performers’ claims, who considered it fair not only to benefit from the commercial use of their performances but also to own exclusive rights in these performances⁷¹. As pointed out by performers, the advent of digital network technologies has contributed to amplify such claims⁷². The rationale of Bill C-60⁷³ would hence provide some

c) *La Société du droit de reproduction des auteurs, compositeurs and éditeurs inc.* (SODRAC)

d) *La Société des auteurs and compositeurs dramatiques* (SACD)

e) *Society of Composers, Authors and Music Publishers of Canada* (SOCAN)

attached to CAPPRT’s decision n°020, Jan. 16, 1997, www.capprt-tcrpap.gc.ca/epic/internet/incapprt-tcrpap.nsf/en/tn00072e.html.

⁶⁵ *Ibid* at para. 39.

⁶⁶ See G. Roussel, “Historique et objectifs des législations québécoises sur le statut de l’artiste”; H. Lussier & J.R. Ouellet, “Le projet de loi fédéral sur le statut de l’artiste” in *Actes de la journée d’étude sur le statut de l’artiste*, ALAI Canada, Nov. 16, 1991.

⁶⁷ Emphasis should be put on the fact that the role of collectives in Canada cannot be separated from that of the Copyright Board (www.cb-cda.gc.ca). The Copyright Board’s role tends to be that of the guardian of equity, especially when it is called to determine what is “equitable remuneration” as per ss. 19 and 80 CA. See S. Martin: “[I]l se soucie de concilier ou de réconcilier les intérêts de l’auteur à ceux des exploitants et du public a marqué d’une manière importante la jurisprudence de la Commission” (“the concern of conciliating or reconciling the interests of the author with those of the users’ has shaped in an important way the Board’s jurisprudence”) [our translation]. S. Martin, “Rémunération équitable : l’équité pour qui? Réflexion sur la philosophie du droit d’auteur au Canada” in *Institutions administratives du droit d’auteur*, Y. Gendreau (ed.), Cowansville, Yvon Blais, 2002 at p. 433.

⁶⁸ See Copyright Board, *Public Performance of Music 1994-1997*, Jan. 30, 1998, and the reasons of Michel Héту, then Vice-Chairman, indicating that collective management “is the only way composers can avoid dealing with powerful users from a position of weakness”, at p. 48.

⁶⁹ Construed *latu sensu* as “entrepreneur”.

⁷⁰ CAPPRT Decision N°28, Ottawa Nov. 17, 1998, www.capprt-tcrpap.gc.ca/epic/internet/incapprt-tcrpap.nsf/en/tn00080e.html, application for judicial review dismissed by the Federal Court of Appeal, *Canada (Attorney General) v. Writers’ Union of Canada*, 2000 CanLII 16507 (F.C.A.).

⁷¹ See UNESCO, *Recommendation concerning the status of the artist* (Belgrade, October 27, 1980), <http://unesdoc.unesco.org/images/0011/001114/111428mo.pdf>.

⁷² See *The Status of the Music Performer in 1997*, A Report by the International Federation of Musicians, UNESCO doc. CLT/CONF/206/INF.2, Paris, June 10, 1997, and the following excerpt: “Everyone clearly

assistance in dealing with the issue of performers' socio-economic status and the development of cultural policies in relation thereto⁷⁴. As per the postulate that any legislative change essentially serves the purpose of disrupting the *status quo*⁷⁵, it may prove timely to envisage to what extent the adoption of new rights in favour of performers will contribute to reshaping the main types of current business relations in place⁷⁶.

In this respect, it may be observed that the artistic property market has developed around the relationship between a performer and a promoter⁷⁷, on an individual or a collective basis. Each relationship, though obeying to its own logic, achieves a distribution of wealth. In theory, a legislative allocation of new rights will increase the distributed wealth, for to each new right is associated an additional potential market value⁷⁸. The concrete situations, beyond theory, must

admits that performers, like authors, should have the opportunity the multiple means of exploitation of their work ["travail" in the French version, in the sense of labour] [...] and to benefit from the considerable income generated by such uses", <http://unesdoc.unesco.org/images/0011/001114/111475eo.pdf>. See also ADAMI, *Actes des Rencontres européennes des artistes*, Cabourg, France, Nov. 27-29, 2003, www.adami.fr.

⁷³ See particularly ss. 8, 9, 11, 16 and 17 of Bill C-60. See also *Interim Report on Copyright Reform*, Report of the Standing Committee on Canadian Heritage, May 2004, www.parl.gc.ca/InfocomDoc/Documents/37/3/parlbus/commbus/house/reports/herirp01/03-cov2-e.htm; see the response of the Government of Canada and the *Government Statement on Proposals for Copyright Reform*, http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/reform/statement_e.cfm announcing its intention to table a Bill to implement the following WPPT provisions: a right to make available, a distribution right, a reproduction right, moral rights, protection of technical protection measures and of rights management information.

⁷⁴ See for example, the Hon. Michel Dupuy (Minister of Canadian Heritage) who moved that Bill C-53, an act to establish the Department of Canadian Heritage and to amend and repeal certain other acts, be read the second time and referred to a committee, and said:

The department also has to spearhead legislation aimed at fostering the full development of creative activity in Canada. The aim of copyright legislation, for example, is to enable our authors, producers and performers to earn a decent living from their crafts and be fairly compensated for their work.

Let us get one thing clear. After a very long period under the former government during which culture suffered from marginalization and was considered merely as a distraction, not to mention a luxury, we must bring back culture to the forefront of society's concerns, for it is essential to our identity, to our pride, to our unity and to our independence in international society. [35th legis, 1st session, Oct. 3, 1994, Hans. 6418, www.parl.gc.ca/english/hansard/previous/102_94-10-03/102GO1E.html]

⁷⁵ See R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, Markham, ON, 4th ed., 2002 at p. 577 : "[...] the usual purpose of legislation is to change the law, and change is often meant to interfere with ongoing arrangements or to disturb existing distributions of burdens and advantages. From this point of view, interference with vested rights looks like the norm and non-interference the exception". See Justice Dickson's reasons in *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271: "It is perfectly obvious that most statutes in some way or other interfere with or encroach upon antecedent rights".

⁷⁶ For a presentation of these rights, see particularly ss. 8, 9, 11, 16 et 17 Bill C-60, Government of Canada, *Government Statement on Proposals for Copyright Reform*, dated March 24, 2005, *op. cit.* and S. 92 Report, *op. cit.*

⁷⁷ The choice of term is deliberate since there are cases where the performer is self-produced. The promoter can be a producer, a distributor, a tour organizer or an Internet service provider.

⁷⁸ It seems that Bill C-32 already came within the scope of this equation, as more fully appears from the following declaration of the Hon. Sheila Copps:

be scrutinized and one must ask whether the reform truly adds wealth or is merely illusory as a result of the current contractual relationships, which are usually averse to wealth redistribution. This approach requires reviewing the main types of contracts in the industry and examine to what extent new legislative provisions are likely to affect the contractual relationships. At the end of the day, the objective is to evaluate how the statute propitiates two contrary objectives: changing the *status quo*, and preserving legitimate reliance on stable contractual relationships⁷⁹.

For this purpose, it is necessary to identify the intrinsic and extrinsic elements of the *Copyright Act*, which may restrain or prevent the complete fulfilment of the reform's objectives. This study will purport to assess the legislative reform's effect on individual contractual relations (First Part), on collective relations (Second Part) and the options which may also be contemplated with respect to the reform's objectives (Third Part). A process of questioning rather than solution finding will be undertaken, with the hope that such an approach will help identify possible discrepancies between the established order and a new one.

Senator Johnson told the Senate something on October 21 of last year which, I think, differentiates us from the position taken by our neighbours to the south. She said:

In Canada, it is important to recognize that culture is not just a business... As legislators, we must ensure that government policy reflects the special role of culture in our society.

It is our responsibility to help our artists show Canada and the world what they can create. Copyright protection -- in effect, property rights for creators -- is a crucial part of that responsibility. Copyright means protecting people's creative work. It means that creators have the right to be paid when their work is used for commercial purposes.

According to Statistics Canada, the average Canadian musician is among the lowest paid in the economy, earning approximately \$13,000 per year. Bill C-32 will improve this situation. We can make sure that Canada's creators are paid for the work that they create, that their intellectual property is respected, and that their contribution to Canadian society is underscored by legislation.

Proceedings of the Standing Senate Committee on Transport and Communications, Issue 13 - Evidence, Ottawa, April 14, 1997, www.parl.gc.ca/35/2/parlbus/commbus/senate/com-e/tran-e/13ev-e.htm?Language=E&Parl=35&Ses=2&comm_id=19.

⁷⁹ See R. Sullivan, *supra* at pp. 544-545:

The most compelling concern underlying transitional law is the rule of law and the values served by the rule of law – certainty, predictability, stability, rationality and formal equality. [...] Historically, common law courts have been preoccupied with ensuring a stable legal framework for the free exchange and enjoyment of private rights, particularly real property rights and rights arising under contracts. These are taken to be the basis of free enterprise and the market economy and legislative interference with such rights has been strongly resisted by the courts. More recently, the preoccupation with private rights has been tempered by acceptance of the legislature's mandate to pursue initiatives in the public interest. In some circumstances it is not necessary but also fair to curtail private rights in order to achieve a public good.

2. LEGISLATIVE REFORM EFFECTS ON INDIVIDUAL RELATIONS

In addition to articles 13, 16 and 17, the CA expressly acknowledges this type of contracts through the definition of “maker”, *viz.*, in relation to a sound recording, the person by whom the arrangements necessary for the first fixation of the sounds are undertaken, such as contracting out performers⁸⁰. The Copyright Board has indicated that, with respect to section 2.11 CA, “[t]he mention of contractual and financial arrangements is clearly meant to refer to those who take on the financial risk of producing records, not to the person who shapes the sound of the record and provides artistic advice to the performers”⁸¹.

These elements pertaining to the risks involved with such a venture reveal the rationale of such contracts which, in practice, are titled “phonographic recording contract”, “artist contract” or “recording contract” and which all imply the recording of a musical performance which will be commercially distributed⁸². These agreements may be analysed in terms of contract for services⁸³.

A legislative change may occur following the conclusion of any such contracts. In theory two types of situation may arise: that where the contract for services does not imply the assignment of rights (2.1) and that where it actually entails an assignment of rights in the performance (2.2). In the meantime, it will have been noticed that the characterization of a contract of services⁸⁴ will not have any legal impact since, contrary to the case of an employed author, the contract of services involving a performer will not affect the ownership of the rights in his performance⁸⁵. Contracts of services will hence only call for brief comments (2.3).

⁸⁰ S. 2 CA : ““*Maker*” in relation to a sound recording, the person by whom the arrangements necessary for the first fixation of the sounds are undertaken”; s. 2.11 CA: “For greater certainty, the arrangements referred to in paragraph (b) of the definition “maker” in section 2, as that term is used in section 19 and in the definition “eligible maker” in section 79, include arrangements for entering into contracts with performers, financial arrangements and technical arrangements required for the first fixation of the sounds for a sound recording”. It has been stressed that although s. 2.11 provides that it applies to situations in relation with sections 19 and 79 CA, it is also relied upon to determine, in practice, who the maker is, in such cases not addressed by the CA (“[...] ces précisions sont aussi, dans les faits applicables à la détermination du producteur d’un enregistrement sonore pour toute autre fin prévue dans la Loi [...]”), S. Gilker, “ La commande d’œuvres musicales et d’enregistrements sonores musicaux dans le secteur du cinéma et de la télévision au Québec ” (2004) 208 *Développements récents en droit du divertissement* 183 at p. 255.

⁸¹ Copyright Board, *File: Private Copying 1999-2000*, Dec. 17, 1999 at p. 28.

⁸² See the different clauses in the exclusivity contract referred to in the Schedule.

⁸³ Under civil law, see art. 2098 C.c.Q.: “A contract of enterprise or for services is a contract by which a person, the contractor or the provider of services, as the case may be, undertakes to carry out physical or intellectual work for another person, the client or to provide a service, for a price which the client binds himself to pay”.

⁸⁴ Under civil law, a contract of services is characterized as a contract of employment. See art. 2085 C.c.Q.: “A contract of employment is a contract by which a person, the employee, undertakes for a limited period to do work for remuneration, according to the instructions and under the direction or control of another person, the employer”.

⁸⁵ Regarding the case of the employed author, article 13(3) CA sets out a presumption of ownership of copyright in favour of the employer as well as distinguishing employment contracts: “The *Copyright Act* distinguishes a “contract of service”, which denotes an employment relationship in the tradition [sic] sense, from a “contract for services”, which refers to a [sic] independent contractor who has arranged to produce a work under a specific contract as opposed to a general employment contract”, in S. Handa,

2.1. Contracts for Services without Assignment of Rights in a Performance

In common situations, the producer will have incurred liabilities and undertaken different uses which are no longer lawful, though they were undisputedly lawful at the time when they occurred. The Canadian legislator has typically resorted to a particular regime for the purpose of channelling the effects of a legislative change. This regime is essentially twofold: a first provision aims at safeguarding the legitimate rights and interests arising under the old law; a second provision provides for the reinstatement of the full ability to exercise the new rights against the beneficiary of the safeguard in consideration of such compensation agreed by the parties or, failing agreement, as determined by arbitration. Following an attempt to draw a historical synopsis of this particular regime, a number of considerations will be made with respect to the scope of a similar regime serving the purpose of assisting the introduction of new rights in favour of performers. Notably, it will be examined whether this regime permits a contracting party to depart from the terms and conditions established by the contract for services. Hence, the scope of said regime may determine how relevant specific solutions may be needed for the purpose of fully implementing the reform's objectives.

2.1.1. Historical Synopsis

Prior to the coming into force of the *Copyright Act, 1921*⁸⁶, the act of making contrivances by means of which the sound could be mechanically reproduced and performed, such as perforated rolls, pianola, music boxes or other phonograms, based on literary, dramatic or musical works, was not, in Canada, an act subject to copyright⁸⁷. The same situation prevailed in the United Kingdom ("UK") before the coming into force of the *Copyright Act, 1911*⁸⁸. Following the coming into force of these Acts, the author of a literary, dramatic or musical work was granted the right to authorize the mechanical reproduction of that work⁸⁹. Because the

Copyright Law in Canada, Markham, ON, Butterworths, 2002 at p. 254; See Fox, *The Law of Master and Servant in Relation to Industrial and Intellectual Property*, University of Toronto Press, 1950 at pp. 77ff.

With respect to performers, it is worthwhile noting that article 24 CA provides that the first owner of the copyright in a performer's performance is the performer. Hence the employer of a performer is not granted any presumption of ownership (to the same effect, see s. 26 CA).

⁸⁶ S.C. 1921, Chap. 24, 11-12 Geo. V, c.i.f. on Jan. 1st, 1924.

⁸⁷ Fox, *Canadian Law of Copyright and Industrial Designs*, 2nd ed., 1967 at p. 186: "In connection with works published before the coming into force of the Act of 1921 it is to be remembered that prior to the commencement of that Act, the making of records, perforated rolls and other mechanical contrivances was not an infringement of copyright".

⁸⁸ F.E. Skone James, *Copinger on the Law of Copyright*, Toronto, The Carswell Company Ltd, 7th ed., 1936 at pp. 18 and 210, quoting *Boosey v. Whight*, [1900] 1 Ch. 122; and *Mabe v. Connor*, [1909] 1 K.B. 515.

⁸⁹ Sect. 3.1(d) *Copyright Act, 1921*:

For the purpose of this Act, "copyright" means the sole right to produce, or reproduce the work or any substantial part thereof in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public; if the work is unpublished, to publish the work or any part thereof; and includes the sole right (d) in the case of a literary, dramatic, or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered;

See also sect. 19:

It shall not be deemed to be an infringement of copyright in any musical, literary or dramatic work for any person to make within Canada records, perforated rolls or other

Copyright Act, 1911 did not apply to Canada⁹⁰, it should be understood that until 1924, the year of coming into force of the *Copyright Act, 1921*, Canadian authors of musical works and their beneficiaries did not have any mechanical reproduction rights⁹¹.

The absence of such rights is best explained by the state of technology at the end of the 19th century, a time when perforated rolls and music boxes were not considered a valuable interest by owners of copyright in musical works. Hence, the Diplomatic Conferences of 1884 and 1885, preparing the *Berne Convention for the Protection of Literary and Artistic Works* (“Berne Convention”), as well as the Convention’s Act in its original version of 1886, adopted a provision expressly declaring that:

*It is understood that the manufacture and sale of instruments for the mechanical reproduction of musical airs in which copyright subsists shall not be considered as constituting an infringement of musical copyright.*⁹²

Nonetheless, rapidly, the evolution of technology – the invention of the gramophone – and the absence of restrictions by means of copyright had nurtured the emergence, in the wake of the Berne Convention, of a flourishing recording industry⁹³. In 1908, at the Berne Convention’s Berlin conference, the members of the Union agreed on a compromise that conciliated the interests of both the recording industry and the authors’ new interests, by granting the latter mechanical reproduction rights to the extent that a member State chose to avail itself of the right to enact reserves and conditions in relation to such rights⁹⁴. The UK made such a choice,

contrivances [...], if such person proves (a) that such contrivances have previously been made by, or with the consent or acquiescence of, the owner of the copyright in the work.

See sect. 1.(2)(d) *Copyright Act, 1911*, to the same effect as sect. 3.1(d) *Copyright Act, 1921*.

⁹⁰ Sect. 25(1): “This Act, except such of the provisions thereof as are expressly restricted to the United Kingdom, shall extend throughout His Majesty’s dominions: Provided that it shall not extend to a self-governing dominion unless declared by the Legislature of that dominion to be in force therein [...]”; see Fox, *supra* at p. 34, citing *Durand & Cie v. La Patrie Publishing Co. Ltd.* (1960), 20 Fox Pat. C.85 at 91; see S. Handa, *op. cit.* at pp. 53ff.

⁹¹ Until 1924, copyright issues were governed in Canada by Canadian statutes (*An Act respecting Copyrights*, S.C. 1868, c. 54, such as modified by the *Copyright Act, 1875*, S.C. 1876, c. 88, *Revised Statutes, 1886*, c. 62 and *Revised Statutes, 1906*, c. 70) and Imperial provisions prior to 1911. See F.E. Skone James, *op. cit.* at pp. 307 and fol.; S. Handa, *op. cit.* at pp. 53-54.

⁹² See paragraph 2 of the Closing Protocol of the 1884 and 1885 conference as well as paragraph 3 of the Closing Protocol of the 1886 Berne Convention.

See S. Ricketson, *The Berne Convention for the protection of literary and artistic works: 1886-1986*, London, Centre for Commercial Law Studies – Kluwer, 1987 at pp. 69, 77, 94 and 375.

⁹³ See F.E. Skone James, *supra* at pp. 18 and 210.

⁹⁴ S. 13 of the Berlin Act set out the principle:

(1) The authors of musical works shall have the exclusive right of authorising (1) the adaptation of those works to instruments which can reproduce them mechanically; (2) the public performance of the said works by means of these instruments.

(2) Reservations and conditions relating to the application of this Article may be determined by the domestic legislation of each country in so far as it is concerned; but the effect of any such reservations and conditions will be strictly limited to the country which has put them into force.

(3) The provisions of paragraph 1 shall not be retroactive, and consequently shall not be applicable in any country of the Union to works which have been lawfully adapted in that country to mechanically instruments before the coming into force of the Convention signed at Berlin on the 13th of November, 1908, and in the case of a country which has

consistently with its diplomatic activism in favour of the inclusion of such powers, when it adopted section 19 of the *Copyright Act, 1911* which provided, in substance, that the author who had once authorized the use of a musical work by means of mechanical reproduction contrivances, had the obligation to grant any person who pays the prescribed royalties, a mechanical reproduction licence in relation to that work⁹⁵.

In Canada, the *Copyright Act, 1921*, although serving the purpose of repealing all previous Canadian or British sources of copyright, statutory or at common law, followed the path led by the UK and adopted the same scheme⁹⁶.

acceded to the Union since that date or accedes in the future, before the date of its accession.

(4) Adaptations made in virtue of paragraphs 2 and 3 of the present article, and imported without the authority of the interested parties into a country where they would not be lawful, shall be liable to seizure in that country

The reference to “adaptation” is explained by the fact that the Berne Convention did not include a general reproduction right at the time and that the meaning of this term was not settled at the time. See S. Ricketson, *ibid.* at pp. 377-378 and 513 and fol. See also S. Plante, “The Compulsory Mechanical Reproduction Licence in Canada” (1987) 3 *I.P.J.* 161 at p. 163.

⁹⁵ F.E. Skone James, *supra* at p. 212.

⁹⁶ S. 19, (previously sect. 18, such as modified in the law’s revised version of 1927, R.S. 1927, Chap. 32):

1) It shall not be deemed to be an infringement copyright in any musical, literary or dramatic work for any person to make within Canada records, perforated rolls, or other contrivances, by means of which sounds may be reproduced and by means of which the work may be mechanically performed, if such person proves, -

(a) that such contrivances have previously been made by, or with the consent or acquiescence of, the owner of the copyright in the work; and,

(b) that he has given the prescribed notice of his intention to make the contrivances, and that there has been paid in the prescribed manner to, or for the benefit of, the owner of the copyright in the work royalties in respect of all such contrivances sold by him, as hereinafter mentioned:

Provided that, -

(i) nothing in this provision shall authorize any alterations in, or omissions from, the work reproduced, unless contrivances reproducing the work subject to similar alterations and omissions have been previously made by, or with the consent or acquiescence of, the owner of the copyright, or unless such alterations or omissions are reasonably necessary for the adaptation of the work to the contrivances in question; and,

(ii) for the purposes of this provision, a musical, literary or dramatic work shall not be deemed to include a contrivance by means of which sounds may be mechanically reproduced; and,

(iii) the making of the necessary manuscript arrangement and instrumentations of the copyrighted work, for the sole purpose of the adaptation of the work to the contrivances in question, shall not be deemed an infringement of copyright.

(2) The royalty as aforesaid shall be two cents for each playing surface of each such record and two cents for each such perforated roll or other contrivance.

(3) If any such contrivance is made reproducing on the same playing surface two or more different works in which copyright subsists, and the owners of the copyright therein are different persons, the sums payable by way of royalties under this section shall be apportioned amongst the several owners of the copyright equally.

Given that the effect of the *Copyright Act, 1921* was to grant all holders of existing rights by way of copyright, before their repeal, substituted new rights⁹⁷, section 42(3) of the *Copyright Act, 1921*⁹⁸ addressed the problem of acts and uses which, but for the new statute, would have been irrevocable. Precisely, it provided that:

Where any person has, before the first day of January, one thousand nine hundred and twenty-four, taken any action whereby he has incurred any expenditure or liability in connection with the reproduction or performance of any work in a manner which at the time was lawful, or for the purpose of or with the view to the reproduction or performance would, but for the passing of this Act, have been lawful, nothing in this section shall diminish or prejudice any rights or interests arising from or in connection with such action

(4) When any such contrivances by means of which a literary, dramatic or musical work may be mechanically performed have been made, then for the purposes of this section, the owner of the copyright in the work shall, in relation to any person who makes the prescribed enquiries, be deemed to have given his consent to the making of such contrivances if he fails to reply to such enquiries within the prescribed time.

(5) For the purposes of this section, the Governor in Council may make regulations prescribing anything which under this section is to be prescribed, and prescribing the mode in which notices are to be given and the particulars to be given in such notices, and the mode, time, and frequency of the payment of royalties; and any such regulations may, if the Governor in Council thinks fit, include regulations requiring payment in advance or otherwise securing the payment of royalties.

(6) In the case of musical, literary or dramatic works published before the first day of January, one thousand nine hundred and twenty-four, the foregoing provisions shall have effect, subject to the following modifications and additions: -

(a) The conditions as to the previous making by, or with the consent or acquiescence of, the owner of the copyright in the work, and the restrictions as to alterations in or omissions from the work, shall not apply;

(b) No royalties shall be payable in respect of contrivances lawfully made and sold by the manufacturer before the first day of January, one thousand nine hundred and twenty-four;

(c) Notwithstanding any assignment made before the fourth day of June, one thousand nine hundred and twenty-one, of the copyright in a literary or dramatic or musical work, any rights conferred by this Act in respect of the making, or authorizing the making, of contrivances by means of which the work may be mechanically performed, shall belong to the author or his legal representatives and not to the assignee, and the royalties aforesaid shall be payable to, and for the benefit of, the author of the work or his legal representatives.

(7) Notwithstanding anything in this Act, where a record, perforated roll, or other contrivance by means of which sounds may be mechanically reproduced has been made before the first day of January, one thousand nine hundred and twenty-four, copyright shall, as from the said date, subsist therein in like manner and for the like term as if this Act had been in force at the date of the making of the original plate from which the contrivance was directly or indirectly derived:

Provided that, -

(i) the person who, on the first day of January, one thousand nine hundred and twenty-four, is the owner of such original plate shall be the first owner of such copyright; and,

(ii) Nothing in this provision shall be construed as conferring copyright in any such contrivance if the making thereof would have infringed copyright in some other such contrivance, if this provision had been in force at the time of the making of the first mentioned contrivance..

⁹⁷ S. 42 *Copyright Act, 1921*. See Fox, *supra* at p. 219.

⁹⁸ Previously numbered 42.1(b), such as modified in the law's revised version of 1927, R.S. 1927, Chap. 32. Any further reference in this paper to the *Copyright Act, 1921* refers to its revised version of 1927, R.S. 1927, Chap. 32.

which are subsisting and valuable at the said date, unless the person who by virtue of this section becomes entitled to restrain such reproduction or performance agrees to pay such compensation as, failing agreement, may be determined by arbitration.

The foregoing section had a twin within the UK *Copyright Act, 1911*, which section 24(1)(b) provided that:

Where any person has, before the twenty-sixth day of July nineteen hundred and ten, taken any action whereby he has incurred any expenditure or liability in connexion with the reproduction or performance of any work in a manner which at the time was lawful, or for the purpose of or with a view to the reproduction or performance of a work at a time when such reproduction or performance would, but for the passing of this Act, have been lawful, nothing in this section shall diminish or prejudice any rights or interests arising from or in connexion with such action which are subsisting and valuable at the said date, unless the person who by virtue of this section becomes entitled to restrain such reproduction or performance agrees to pay such compensation as, failing agreement, may be determined by arbitration.

A similar provision could be found in the *International Copyright Act, 1886*⁹⁹. This statute had been passed in order to allow the UK to give effect to the 1886 version of the Berne Convention, then in its infancy¹⁰⁰. Section 6 of the *International Copyright Act, 1886* provided that the author or the publisher of any literary or artistic work first produced in a foreign country prior to any Order in council applicable to this country, was entitled to the same rights and remedies as if the provisions of the Copyright Acts had applied to that country at the date of said production; this right was however subject to the following proviso:

*Provided that, where any person has, before the date of the publication of an Order in Council, lawfully produced any work in the United Kingdom, nothing in this section shall diminish or prejudice any rights or interests arising from or in connection with such production which are subsisting and valuable at the said date.*¹⁰¹

The *Copyright Act, 1911* displayed some differences in comparison with the *International Copyright Act, 1886*; particularly it granted a right which has been depicted as « [...] the right to compulsorily buy up the rights and interests which are preserved »¹⁰². This right, as it matured throughout the legislative evolution, has also been described as a “restoration right”¹⁰³. One could similarly assimilate it to an eviction right inasmuch as it allows its owner to terminate the rights or interests vested in or accruing to the beneficiary of the safeguard regime.

These comments on the differences of the *International Copyright Act, 1886* would apply *mutatis mutandis* to section 42(3) of the *Copyright Act, 1921*.

Part of the rationale of these provisions derives from the Berne Convention. The main effect of this Convention was to retroactively remove from a country’s public domain a foreign work still protected in its country of origin¹⁰⁴. The drawbacks associated with retroactivity did not go unnoticed:

⁹⁹ 49 & 50 Vict. c. 33. Fox indicated that the *Copyright Act, 1886* applied to Canada, Fox, *supra* at pp. 204, 29 and 34-35.

¹⁰⁰ F.E. Skone James, *Copinger on the Law of Copyright*, Toronto, Carswell, 1936, 7th ed. at p. 256.

¹⁰¹ *Ibid.* at p. 243.

¹⁰² *Ibid.*

¹⁰³ Léger Robic, *Canadian Copyright Annotated*, Toronto, Carswell, loose leaf, under s. 32.4.

¹⁰⁴ See S. Ricketson, *The Berne Convention for the protection of literary and artistic works: 1886-1986*, London, Centre for Commercial Law Studies – Kluwer, 1987 at pp. 665 and fol.; see K. S. Deters,

However, a problem may arise in the case of existing works which previously only entitled to protection in one country but not in the other. One of the main objects of the new agreement will usually have been the gaining of protection for those works in the second country, but difficulties may occur with respect to the position of persons in that country who have been exploiting the works in absence of any legal protection. Although the moral position of these users may not be strong, they have nonetheless acted in good faith in reliance on a given state of affairs, namely that these works were in the public domain and could be used freely. In pursuance of this reliance, they may also have invested capital and labour in the furtherance of these activities, for instance, in the preparation of a new edition for printing, the making of a translation or other adaptation, or the production and public of the works in question. Are these people suddenly to find themselves in the position of infringers and dealers in infringing copies if the new convention applies to these works, as well as to works that are created or published after its entry into force? In an absolute sense, they have little in their favour, as they have been freely exploiting works which do not belong to them. Nonetheless, where they have made substantial outlays in the carrying out of these activities, it would be unfair for the fruits of these undertakings to be forfeited to the foreign copyright owner. In addition, if the new convention is made completely retroactive, this may have a drastic effect on any local industry which has been built up in the previous legal vacuum. On the other hand, to exclude retroactivity altogether will work harshly against the foreign author, and deprive the new convention of much of its *raison d'être*. Accordingly, it is necessary to strike some balance between these "acquired rights" and the newly recognised rights of the foreign author. By definition, such provisions should only be temporary in nature, as all that is needed is sufficient time to allow the prior user to recoup his investment, following which time the foreign author's rights should be entitled to full protection in accordance with the terms of the new Convention. This problem, of course, is not one that is peculiar to international copyright agreements: it arises also in many areas of domestic law where a new regulation is made that renders unlawful activities previously carried on without restriction. However, while there may be agreement in principle on the need for some kind of transitional arrangement in these cases, there are various ways in which this may be done and there is room for argument over which is the most equitable and efficacious.¹⁰⁵

Facing the challenge to combine the need to give the Convention a certain retroactive effect in order to reach the goal of a universal copyright protection, and the necessity to preserve the rule of law and reliance thereupon, States participating in the Berne Convention preparatory conferences agreed on the principle that each member State could monitor the retroactivity of the Convention according to its own laws or conventions¹⁰⁶. Section 14 of the final version sanctioned the principle of retroactivity, and its caveats, in the following terms:

Under the reserves and conditions to be determined by common agreement, the present convention shall apply to all works which at the moment of coming into force have not yet fallen into the public domain in the country of origin.

The Closing Protocol confirmed that said retroactivity could be freely implemented domestically:

The application of the Convention to works which have not yet fallen in the public domain at the time when it comes into force shall take effect according to the relevant stipulations contained in special Conventions existing, or to be concluded, to that effect. In the absence of such stipulations between any countries of the Union, the respective

"Retroactivity and Reliance Rights Under Article 18 of the Berne Copyright Convention" (1991) 24 *Vanderbilt J. Transnt'l L.* 971.

¹⁰⁵ S. Ricketson, *supra* at pp. 665-666. [our emphasis]

¹⁰⁶ *Ibid.*

*countries shall regulate, each in so far as it is concerned, by its domestic legislation, the manner in which the principle contained in Article 14 is to be applied.*¹⁰⁷

Later on, several conferences hosted by the *Association littéraire et artistique internationale* (“ALAI”) gave birth to a series of resolutions aimed at suppressing the foregoing reserves and conditions. During the Paris Conference of 1896, France proposed to abolish it. Commentators observed that:

*[a]lthough some member states approved the French proposal, several other key states, including Britain, rejected the proposed revisions on the ground that, “despite the lapse of time, absolute retroactivity might still injure ‘legitimate interests’”. The continued concern about the reliance interests of domestic exploiters of foreign works caused the reserves and conditions provision of article 14 to remain in place. [...] Despite continued efforts by the ALAI to abolish the reserves and conditions provision, the lack of substantial change in article 14 afforded the Berne member states considerable leeway in protecting the reliance interests of their nationals at the expense of foreign authors and copyright owners. At the Berlin conference of 1908, article 14 was consolidated into the new article 18.*¹⁰⁸

The successive revisions of the Berne Convention, following the Berlin Conference of 1908, have left the principle set out in section 14, section 18 as of today, unchanged¹⁰⁹. Canada adhered to the revised Berne Convention following the Berlin conference and to the Additional Protocol to Berne of March 20, 1914, by means of an Order in Council passed July 27, 1923¹¹⁰. Canada became member of the Union in its own right in 1928¹¹¹, and adhered to and ratified the Rome Conference version of 1928 on August 1, 1931, after amending the *Copyright Act*,

¹⁰⁷ See S. Ricketson, *supra* at pp. 668-669. The English 1887 version of the Berne Convention is also available in W. Nordemann and al., *supra*.

¹⁰⁸ K. S. Deters, *supra* at pp. 980-981. [our emphasis]

¹⁰⁹ *Ibid.*; s. 18 of the Berne Convention in its current version provides that:

(1) This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.

(2) If, however, through the expiry of the term of protection which was previously granted, a work has fallen into the public domain of the country where protection is claimed, that work shall not be protected anew.

(3) The application of this principle shall be subject to any provisions contained in special conventions to that effect existing or to be concluded between countries of the Union. In the absence of such provisions, the respective countries shall determine, each in so far as it is concerned, the conditions of application of this principle.

(4) The preceding provisions shall also apply in the case of new accessions to the Union and to cases in which protection is extended by the application of Article 7 or by the abandonment of reservations.

It should be noted that although the principle of retroactivity has remained in the Berne Convention, the latter evolved as the protection minima increased through the adoption in 1971 of an exclusive reproduction right and restrictions on exceptions by means of the so called “three-step test” (art. 9(2): “It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author”).

¹¹⁰ Fox, *supra* at p. 38; N. Tamaro, *The 2005 Annotated Copyright Act*, Toronto, Carswell, 2005 at pp. 20ff.

¹¹¹ *Ibid.*

1921¹¹². Canada has thus always theoretically adhered to the scheme set out in section 18 of the Berne Convention, which has remained unchanged since its inception. Nonetheless, how Canada has implemented said section 18 and availed itself of the freedom of choice regarding the means of its implementation, particularly in light of the various transitional and eviction regimes, remain questions open to discussion.

It is noteworthy that throughout the history of the Berne Convention, not all the rights it instituted had a retroactive effect. For instance, paragraph 3 of section 13, which introduced mechanical reproduction rights in musical works in 1908 during the Berlin Conference, expressly deprived these rights of any retroactive effect and provided that they were not applicable in any member country to musical works which had been lawfully “adapted” in such a country before its ratification of the Convention. As a result, as per the British and Canadian Copyright Acts, the “adaptation” without authorization of a musical work published prior to 1911 or 1924, by means of mechanical reproduction contrivances, was not an act subject to the retroactive effect of the law, such as it appears from sections 19(7)(a) of the *Copyright Act, 1911* and 19(6)(a) of the *Copyright Act, 1921*, which provided in quasi identical terms that:

In the case of musical works published before the commencement of this Act [before the first day of January, one thousand nine hundred and twenty-four], the foregoing provisions shall have effect, subject to the following modifications and additions:

(a) The conditions as to the previous making by, or with the consent or acquiescence of, the owner of the copyright in the work, and the restrictions as to alterations in or omissions from the work, shall not apply;

The first reform of the *Copyright Act, 1921* occurred in 1988. By means of *An Act to amend the Copyright Act and to amend other Acts in consequence thereof*¹¹³, the Canadian legislator abolished the compulsory mechanical licence scheme applying to musical works¹¹⁴. Notably, no transitional regime of the type of section 42(3) of the *Copyright Act, 1921* was adopted on that occasion¹¹⁵. Instead, the Act established a six-month phase-out period following its coming into force, at the end of which makers of sound recordings were compelled to enter into negotiations with the rights holders of musical works in order to be authorized to reproduce said works mechanically¹¹⁶.

In 1994, following the implementation of the TRIPS Agreement in Canada, provisions similar to section 42(3) of the *Copyright Act, 1921* were introduced by *An Act to implement the World Trade Organization Agreement*¹¹⁷, namely sections then numbered 28.03 and 29 (32.4 and 33 CA in its 1997 version). Section 70.8 CA was also introduced, which allowed the copyright owner of the new rights to apply to the Copyright Board for the determination of the compensation amount for the exercise of the “eviction” right. It will be recalled that the TRIPS Agreement provided a limited copyright regime for performers:

In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation. Performers shall also have the possibility of preventing the following acts when

¹¹² S.C. 1931, c. 8, section 12: “The governor in Council may take such action as be deemed necessary to secure the adherence of Canada to the revised Convention [...]”.

¹¹³ L.C. 1988, c. 15.

¹¹⁴ See D. Vaver, “The Canadian Copyright Amendments of 1988” (1988) 4-2 *I.P.J.* 121; S. Gilker, “Une nouvelle loi sur les droits d’auteur : 19504 jours et 19 études plus tard” (1988) 1-1 *C.P.I.* 31 at pp. 39-40.

¹¹⁵ S. 42(3) 1921 has never been either consolidated or repealed, probably because it was marginal or non applicable *de facto* in 1988.

¹¹⁶ Re. The reasons for such a transitional regime, see D. Vaver and S. Gilker, *op. cit.*

¹¹⁷ S.C. 1994, c. 47.

*undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance.*¹¹⁸

Section 14(6) TRIPS adopted the principle of section 18 of the Berne Convention by expressly referring to it¹¹⁹. At the domestic level, the Canadian legislator was thus able to implement a specific transitional regime, such as it appears from section 26 CA, while also providing for an eviction regime.

In 1997, on the occasion of the second reform of the CA, *An Act modifying the Copyright Act*¹²⁰ introduced a copyright regime for performers that was distinct from the one fathered by TRIPS¹²¹, in conformity with the minimum protection set out in the Rome Convention¹²². Section 32.5 CA was added following a logic apparently identical to that of section 32.4 CA, previously numbered 28.03. Nonetheless, at first glance, it does not seem possible to link this addition to the principle of section 18 of the Berne Convention since the Rome Convention, to the contrary, does not create any obligation with respect to the temporal application of its provisions, particularly with respect to retroactivity¹²³. The adoption in 1997 of an eviction regime is an indication that the new rights did not have a strictly prospective application.

Bill C-60, while modifying section 33, would add sections 32.6 and 33.1, which apparently repeat the same principle of its predecessors, viz. sections 42(3), 32.4 and 32.5. One must pinpoint the fact that section 22 WPPT governs the temporal application of the Treaty's provisions by reference to section 18 of the Berne Convention, including its paragraph 3. Section 22(2) WPPT further provides that, exceptionally, a Member State can limit the temporal application of the protection set out in section 5 (performer's moral rights) to performers' performances connected with a country, which occurred after the coming into force of WPPT. Canada would avail itself of this reserve by adopting section 9 of Bill C-60 which specifies that section 17.1(1) applies only in respect of a performer's performance that occurs after its coming into force and in respect of which copyright subsists under subsection 15(1.1), a provision pertaining to economic rights. The latter are granted following the connecting criteria set out in section 15(2.1), which distinguishes Canadian performers' performances from those occurring in a WPPT country. As a result, the Bill does not specify that the protection benefits the performer only after the coming into force of the Treaty in the member country. Instead, protection is

¹¹⁸ S. 14(1) TRIPS, www.wto.org/english/docs_e/legal_e/legal_e.htm.

¹¹⁹ S. 14(6) TRIPS :

Any Member may, in relation to the rights conferred under paragraphs 1, 2 and 3, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention. However, the provisions of Article 18 of the Berne Convention (1971) shall also apply, mutatis mutandis, to the rights of performers and producers of phonograms in phonograms.

¹²⁰ S.C. 1997, c. 24.

¹²¹ See s. 26 CA.

¹²² See ss. 15 and 19 CA.

¹²³ http://www.wipo.int/treaties/en/ip/rome/trtdocs_wo024.html#P154_16391; see WIPO, *Guide to the Rome Convention and to the Phonograms Convention*, WIPO Publication, 1981, 190pp.; see W. Nordemann and al., *International Copyright and Neighboring Rights*, New-York, VCH, 1990 at p. 419. In the UK, the 1996 legislative change provided for the following transitional provisions:

No act done before commencement shall be regarded as an infringement of any new right, or as giving rise to any right to remuneration arising by virtue of these regulations.

S. 26(2) *The Copyright and Related Rights Regulations 1996* S.I. 1996/2967, c.i.f. on Dec. 1st, 1996, www.legislation.hmso.gov.uk/si/si1996/Uksi_19962967_en_1.htm#end.

granted the moment when, in Canada, the economic rights' are recognized. The consequence with respect to the eviction regime is simple in theory.

The following table facilitates the comparison of the foregoing provisions:

S. 42(3) (1924)	S. 32.4 (1994)	S. 32.5 (1997)	S. 32.6 (2005)
<p>Where any person has, before the first day of January, one thousand nine hundred and twenty-four, taken any action whereby he has incurred any expenditure or liability in connection with the reproduction or performance of any work in a manner which at the time was lawful, or for the purpose of or with the view to the reproduction or performance would, but for the passing of this Act, have been lawful, nothing in this section shall diminish or prejudice any rights or interests arising from or in connection with such action which are subsisting and valuable at the said date,</p>	<p>(1) Notwithstanding section 27, where a person has, before the later of January 1, 1996 and the day on which a country becomes a WTO member, incurred an expenditure or liability in connection with, or in preparation for, the doing of an act that would have infringed copyright under section 26 commencing on the later of those days, had that country been a WTO member, any right or interest of that person that</p> <p>(a) arises from or in connection with the doing of that act, and</p> <p>(b) is subsisting and valuable on the later of those days</p> <p>is not prejudiced or diminished by reason only that that country has become a WTO member, except as provided by an order of the Board made under subsection 78(3).</p>	<p>(1) Notwithstanding section 27, where a person has, before the later of the coming into force of Part II and the day on which a country becomes a Rome Convention country, incurred an expenditure or liability in connection with, or in preparation for, the doing of an act that would have infringed copyright under section 15 or 21 commencing on the later of those days, had Part II been in force or had that country been a Rome Convention country, any right or interest of that person that</p> <p>(a) arises from or in connection with the doing of that act, and</p> <p>(b) is subsisting and valuable on the later of those days</p> <p>is not prejudiced or diminished by reason only that Part II has come into force or that the country has become a Rome Convention country, except as provided by an order of the Board made under subsection 78(3).</p>	<p>(1) Despite sections 27, 28.1 and 28.2, if a person has — before the day on which any of subsections 15(1.1), 17.1(1) and 18(1.1) apply in respect of performers' performances and sound recordings connected with a country — incurred an expenditure or a liability in connection with, or in preparation for, the doing of an act that would, if done after that day, have infringed a right under that subsection, any right or interest of that person that</p> <p>(a) arises from or in connection with the doing of that act, and</p> <p>(b) is subsisting and valuable on that day is not prejudiced or diminished by reason only that the subsection applies in respect of performers' performances or sound recordings connected with that country, except as provided by an order of the Board made under subsection 78(3)</p>
<p>... unless the person who by virtue of this section becomes entitled to restrain such reproduction or performance agrees to pay such compensation as, failing agreement, may be determined by arbitration.</p>	<p>(2) Notwithstanding subsection (1), a person's right or interest that is protected by that subsection terminates if and when the owner of the copyright pays that person such compensation as is agreed to between the parties or, failing agreement, as is determined by the Board in accordance with section 78.</p>	<p>(2) Notwithstanding subsection (1), a person's right or interest that is protected by that subsection terminates if and when the owner of the copyright pays that person such compensation as is agreed to between the parties or, failing agreement, as is determined by the Board in accordance with section 78.</p>	<p>(2) Despite subsection (1), a person's right or interest that is protected by that subsection terminates, as against the copyright owner or holder of moral rights, as the case may be, if and when that owner or holder pays the person any compensation that is agreed to between the parties or, failing agreement, that is determined by the Board in accordance with section 78.</p>
	<p>(3) Nothing in subsections (1) and (2) affects any right of a performer available in law or equity.</p>	<p>(3) Nothing in subsections (1) and (2) affects any right of a performer available in law or equity.</p>	<p>(3) Nothing in subsections (1) and (2) affects any right of a performer available in law or equity.</p>

2.1.2. Considerations

In light of the historical perspective, several comments regarding the eviction regimes' rationale can be made:

1) The retroactive effect is distinct from the retrospective effect or the immediate effect of the law:

The eviction regimes seem all associated to the same principle of retroactivity given that their respective provisions are drafted with great similarities whereas some regimes stem directly from the implementation of section 18 of the Berne Convention.

One should however resist the temptation of automatically associating the eviction regime with a retroactive effect. Nuances regarding the temporal application of the law have been recognized by authorities who distinguish the retroactive effect of a statute from its retrospective or immediate effect¹²⁴. However, according to Professor Côté,

[our translation] *Distinguishing between the retroactive and retrospective effect may be pointless where the legislator has clearly defined how the new statute will apply. If the legislator has expressed a clear will that the statute applies in a certain way, it does not matter to know whether the statute has a retroactive or retrospective effect.*

*However, the distinction becomes useful where the legislator has not expressly answered the question of the new statute's time application. To overcome this silence, the interpreter will resort to two principles, of unequal authority: the principle of non-retroactivity of the statute and the principle of preservation of vested rights.*¹²⁵

The *Copyright Act, 1911* has been construed as not displaying any retroactive effect except with respect to the term of protection, such as more fully appears from its section 24(1) providing that:

Where any person is immediately before the commencement of this Act entitled to any such right in any work as is specified in the first column of the First Schedule to this Act, or to any interest in such a right, he shall, as from that date, be entitled to the substituted

¹²⁴ See P.-A. Côté, *Interprétations des lois*, 3rd ed., Montréal, Thémis, 1999 at p. 167; See R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, Markham, ON, 4th ed., 2002 at pp. 542ff and specifically at p. 546:

Legislation may be applied so as to:

- 1. change the past legal effect of a past situation (a "retroactive" application)*
- 2. change the future legal effect of a past situation (a "retrospective" application)*
- 3. change the future legal effect of an on-going situation (an "immediate" application)*
- 4. change the future legal effect of future situations (a "future" application)*
- 5. take away or diminish a protected expectation or interest (interference with "vested, accrued or accruing rights")*

Retroactive applications are generally considered to be the most objectionable since they involve changing the past. Retrospective and immediate applications are less objectionable because they involve changes for the future only. Any of these three categories of application may, in a given case, turn out to interfere with vested rights. Such interference is considered objectionable because it amounts to expropriation of a form of property without compensation.

¹²⁵ P.-A. Côté, *ibid.* at p. 169.

right set forth in the second column of that schedule, or to the same interest in such a substituted right, and to no other right or interest, and such substituted right shall subsist for the term for which it would have subsisted if this Act had been in force at the date when the work was made and the work had been one entitled to copyright there-under.
[our emphasis]

It was observed, with respect to the British Act, that:

*It is clear that the owner of the substituted right conferred by section 24 cannot sue in respect of any act committed prior to the commencement of the Act of 1911 which was not an infringement of copyright at the date when the act was committed.*¹²⁶

One will notice that, in Canada, section 42(1) *Copyright Act, 1921* repeated the same principle, thus prompting the assumption that the foregoing comments would apply thereto *mutatis mutandis*.

Except for this specific provision of the 1924 Reform, “pure” retroactive provisions elsewhere in the 1924 statute or passed during the subsequent reforms or modifications of the CA, in 1988, 1994 and 1997, are scarce. But for such express provisions, one would apply the presumption of non-retroactivity¹²⁷. But for provisions such as section 42(3) and its successors, one would have asked the question as to whether the presumption of the preservation of vested rights was applicable¹²⁸. These provisions seem to address the issue pertaining to the preservation of vested rights by instituting a twofold regime, which, as mentioned, on the one hand, defines those vested rights and, on the other hand, provides that said vested rights may be terminated if and when a compensation is paid out. This regime, most likely, aims at expressing the legislator’s appreciation of what is “just and reasonable” and at reaching a solution “that, under the circumstances, appears the least costly, that achieves the best possible compromise between individual interests, which call for the preservation of the former statute, and the social interest, which warrants the immediate application of the new statute”¹²⁹.

2) The eviction regime is an expression of the legislator’s intent, which cannot be overlooked:

The inclusion or the exclusion of an eviction regime among the transitional provisions within a reform of the CA is the expression of the legislator’s will, notwithstanding any obligation arising from an international treaty. A meaning should be given to the legislator’s expression of intent associated with the presence of an eviction regime. The legislator’s motives may become more visible when comparing the different available transitional options. For instance, moral rights under Bill C-60 or WTO economic rights in 1994 essentially had a prospective application. Conversely, the economic rights protection regime under Bill C-60 or in 1997 had a

¹²⁶ F.E. Skone James, *op. cit.* at p. 242.

¹²⁷ See *Lauri v. Renad*, [1892] 3 Ch. 402 at p. 421: “It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction: and the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to give a greater retrospective operation than its language renders necessary”, cited par F.E. Skone James, *op. cit.* at p. 249. It should be underlined that in the earlier cases, both terms, “retroactive” and “retrospective”, were used interchangeably.

¹²⁸ As indicated, the terminology also refers to “accrued or accruing rights” or “rights saved”. Compare the title of section 62(2) CA: “Rights saved”, as well as its text: “[...] but any order made under this section does not affect prejudicially any rights or interests acquired or accrued at the date when the order comes into operation, and shall provide for the protection of those rights and interests”. See P.-A. Côté, *op. cit.* at pp. 197-199 and 212-219.

¹²⁹ See P.-A. Côté, *op. cit.* at p. 217. See also, R. Sullivan, *op. cit.*, and the observations that with respect to retroactivity and retrospectivity, “[s]uch interference is considered objectionable because it amounts to expropriation of a form of property without compensation”.

retrospective application. Such a choice may also be considered within the general context of the law and its believed reform objectives. Upon such footings, any ambiguity in the text of a provision may be construed in a way consistent with these objectives¹³⁰. In the case at hand, it may be assumed that the eviction regime does not display absolute clarity, notably with respect to the scope of the vested rights it covers. The reform objectives may hence provide guidance and warrant limiting such a scope. Similarly, the gist and text of section 89 CA may influence the method of construction, triggering a narrow interpretation precluding a broad scope of vested rights or limitless temporal and space boundaries, which would appear contrary to this provision's operation. Indeed, broad vested rights would restrain, *de facto*, but also legally by means of a contractual practice promoted to the rank of usage, the field of uses, which, by definition, can arguably only be limited by the CA¹³¹.

3) The eviction regime's assessment would depend on the nature of the new rights:

One could cast the hypothesis that an eviction regime is only useful where the new right is exclusive and "full". Indeed, if the new right were merely a remuneration right, its owner may only claim the related remuneration and the user may solely elect to effect the corresponding payment. Likewise, if the new right is a "soft" right or a fractional right, it is likely that the user will be called into question only in marginal circumstances or else that the new right will easily be integrated in a contractual regime, considering its small legal value.

The fact that the eviction regime has actually seldom been applied, especially in the field of sound recordings, may be connected to the nature of the rights pertaining thereto. For example, in 1924, the rights consisted essentially of a compulsory licence for mechanical reproductions. In 1988, whereas the compulsory "mechanical" licence was abrogated, no eviction regime was instituted¹³². In 1994, one would be inclined to see the rights granted to performers as rights to

¹³⁰ See P.-A. Côté, *op. cit.* at p. 491, referring to the teleological method of statutes' construction, such as further codified at s. 12 of the *Interpretation Act*, R.S 1985, c. I-21: "Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

¹³¹ S. 89 CA: "No person is entitled to copyright otherwise than under and in accordance with this Act or any other Act of Parliament".

¹³² In 1988, the legislator sets up a transitional period beyond which any copyright owner of a musical work could deny the authorization to a potential user to reproduce such a work, even though where it had already been reproduced in a sound recording, S. Gilker, "Une nouvelle loi sur les droits d'auteur : 19504 jours et 19 études plus tard", *op. cit.* at p. 40. The observations made by the abovementioned author regarding this transitional regime raise interpretation issues regarding the scope of the transitional regime which are similar to those regarding the eviction regimes:

Section 23 of Bill C-60 further provides for a transitional regime serving the purpose of decreasing the financial impact on certain industries which would likely result from such a change in the Act. Hence, the act of making in Canada, on or before December 8, 1988, sound mechanical contrivances will not be considered as a copyright infringement of a musical, literary or dramatic work inasmuch as anyone who endeavours to make them proves that he had already manufactured these contrivances in accordance with the provisions of section 19 of the Act and its regulations, and that he will have conformed himself, in respect of the contrivances manufactured on or before December 8, 1988 to section 19 of the Act such as it existed before it was repealed.

It should be noted that certain diverging interpretations of the first condition required by these transitional provisions prevail. Some consider that it will suffice that a publisher has manufactured any contrivance in the past, following section 19, in order to benefit from a compulsory mechanical licence in respect of any work, up until December 8, 1988. Others consider that a publisher who wishes to reproduce a work under this transitional regime is required to prove that she has already manufactured a contrivance under the

“prevent” certain unauthorized uses, as opposed to exclusive rights. The right to “prevent” has been explained negatively, as one which is not a direct proprietary right in the performance, and one which cannot be assigned¹³³. Although section 26 CA refers to a “sole right”, the latter appears limited and fractional, particularly in comparison with the rights enacted in 1997, since it only governs the acts of fixation and telecommunication of live performances¹³⁴. In 1997, the rights granted to performers seem more complete given that the legislator did not limit herself to the minimum of protection set out in the Rome Convention¹³⁵. It has been indicated that Canada chose to grant performers a “real” right in their performances¹³⁶. Nevertheless, one may tend to think that the protection devised in 1997 is incomplete since the regime, in addition to revolving around remuneration rights for communication and private copying, comprises a rather awkward reproduction right, such as provided for at section 15(1)(b)ii) CA. Indeed, the provision would appear to set out a reproduction right whose operation is dependant on the terms of a contract with a producer and on the scope of the authorization given by the performer¹³⁷. Consequently, without a more “complete” regime, such as the one contemplated by Bill C-60, which may put the performer on clear equal footing with the producer, one cannot escape the abovementioned hypothesis according to which the eviction regime is yet to reveal its full magnitude. This viewpoint remains unchallenged by case law, for the few cases addressing the issue date back to the 19th century, a different era in terms of technology and economy, and concern the interpretation of section 6, *International Copyright Act, 1886*¹³⁸.

4) The eviction regime encompasses uncertainties:

There are essentially two kinds of uncertainties: a) contextual ones, viz. in relation to the context within which the regime is to be applied, and b) structural ones, viz. related to the operation of the regime itself.

a) *Contextual Uncertainties*

Bill C-60 would take place in a particular context since it purports to introduce a set of rights that adds up to the existing scheme of protection. Indeed, as it can be noticed, the current section 15(1) CA is not to be repealed under Bill C-60. One will also notice that the new scheme is set up by adding paragraph (1.1) to the current paragraph 15(1) CA. It may be puzzling to further observe that paragraphs 15(1)(a)(i to iii) are identical to paragraphs 15(1.1)(a)(i to iii) introduced by Bill C-60, thus creating a legislative redundancy. Under Bill C-60, moral rights are granted to performers, but only with respect to the rights of section 15(1.1)¹³⁹, thus creating two sets of

*regime of section 19 with respect to **this specific work** before June 8, 1988. The English version would suggest that the latter interpretation is more likely to be the correct one (in respect of **that** work). [our translation]*

¹³³ See E. Lefebvre, “Les droits des artistes-interprètes sur leur prestation : de la Convention de Rome au projet de loi C-32”, *op. cit.*; re. the unassignability of the right, see s. 26(7) CA.

¹³⁴ See N. Tamaro, *op. cit.* at p. 17.

¹³⁵ E. Lefebvre, *ibid.*

¹³⁶ *Ibid.*

¹³⁷ See W. Nordemann and al., *op. cit.* at p. 387.

¹³⁸ See Fox, *op. cit.* at pp. 228 and fol.; see F.E. Skone James, *op. cit.* at pp. 242 and fol. and the following commented cases: *Moul & Mayeur v. Groenings*, [1891] 2 Q.B. 443, *Schauer v. J.C. & J. Field Ltd*, [1893] 1 Ch. 35, *Hanfstaengl Art Publishing Co. v. Holloway*, [1893] 2 Q.B. 1, 68 L.T. 676 and *Cranz v. Sheard*, [1913] Macg. Cop. Cas. 86.

¹³⁹ S. 17.2 added by Bill C-60: “Subsection 17.1(1) applies only in respect of a performer’s performance that occurs after its coming into force and in respect of which copyright subsists under subsection 15(1.1). The moral rights subsist for the same term as that copyright”.

regimes. To the contrary, as far as makers of sound recordings are concerned, it can be noticed that the new rights are integrated into the current regime¹⁴⁰, thus inducing a unified and interrelated regime which contrast with the performers' dual regime that would take place in the wake of the passing of Bill C-60.

The coexistence of two regimes may not be without hurdles as to which of the two regimes should apply. Indeed, in theory, the criteria for the application of the eviction regimes are that i) an act was lawful prior to the reform and ii) that this act has become unlawful following the reform. In practice, the assessment of the legality of the act will require the interpretation of certain provisions of Part II CA which were applicable before the reform and are still in force, particularly section 15(b)ii) CA, which grants a performer, in relation to her performance, the sole right "where the performer authorized a fixation, to reproduce any reproduction of that fixation, if the reproduction being reproduced was made for a purpose other than that for which the performer's authorization was given".

This provision has been presented as the right that may be claimed against anyone with respect to any unauthorized reproduction of an authorized fixation¹⁴¹. As previously indicated, the performer's reproduction right may be evaluated according to the terms of the contract with a producer and to the authorization granted therein¹⁴². In this respect, it has been observed that

[our translation] *Inspired by sub-paragraph 7(1)c)(ii) of the Rome Convention, this right affirms the performer's option to subject the authorization which he may grant to conditions. He may decide that the authorization granted to the sound recording maker applies to the fixation of his performance for the purpose of reproducing sound recordings to be sold in Québec. He may also decide that the producer of a cinematographic work may not use the performance embodied therein for the purpose of producing a sound recording without a new authorization, the proviso of paragraph 17(1) of the Act not being applicable in such a case.*

*Paragraph 13(4) of the Act may provide us with reliable indications on the meaning of the term "reproduction [...] for a purpose other than". In theory, the licence conditions which are the subject-matter of the authorization may only be limited by public order since, in this area, freedom of contract prevails. These licence conditions may however include limitations relating to the territory, medium, sector of the market, scope of authorization and term of use. In other words, a performer may limit the use of his performance to specific purposes and retain all legal actions made available to him at law when the conditions of the licence are breached.*¹⁴³

¹⁴⁰ S. 18(1.1) added by Bill C-60: "[...] a sound recording maker's copyright in the sound recording also includes the sole right to do the following acts in relation to the sound recording or any substantial part of it: (a) to sell or otherwise transfer ownership for the first time [...]; (b) to make it available to the public in a way that allows members of the public to access it through telecommunication from a place and at a time individually chosen by them".

¹⁴¹ "[D]roit opposable à tous touchant à toute reproduction non autorisée d'une fixation autorisée", S. Gilker, "La commande d'œuvres musicales et d'enregistrements sonores musicaux dans le secteur du cinéma et de la télévision au Québec" (2004) 208 *Développements récents en droit du divertissement* 183 at p. 215.

¹⁴² See W. Nordemann & al., *op. cit.* at p. 387.

¹⁴³ E. Lefebvre, *op. cit.*

As a result, the assessment of the legality of the use will require construing explicit or implicit contractual authorization¹⁴⁴. In addition, a certain analysis of section 15 could reveal that the right set out therein is less incomplete than contemplated¹⁴⁵.

Moreover, such an analysis would mention paragraph 15(1)(b)(iii) CA, which suggests that a reproduction right is recognized with respect to any fixation permitted by Part III CA (“Exceptions to infringement”) and Part VIII CA (“Private copying”) where the reproduction being reproduced was made for a purpose other than one permitted under Part III or VIII¹⁴⁶. A performer will be able to exercise his reproduction right and bring an action for copyright infringement where the sound recording, which was lawfully made, was used in such a way that it was no longer for private use, for instance, where multiple copies were made and distributed¹⁴⁷.

In addition, section 30.9(1) CA (“Pre-recorded recordings”) refers indirectly to a reproduction right by setting out an exception to such a right if a licence to reproduce the sound recording for the purpose of broadcasting is not available from a collective society.

Several questions remain unanswered: couldn’t the coexistence of two protection regimes for performers generate situations where overlap occurs, particularly when section 15(1)(b)(ii) CA is exercised? In such a case, uses covered by Bill C-60 would also be covered by section 15(1) CA¹⁴⁸. Hence, in light of its criteria, the eviction regime may not be available where the use or

¹⁴⁴ Re. the issue of implicit licences, see G. D’Agostino, “En attendant *Robertson* : Définir la possession du droit d’auteur sur les œuvres des pigistes dans les nouveaux médias ” (2006) 18-1 *C.P.I.* 163; *Robertson v. Thomson Corp* (2004), 34 CPR (4th) 161 (Ont CA) (leave to appeal granted 21 April 2005; case heard on Dec. 6, 2005; case to be re-heard); M. F. Radcliffe, “On-Line Rights: How to Interpret Pre-Existing Agreements” (1996) 9 *E.I.P.R.* 494.

¹⁴⁵ W. Nordemann and al., *op. cit.* at p. 387:

The rights of the performing artists are not entirely dependent on their contractual relations where the reproduction is made for purposes different from those for which his consent was given. If the performing artist has given his consent to a broadcasting organization, then it pertains only to reproduction for purposes of broadcasting; if the phonogram produced is to be used also for the purpose of selling commercial records, then the performing artist’s consent thereto is required [...]. The same principle applies in the reverse situation or where the consent is given to make reproductions for purposes of producing records or for the distribution of audio-cassettes or for cinematographic productions [...]. If the manufacturing enterprise plans from the outset reproductions for multiple purposes such as, for example, phonographic records and audio-cassettes and if the performing artist is aware of these purposes, then the consent of the artist includes both types of exploitation. No transgression of purposes takes place if the phonogram producer reproduces a larger number records than is provided for in the phonograph production contract or if he reproduces phonograms outside of the territory licensed by the phonograph production contract. [references omitted]

¹⁴⁶ 15(b)(iii) CA.

¹⁴⁷ See *BMG Canada Inc. v. John Doe*, 2005 FCA 193:

When the Motions Judge stated that, under subsection 80(1) of the Copyright Act, R.S. 1985, c. C-42, “downloading a song for personal use does not amount to infringement,” he gave no consideration to the possible application of subsection 80(2) and the circumstances in which the defence of “private use” will not be available, such as, inter alia, where the reproduction of a musical work embodied in a sound recording onto an audio recording medium is done for the sale, rental, distribution, communication by telecommunication or performance to the public.

¹⁴⁸ See the case of *BMG Canada Inc. v. Doe*, 2005 FCA 193 (CanLII) where the Federal Court of Appeal indicated that acts can be governed by other rights than the making available right which did not exist in Canada at the time of the facts.

act never became unlawful as a result of its conformity with the law prior to Bill C-60, and after, given that the older law is not repealed under the Bill's scheme. The consequences of such an overlap, where confirmed, would raise the issue as to whether an authorization which scope covers a use specifically governed by a new right may neutralize the effect of said new right. They would also raise the issue of the purpose of the eviction regime which may become unavailable. This may well further blur the criteria of access to the eviction regime.

b) Structural Uncertainties

With respect to the structure of the eviction regime, its mechanism should be reiterated: i) vested rights ii) which can be terminated iii) if and when a compensation is paid. The first question which must be answered is: which vested rights? Should all vested rights be compensated, including those arising from a contractual relationship, or only specific vested rights, viz. those which are in connection with, or in preparation for, the doing of an act that would have infringed copyright had Bill-C60 been in force? Should the corollary of the non availability of the eviction regime be the full availability of the new rights?

The question of the limits of vested rights must be addressed one more time. This question can be subdivided: can a person who has no link whatsoever with the new rights owner claim vested rights? The eviction regimes subsequent to 1921 all refer to “a person” who “has incurred an expenditure or liabilities”. As a result, the case of *Moul c. Groenings*¹⁴⁹ may be of little assistance given that the provision which was construed therein was section 6 *International Copyright Act, 1886*, which referred to “any person”. This case remains however relevant for the purpose of illustrating the problem associated to the application of the eviction regime to third parties. The commentaries on this case brought out that the rights and interests that were to be preserved as vested rights were those pertaining to the music publisher but also to any person who had bought a copy of the musical score entitled “Caprice Polka” – in this case, the bandmaster –, even though the purchase occurred after the coming into force of copyright in musical scores¹⁵⁰. In light of the resemblance of the terms of that provision to that of the eviction regime in the *Copyright Act, 1911*, the commentator observed: “It is to be remarked that the proviso to section 24 applies to a case where “any person” has incurred expenditure or liability, so that the rights and interests of the person who actually incurred the expenditure or liability are safeguarded, but also the rights and interests of all persons deriving title under such person”¹⁵¹.

For the purpose of assessing the scope of the eviction regime, the interpretation of the notion of “interest” should follow certain rules. The following example is given:

*[...] it is submitted that, although prior to the Act of 1911 it was no infringement of copyright to dramatise a novel, the effect of the proviso to section 24 is not to give to purchasers of books purchased from a stock in existence before the above-mentioned date any right to dramatise the same after that date. Novels are not usually purchased with the object of dramatising them, and to deprive the publisher of his power to sell a novel with a right to dramatise the same could hardly restrict his market or operate to the prejudice of any right or interest of his which was subsisting or valuable on the date in question. On the other hand, if a person had before July 26, 1910, incurred expenditure or liability in actually dramatising a novel, then his rights or interests would be protected under the proviso to section 24.*¹⁵²

¹⁴⁹ *Op. cit.*

¹⁵⁰ F.E. Skone James, *op. cit.* at pp. 248-249.

¹⁵¹ *Ibid.* [emphasis added].

¹⁵² *Ibid.* at p. 249.

This type of analysis heralds the type of questioning and problems which the application of the eviction regime is likely to spur.

Furthermore, one should not omit to stress the fact that each eviction regime regarding performers comprised a provision which preserved, notwithstanding any other provision, the rights of a performer available in law or equity¹⁵³. This provision has been explained in the following terms:

[s]ubsection 32.4 [or 5] (3) simply states that the right of a performer in law or in equity are in no way limited by what is set out in the preceding two subsections. The wording of subsection 32.4 [or 5] (3) resembles that found at section 89 in fine of the Copyright Act.

32.4(3) Nothing in subsections (1) and (2) affects any right of a performer available in law or equity.

89. [...] but nothing in this section shall be construed as abrogating any right or jurisdiction in respect of a breach of trust or confidence.

*Subsection 32.4 [or 5] (3) leaves open the possibility of instituting proceedings otherwise than under the Copyright Act, as would be the case, for instance, for a breach of trust or an abuse of confidence, a breach of contract, interference with publicity or privacy rights, the appropriation of someone's personality or image, passing off and the like.*¹⁵⁴

The explanation regarding the existence of contractual relationships ought to be considered since it is a known fact that before the introduction of copyright provisions in favour of performers, the latter had contractually organized their relationship with sound recording makers, individually or collectively¹⁵⁵. The reach of this provision seems ambiguous. On the one hand, it apparently aims at preserving all available remedies which a performer may pursue, outside the CA and its eviction regime. The language of the provision also seems to indicate that it is only available to performers. In addition, the provision's underlying policy could be understood as being pro performer.

On the other hand, another interpretation would consist in asserting that if a contract may validly be relied upon by a performer, the other contracting party should equally be allowed to avail itself of the provisions which aptly govern the issues at stake, notwithstanding any transfer of rights issue. This would be the case where the new right concerns an act which is already addressed by the existing contract. Commentators have observed that the preservation of contractual relationships in existence prior to the coming into force of copyright provisions covering their subject matter is a principle that has formally been addressed in the *Copyright Act* as per its section 16 which provides that "nothing in section 15 prevents the performer from entering into a contract governing the use of the performer's performance for the purpose of broadcasting, fixation or retransmission"¹⁵⁶. Therefore, "[i]n practice, nothing has changed, if not

¹⁵³ Ss. 32.4/5/6(3) CA.

¹⁵⁴ Léger Robic, *op. cit.* under ss. 32.4 and 32.5 CA; see Y. Gendreau & D. Vaver, "Canada" in M.B. Nimmer & P.E. Geller, *International Copyright Law and Practice*, New York, Matthew Bender at para. 9[1](a).

¹⁵⁵ On individual artist-producer agreements before 1997, see the cases of *Lapointe v. Disques Gamma Québec Ltée* (1996), J.E. 96-834 (C.S. Qué.); see *Schroeder Music Publishing Co. Ltd. v. Macaulay*, [1974] 3 All E.R. 616 (H.L.); *Clifford Davis Management Ltd. v. W.E.A. Records Ltd.*, [1975] 1 All E.R. 237 (C.A.); *O'Sullivan v. Management Agency and Music Ltd.*, [1985] 3 All E.R. 351 (C.A.). On collective agreements, see *infra* 3.1; see M. Adler, "Historique, typologie, objet et importance des rapports collectifs de travail impliquant des associations ou syndicats d'auteurs et d'artistes au Québec", Canadian Report in Montebello ALAI International Congress, *Protection of Authors and Performers by Contract*, ("ALAI Montebello"), Cowansville, Yvon Blais, 1998 at pp. 891 and 894.

¹⁵⁶ N. Tamaro, *The 2005 Annotated Copyright Act*, Toronto, Carswell, 2005 at p. 403:

the acknowledgement that previously negotiated rights on a purely contractual basis are today expressly recognized by law¹⁵⁷.

If one were to admit that the eviction regime can be used by a performer against the other contracting party, save for public order considerations¹⁵⁸, an eviction market may develop as competitors may have an incentive to acquire the performers' eviction right in order to evict other competitors. Similarly, a performer may assign its rights, including the eviction right, to a collective¹⁵⁹. Finally, if the eviction regime were to be available to a performer against the other contracting party, it would seem obvious that the eviction regime may also be used against a third party who would have entered into a contract with the performer's contractee, and so on and so forth.

Lastly, the scheme in section 58.1 of *An Act to Amend the Copyright Act*, in 1997, which expressly governed the question of on-going contractual relationships, should be considered. Section 58.1 provided that

No agreement concluded before April 25, 1996 that assigns a right or grants an interest by licence in a right that would be a copyright or a right to remuneration under this Act shall be construed as assigning or granting any rights conferred for the first time by this Act, unless the agreement specifically provides for the assignment or grant.

In light of this provision, one may submit the thesis that when the legislator purports to interfere with existing contracts, specific and unequivocal provisions are enacted for that purpose. For instance, in 1921, specific provisions, distinct from the eviction regime set up by section 42(3), the ancestor of section 32.6, governed the issue of existing contractual relationships. Nonetheless, it may prove tricky to separate section 58.1 from its context, all the more since this

Societies representing performers were negotiating in collective agreements rights for performers well before the adoption of provisions dealing with copyright for such performers. These rights already negotiated by collective agreements are not necessarily affected since the amendments made to the Act in 1997.

In practice, nothing has changed, if not the acknowledgement that previously negotiated rights on a purely contractual basis are today expressly recognized by law. In this respect, the Act specifies that it does not affect the rights of the performer to enter "into a contract governing the use of the performer's performance for the purpose of broadcasting, fixation or retransmission". The rights negotiated previously in these respects are still applicable and may continue to be negotiated.

The nature of the rights recognized by the Act for performers therefore has no influence on the practices that were established of negotiating "droits de suite", even if, for some of these rights, one must henceforth speak of "copyright" since 1997. One could say that the Act is content to formally recognize rights that were previously negotiated without the framework of the Act, and the latter acknowledges authority to negotiate by the performer for other uses of his performances, which would not be specifically mentioned in the Act.

¹⁵⁷ *Ibid.*

¹⁵⁸ At common law, the standard of *maintenance* or *champerty* may thwart such a market, see Y. Gendreau & D. Vaver, "Canada", *op. cit.* at para. 4[3](c). At civil law, the standards of good faith and abuse of right may have the same result.

¹⁵⁹ Possibly concurring, see Y. Gendreau & D. Vaver, "Canada", *op. cit.* at para. 4[3](c), stating that

Courts have recently held that an assignment of even a bare cause of action, whether contractual, tortious, or equitable, is valid if the assignee has a genuine pre-existing commercial or financial interest in acquiring the right that is at issue in the action. Under this theory, there seems to be no reason why a collecting society cannot have a cause of action for copyright infringement validly assigned to it by a member.

provision addressed the issue of ownership of new rights and, hence, the question of assignment, *viz.* a parallel question. In addition, one would be acute enough to observe that paragraph 2 of section 32.6 confers an eviction right to the “owner of the copyright”. The *Copyright Act, 1921* may be useful to understand the distinctions conveyed by this term. At the time, the legislator substituted new rights, the beneficiaries of which being the “owners” of the pre-existing ones, particularly by means of assignment. The *Copyright Act, 1921* provided that in some instances, the substitution would not benefit the owner/assignee of the former rights but, rather, would be reserved to the author, notwithstanding any assignment, for obvious reasons of fairness¹⁶⁰. By analogy, this approach may provide an indication that the eviction regime is available in contractual matters where no transfer of rights has occurred since, in such a case, the author [or performer], having not conveyed her rights, remains the “owner of the copyright”. It is worthwhile to note that the third paragraph of the eviction regimes refers to “a performer”, such a person being possibly another person than the “owner of copyright”. Further, where no rights have been assigned, a performer could theoretically terminate a contract, and incur a liability to the extent of the corresponding damages¹⁶¹. In such a case, besides the issue of the appropriate forum, the procedure would not differ in substance from the one pertaining to the eviction regime. Nevertheless, allowing the owner of copyright to resort to the eviction regime begs the question as to whether it amounts to giving the Act a purely retroactive effect by changing the past and the original intent of the contracting parties.

From this perspective, transfer of rights may become a significant issue.

2.2. Contracts for Services with Assignment of Rights in a Performance

The working hypothesis, which will be hereby followed, consists in considering situations where the contractual terms may be construed such as to conclude that a transfer of rights has occurred. It is a question of title of property which relates to facts that may have taken place before, *i.e.* the agreement, and after, *i.e.* a new performance, or at the time of the coming into force of the Act, *i.e.* the introduction of new rights in a pre-existing performance.

It is a well-established principle that copyright only exists by virtue of the law. This has been recognized by the Supreme Court of Canada¹⁶² and is set out in section 89 CA, which provides that “[n]o person is entitled to copyright otherwise than under and in accordance with this act or any other Act of Parliament”. As a consequence, a performer may not possess and hence assign rights which do not exist¹⁶³.

¹⁶⁰ See next section.

¹⁶¹ Some artist contracts include an undetermined term, which will depend on the delivery of a certain amount of music albums, hence creating possibly extended terms, see Schedule and articles 4.1, 4.2 and 8.1 of the Exclusive Contract. In some cases, the contractual term may be limited: see *Entente collective entre la Guilde des musiciens du Québec et l'Association québécoise de l'industrie du disque, du spectacle et de la vidéo pour le phonogramme* (“Entente Guilde-ADISQ”), 1996-1998, www.adisq.com/doc/pdf/entente-guilde-ADISQ-phono.pdf, which provides for a term of five years (art. 12.10).

¹⁶² *Bishop v. Stevens*, [1990] 2 S.C.R. 467, at p. 477: “Analysis of these arguments must begin by emphasizing that copyright law is purely statutory law, which “simply creates rights and obligations upon the terms and in the circumstances set out in the statute”; *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 R.C.S. 339, 2004 CSC 13 at para. 9: “In Canada, copyright is a creature of statute and the rights and remedies provided by the *Copyright Act* are exclusive: see *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336, 2002 SCC 34, at para. 5; *Bishop v. Stevens*, [1990] 2 S.C.R. 467, at p. 477; *Compo Co. v. Blue Crest Music inc.*, [1980] 1 S.C.R. 357, at p. 373”.

¹⁶³ One could quote the adage *Nemo dat quod non habet*.

In 1924, such as previously indicated, new rights were substituted, spurring the question as to who are the owners of the new rights:

What has to be determined in each case is who became "entitled to" the particular right in question, within the meaning of s. 42 of the Act, for the person entitled to the substituted right is the person who was entitled to the existing right immediately before the Act came into force. Questions may arise as to the ownership of the substituted right in connection with assignments and licences and care must be exercised in any case to ascertain whether an instrument made prior to the commencement of the Act operated as an assignment of a right in a work or an interest in such a right or only as the grant of an interest in the right by licence. S. 42 operates to grant the substituted right only to a person who was "entitled to any such right in any work as is specified in the first column of the First Schedule, or to any interest in such a right." If that person was entitled only to an interest by way of licence, he is not to be classed as a person who becomes entitled to the substituted right provided by the section.¹⁶⁴

As also mentioned, a specific transitional provision was set up:

Notwithstanding any assignment made before the fourth day of June, one thousand nine hundred twenty-one, of the copyright in a literary or dramatic or musical work, any rights conferred by this Act in respect of the making, or authorizing the making, of contrivances by means of which the work may be mechanically performed, shall belong to the author or his legal representatives and not to the assignee, and the royalties aforesaid shall be payable to, and for the benefit of, the author of the work or his legal representatives.¹⁶⁵

Fox referred to the observations of a judge in the case of *Coleridge-Taylor v. Novello & Co, Ltd.*¹⁶⁶ in order to explain the foregoing provision:

It was felt that it would be unjust to the author that the right that was for the first time conferred by s. 3(1)(d) of the 1921 Act should pass to the assignee under an assignment made at a time when such a right did not exist. The provisions of s. 19 ([6]) (c) are an obvious piece of justice, because when an author before the Act had assigned copyright, the assignee acquired no rights with regard to the making of records, because the author did not have such rights. Accordingly, that particular new right was reserved to the author.¹⁶⁷

The passing, during third reading of *An Act to Amend the Copyright Act*¹⁶⁸, of section 58.1, a transitional provision similar in substance to section 19(6)(c) *Copyright Act, 1921*, seems to confirm the goal of preserving newly recognized interests. The nature of the new rights, particularly remuneration rights, and the policy objectives underlying such rights may provide, at least partially, a convincing explanation of said transitional provision¹⁶⁹.

¹⁶⁴ Fox, *op. cit.* at p. 220.

¹⁶⁵ S. 19(6)(c) *Copyright Act, 1921*, R.S. 1927, Chap. 32.

¹⁶⁶ *Coleridge-Taylor v. Novello & Co, Ltd.*, [1938] 3 All E.R. 507 at p. 509.

¹⁶⁷ Fox, *op. cit.* at p. 189.

¹⁶⁸ S.C. 1997, c. 24 (Bill C-32).

¹⁶⁹ See Y. Gendreau & D. Vaver, "Canada", *op. cit.* at para. 4[3](c):

The policy underlying the section seemingly is to ensure that the persons named in the Act as intended beneficiaries of the new rights granted by the amending Act do in fact benefit from them, and that those persons are not immediately stripped of them by general language in existing agreements. It seems, therefore, that a provision in a contract between a record company and a performer that purports to assign to the company all future rights to which the performer may become entitled would not be

Accordingly, any transfer clause is deemed ineffective unless the assigned right is specifically mentioned in the agreement¹⁷⁰. This provision may have neutralized a clause of a contract between a performer and a promoter stipulating that

*The artist assigns to the producer, for the whole world and term of copyright, the whole and exclusive reproduction rights as well as any other rights which he owns or may own in relation to the sound recording and to his performances such as fixated in the sound recording. The rights assigned include, without restrictions or limitations, the sole rights to do and authorize any of the following acts: to reproduce, to communicate, to perform, and use the sound recording without restrictions of medium, by all means known or yet to be discovered.*¹⁷¹

It may be assumed that this clause is in conformity with section 13 CA, paragraphs (4) to (7), such as applicable to performances as per section 25 CA, providing for a global assignment without any restriction¹⁷².

Although a provision slightly less intrusive than in 1921, section 58.1 CA conveys a “pure” retroactive effect that has been criticized during the parliamentary hearings as it allegedly unduly interfered with existing agreements¹⁷³. Critics argued that such interference would create legal uncertainty as any change in the terms of the contract may disrupt the chain of titles originating in that contract and possibly affecting subsequent agreements such as licence agreements in other territories as well as sub-licence agreements¹⁷⁴. In addition, it was argued

effective to assign such rights as the blank-tape levy or the right to equitable remuneration for public performances or telecommunication that the 1997 Act first conferred on performers in respect of their performances. The assignment would be effective only if the agreement contemplated the future enactment of these particular rights and referred to them specifically in the granting language in such terms that the performer was made aware of what he was giving up.

¹⁷⁰ From a civil law point of view, since copyrights are characterized as movables, this approach would be consistent with article 1453 of the *Civil Code of Québec* which states that:

[t]he transfer of a real right in a certain and determinate property, or in several properties considered as a universality, vests the acquirer with the right upon the formation of the contract, even though the property is not delivered immediately and the price remains to be determined.

The transfer of a real right in a property determined only as to kind vests the acquirer with that right as soon as he is notified that the property is certain and determinate.

¹⁷¹ See Schedule, and terms of articles 1.2 and 8 of the Exclusivity Contract.

¹⁷² S. 13(4) CA: “The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof, and may grant any interest in the right by licence, but no assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by the owner’s duly authorized agent”. See J.-P. Mikus, *ALAI Montebello* at p. 144.

¹⁷³ See *Proceedings of the Standing Senate Committee on Transport and Communications*, Issue 14, Transcript (Evidence) of Proceedings for the afternoon session, Ottawa, April 15th, 1997, presentation of the late M. Mayer on behalf of the Joint Copyright Legislation Committee of the Patent and Trademark Institute of Canada and the Canadian Bar Association, www.parl.gc.ca/35/2/parlbus/commbus/senate/com-e/tran-e/14evb-e.htm?Language=E&Parl=35&Ses=2&comm_id=19.

¹⁷⁴ See *Proceedings of the Standing Senate Committee on Transport and Communications*, Issue 17, Morning session, Ottawa, April 21st, 1997, presentation of Ms. Susan Peacock on behalf of the Canadian Motion Picture Distributors Association, www.parl.gc.ca/35/2/parlbus/commbus/senate/com-e/tran-e/17eva-e.htm?Language=E&Parl=35&Ses=2&comm_id=19.

that such retroactivity would possibly give rise to territorial conflicts of laws since section 58.1 may not discriminate among contracts governed by foreign laws¹⁷⁵. Further, contradictory title of ownership could coexist where a foreign court declared that the terms of the contract supported the transfer of the new rights¹⁷⁶. These criticisms have nonetheless given way to the legislative intent to guarantee the actual benefit of the new rights.

Equity may be of little assistance in order to determine whether the transfer of the entire set of pre-existing rights conveys the new ones, since one who has clearly expressed his intention to assign all his rights for any and all known or yet to be discovered uses, without exceptions, could bear a heavy burden in trying to convince that all future rights have been reserved or that he is entitled to an additional remuneration.

Under the current state of the law, despite the lack of a clear transfer clause, an assignment may be held valid as per section 13(4), such as applicable to rights in performances by virtue of section 25 CA. The courts have steadily adopted the position that, although “the requirement of a written agreement is a substantial legal requirement without which the transfer is invalid”¹⁷⁷, section 13(4) CA does not require that the written agreement refer to an assignment or to copyright as a condition of its validity¹⁷⁸. It suffices that the agreement, signed by the copyright owner, clearly indicates that his true intention was to assign the copyright¹⁷⁹.

Yet, some doubts remain in light of the following observation:

A provision that prevents agreements made before April 25, 1996, from being construed so as to assign or exclusively license the new copyrights and rights of remuneration may

¹⁷⁵ *Ibid.*, referring to the previous presentation of April 15, 1997.

¹⁷⁶ See for example in the UK, s. 191C of *The Copyright and Related Rights Regulations 1996* S.I. 1996/2967, c.i.f. Dec.1st, 1996, www.legislation.hmsso.gov.uk/si/si1996/Uksi_19962967_en_1.htm#end, which adopts a different solution:

(1) *This section applies where by an agreement made in relation to a future recording of a performance, and signed by or on behalf of the performer, the performer purports to assign his performer's property rights (wholly or partially) to another person.*

(2) *If on the rights coming into existence the assignee or another person claiming under him would be entitled as against all other persons to require the rights to be vested in him, they shall vest in the assignee or his successor in title by virtue of this subsection.*

(3) *A licence granted by a prospective owner of a performer's property rights is binding on every successor in title to his interest (or prospective interest) in the rights, except a purchaser in good faith for valuable consideration and without notice (actual or constructive) of the licence or a person deriving title from such a purchaser. References in this Part to doing anything with, or without, the licence of the rights owner shall be construed accordingly.*

(4) *In subsection (3) "prospective owner" in relation to a performer's property rights means a person who is prospectively entitled to those rights by virtue of such an agreement as is mentioned in subsection (1).*

¹⁷⁷ N. Tamaro, *The 2005 Annotated Copyright Act*, Toronto, Thomson Carswell, 2005, at p. 372, quoting *Bradale Distribution Enterprises Inc. v. Safety Firts Inc.* (1987), 18 C.I.P.R. 71 (C.S. Qué.).

¹⁷⁸ See J.-P. Mikus, *Canadian Report* (Cd-Rom), ALAI Budapest.

¹⁷⁹ *Turgeon v. Michaud* (2003), REJB 2003-43940 (C.A. Qué.) at para. 71. On that decision, see B. St-Sauveur & L.-A. Vincent, “The *Turgeon* Case Law or the Not so Traditional Issues of Assignment” (2003-04) 17 *I.P.J.* 287.

*be taken as evidence of a more general legislative signal to courts to protect performers from over-easy relinquishment of their rights in favor of record companies.*¹⁸⁰

This approach could be seen as being consistent with the Copyright Board's decision in *Retransmission of Distant Radio and Television Signals for the years 1992, 1993 et 1994*¹⁸¹, where the board adopted the reasons in the case of *CBS., Inc v. Viacom Int'l, Inc.*¹⁸² which were to the effect that, unless express terms are provided for, the assignment of right does not entail the assignment of a remuneration right.

It should also be borne in mind that assignments of future works or performances have been held valid¹⁸³. Where a performance takes place after the coming into force of the new rights, it is likely that the question as to whether the transfer involves those new rights, unless express reservations are provided for, will be debated and/or tried.

All in all, once it has been established that the agreement conveys ownership of the new rights, it will remain to be seen whether the eviction regime is available to the assignor. Any attempt to invoke the eviction regime will meet a significant hindrance, which simply stems from the language of the Act: it is clearly indicated that it is the "owner of the copyright" who may exercise the eviction right. Based on this limitation, one could argue that the eviction regime is not an expropriation regime, although their differences can be subtle and, at times, even unsettling¹⁸⁴.

The different points thus raised may, to a certain extent, also apply to contracts of services that may, depending on their terms and form, provide for the assignment of copyright or for the grant of an interest therein.

2.3. Contracts of Services

A contract may be characterized as a contract of services when and if certain criteria are met¹⁸⁵. Once it qualifies as such, an employer may rely on the belief that he is entitled to reap the fruits

¹⁸⁰ Y. Gendreau & D. Vaver, "Canada", *op. cit.* at para. 9[1][a][i].

¹⁸¹ www.cb-cda.gc.ca/decisions/r14011993-b.pdf.

¹⁸² April 30th, 1992 (N.Y. Supreme Court, unreported), confirmed by 595 N.Y.S. 2d 684 (App. Div., 1993). See Y. Gendreau & D. Vaver, "Canada", *op. cit.* at para. 4[2]c).

¹⁸³ In Québec, see *Turgeon v. Michaud* (2003), REJB 2003-43940 (C.A. Qué.) at para. 61; *Diffusion Y.F.B. inc. v. Disques Gamma (Québec)*, *Itée*, J.E. 99-1139 (C.S. Qué.), discontinuance of appeal on 20-02-01, C.A. Montréal, n°500-09-008192-999. Legally, the assignment occurs when one of the contractual conditions arises. At *common law*, such agreements appear lawful, see Y. Gendreau & D. Vaver, "Canada", *op. cit.* at para. 4[3]c): "[i]n the common law provinces, an agreement with respect to future works is effective in equity and may be specifically enforced once the work comes into existence".

¹⁸⁴ The expropriation right is usually associated with a public power prerogative. Even so, expropriation for private reasons seems admissible in certain cases: with regards to superfiary property, the superfiary may elect to buy out the owner at the end of the term which may be fixated contractually (arts. 1117 and 1118 *Civil Code of Québec*).

¹⁸⁵ Regarding these criteria, see S. Gilker, *op. cit.* as well as S. Handa, *op. cit.*, citing the following cases: *Les Amusements Wiltron Inc. v. Mainville* (1992), [1991] R.J.Q. 1930, 40 C.P.R. (3d) 521 (C.S. Qué.); *BBM Bureau of Measurment v. Cybernauts Ltd.* (1992), 42 C.P.R. (3d) 180 (Ont. Gen. Div.); *Pizza Pizza Ltd. v. Gillepsie* (1990), 33 C.P.R. (3d) 515, 75 O.R. (2d) 225 (Gen. Div.). See also article 2085 *Civil Code of Québec*; s. 6 SAQA *a contrario*: "For the purposes of this Act, an artist who regularly binds himself to one or several producers by way of engagement contracts pertaining to specified performances is deemed to practise an art on his own account"; and s. 5 SACA *a contrario*: "'artist" means an independent contractor described in paragraph 6(2)(b)".

of the work in consideration of which the employee was remunerated¹⁸⁶. This principle could be the explanation behind the presumption of ownership of copyright in favour of the employer with respect to a work made in the course of employment, as per section 13(4) CA.

Yet, section 24 CA, unchanged by Bill C-60, provides that the first owner of the copyright in a performer's performance is the performer. As a consequence, unless there is an agreement to the contrary, the Act applies strictly¹⁸⁷. On the other hand, if the contract of services is in writing, the employer may allege that this satisfies the conditions of a transfer of rights in his favour, in light of the judicial stance on section 13(4) CA, such as imported in Part II CA through section 25 CA¹⁸⁸.

After having addressed economic rapports from an individual perspective, we now turn to addressing the impact of the reform on relationships from a collective viewpoint.

¹⁸⁶ See A. Quaedvlieg, "Salaire, profit, propriété intellectuelle – observations générales sur le droit du travail, le droit de la propriété intellectuelle et le droit des sociétés" (1999) 11-3 *C.P.I.* 729; M.F. Bich, "Emploi et propriété intellectuelle – Méditations sur les droits moraux des salariés" (1999) 78 *Rev. B. Can.* 326. The courts have granted the employer ownership in a patent though no such provision could be found in the *Patent Act*; on this issue, see Y. Gendreau "La titularité des droits sur les logiciels créés par un employé" (1995) 12 *C.I.P.R.* 147; M.F. Bich, *op. cit.*; K. Puri, "Ownership of Employee's Inventions: A Comparative Study" (1998) 12 *I.P.J.* 1.

¹⁸⁷ This interpretation is consistent with the ruling in the case of *Bishop v. Stevens*, *op. cit.* Professor Quaedvlieg may also be quoted, *op. cit.* at p. 740:

[our translation] *It's with too much complacency that intellectual property rights are perceived as the fruits of labour. Truly, it is only the intellectual creation as such – the invention or the work – which is the fruit of labour. This creation goes to the employer who may reap its benefits and use it. Conversely, the (right to apply for) a patent or the copyright in a work are the fruits of the labour of the employee. It is not the employee who creates the exclusive right. It is the legislator who bestows it, based on social and economic benefits considerations. The exclusive right is hence related to other reasons than labour as such and belongs to a much wider context than the narrow relationship between an employer and her employee. The legislator creates, through the exclusive right, an incentive to technical and cultural innovations. The choice as to whom should benefit from this incentive or as to how it should be distributed should thus be guided by the law, which creates the incentive, rather than by other sets of rules.*

¹⁸⁸ See *supra* section 2.2 and the *Turgeon v. Michaud* case, *op. cit.*

3. LEGISLATIVE REFORM EFFECTS ON COLLECTIVE REGIMES

Collective representation for the purpose of organizing contractual relationships is often used to level the playing field and rationalize these relationships. Collective representation is structured through various regimes which are each likely to be influenced by a reform. Its potential effect on collective regimes for employed or self-employed artists (3.1) and for rights management (3.2) will be discussed in the same order.

3.1. Collective Regimes for Labour Relations

The observations on individual contracts should apply *mutatis mutandis* to collective agreements governing work relationships involving employed performers¹⁸⁹. One should mention that the SAQA provides that it “does not apply to a person whose services are retained for an occupation contemplated by a certification granted under the *Labour Code* (R.S.Q., c. C-27) or a decree passed under the *Act respecting collective agreements decrees* (R.S.Q., c. D-2)”¹⁹⁰. In practice, as soon as a performer becomes member of a union, the provisions of the SAQA are excluded¹⁹¹.

With respect to labour relations involving self-employed performers, it should be pinpointed that audio performers have long ago regrouped within professional associations, some of which were actually parties to collective agreements prior to protective legislation¹⁹². Following UNESCO's *Recommendation concerning the status of the artist*, Québec and Canada gave performers access to collective negotiation schemes normally reserved to employed workers by enacting federal and provincial legislation on the status of the artist¹⁹³. The federal Act, for reasons of distribution of constitutional powers¹⁹⁴, essentially applies to federal institutions and broadcasting undertakings under the jurisdiction of the Canadian Radio-television and Telecommunication Commission¹⁹⁵. In Québec, the SAQA is has a significant scope in the sense that certified associations have the exclusive power to represent any artist of the sector defined by the CRAAAP.

¹⁸⁹ Refer to instrumental ensembles' collective agreements, such as symphonic orchestras'.

¹⁹⁰ S. 5 SAQA.

¹⁹¹ See the Collective agreement involving the Montréal Symphonic Orchestra (“MSO”). Note that an agreement between the *Union des artistes* and the MSO, among others, exists and applies to self employed artists.

¹⁹² See M. Adler, “Historique, typologie, objet et importance des rapports collectifs de travail impliquant des associations ou syndicats d'auteurs et d'artistes au Québec”, Canadian Report, ALAI Montebello at pp. 891 and 894.

¹⁹³ See M. Morgan, General Report, ALAI Montebello, p. 965, at p. 970; *Act respecting the professional status and conditions of engagement of performing, recording and film artists* (“SAQA”), R.S.Q., c. S-32.1; *Status of the Artist Act* (“SACA”), S.C. 1992, c. 33; L.R.C. 1985, c. S-19.6.

¹⁹⁴ The federal government has exceptional jurisdiction with respect to labour relations within undertakings under its jurisdiction. See E. Lefebvre, “Du droit d'auteur au statut de l'artiste : étude comparative des législations applicables dans un contexte de droit civil et examen comparatif des pouvoirs de leur forum décisionnel” in *Institutions administratives du droit d'auteur*, Y. Gendreau (dir.), Cowansville, Yvon Blais, 2002, p. 161 at p. 193, quoting R.P. Gagnon, *Le droit du travail au Québec*, Cowansville, Yvon Blais, 3rd ed., 1996 at p. 3.

¹⁹⁵ S. 6 SACA. For a presentation of the various group agreements under this Act, see E. Lefebvre, *op. cit.* at p.232.

Both Acts provide for a framework regarding minimum conditions with respect to the hiring of artists. In Québec, the negotiation of a first group agreement is compulsory where a negotiation notice is filed by a recognized artists' association, an association of producers, or a producer who is not a member of an association of producers¹⁹⁶. A similar procedure applies at the federal level¹⁹⁷. In Québec, the group agreement will bind the producer and any artist belonging to the related negotiating sector who is hired by him¹⁹⁸. If an agreement is reached with an unrecognized association of producers, this agreement will bind any producer who is a member of this association¹⁹⁹. If an agreement is reached with a recognized association of producers, this agreement will bind any producer, in the related negotiating sector, whether he is a member or not of this association²⁰⁰. At the federal level, a similar principle applies²⁰¹.

However, the contractual relationship between a performer and a producer will require an individual agreement whose terms and conditions may be freely negotiated within the framework set out by the minimum conditions of the relevant group agreement²⁰². Any departure from the legal threshold may be reviewed by the CAPPRT²⁰³ or the arbitrator in Québec²⁰⁴, as only more favourable conditions can be included in the individual agreement.

The content of these minimum conditions has been reviewed by the TCRPAP with respect to a dispute over the issue as to whether the minimum conditions could apply to the use of pre-existing works and, consequently, to copyright. For example, the Tribunal stated the following:

[57] In the Tribunal's view, the Status of the Artist Act was intended to complement and supplement the regime provided in the Copyright Act. It is intended to do so by providing artists with an additional mechanism to obtain compensation for their work, thereby enhancing and promoting artists' freedom of choice as to how they will exploit the fruits of their creative talents.

[58] The statute must be given an interpretation that will fulfill Parliament's intention of improving the socio-economic status of artists in Canada. The Act mandates certified artists' associations to represent the socio-economic interests of artists. It follows, therefore, that any exclusions from the collective bargaining regime that Parliament has provided to self-employed artists would have to be clearly articulated in the Act. Parliament did not expressly

¹⁹⁶ Ss. 28, 30 and 33 SAQA. Note that if the negotiation and the mediation fail, either party may request the designation of an arbitrator and that his award will have the same effect as a collective agreement (s. 33 para. 3). The rules of procedure are those found in the *Labour Code* (s. 33.1 SAQA). The arbitrator decides according to equity (s. 79 *Labour Code*). The only recourse is a judicial review. An award can only impose a collective agreement if no agreement binds the parties (s. 33 para. 1). There are no federal rules addressing a failure in the negotiations.

¹⁹⁷ S. 32 SACA.

¹⁹⁸ S. 40 SAQA.

¹⁹⁹ S. 32 SAQA.

²⁰⁰ *Ibid.*

²⁰¹ S. 33 SACA.

²⁰² S. 8 SAQA: "Every artist is free to negotiate and agree the conditions of his engagement by a producer. An artist and a producer bound by the same group agreement cannot, however, stipulate a condition that is less advantageous for the artist than the condition stipulated in the group agreement";

s. 33(4) SACA: "A scale agreement applies notwithstanding any inconsistency with a contract between an artist and a producer, but it shall not be applied so as to deprive an artist of a right or benefit under the contract that is more favourable to the artist than is provided for under the agreement".

²⁰³ S. 33(5) SACA: "The Tribunal shall assess what is more favourable to the artist pursuant to subsection (4) in relation to each right or benefit, and shall compare the elements of each right or benefit under the scale agreement with the elements of each under the contract".

²⁰⁴ S. 35.1 SAQA: "The group agreement shall include a grievance arbitration procedure".

exclude matters related to copyright from the ambit of collective bargaining. Indeed, the Act contains no express limitation on an artists' association's right to bargain with producers about any matters affecting the socio-economic interests of its members. This is consistent with Canadian labour law generally, in which the duty to bargain has been held to encompass any subject matter the parties consent to include in a collective agreement.

[...]

[61] The advent of the Status of the Artist Act provides a third option for certain artists. The Act enables certified artists' associations to negotiate with producers in the federal jurisdiction for the purpose of entering into scale agreements that establish the minimum terms and conditions that will apply to the provision of artists' services and other related matters. In the Tribunal's view, the right to use an existing work is a service that the artist who holds the copyright in that work may provide to a producer, and representing artists' interests in this fundamental socio-economic right is an appropriate activity for a certified artists' association. As an example, the artists' association may seek to negotiate with a producer provisions regarding the minimum fee to be offered to an artist in the sector for the use of one of his or her works in a new medium or as the basis for an adaptation.²⁰⁵[our emphasis]

In Québec, a similar approach was followed in the case of *Ass. des producteurs de films et de télévision du Québec v. Association des réalisateurs et des réalisatrices du Québec*²⁰⁶. At issue was an alleged excess of jurisdiction of the arbitrator on the grounds that he had contemplated the possibility of including copyright issues in the minimum conditions of the group agreement. The Superior court held the following:

[34] It is too narrow an interpretation of the arbitrator's mandate. The latter is authorized to take into account elements which are relevant for the purpose of defining the service to be provided by the artists, including, as the case may be, certain elements pertaining to copyright. [our translation]

The court took the view that it was important to analyse the industry's contractual practices and that it was reasonable to link the service provided to the use of the economic rights in relation with this service. In this respect, the Court thought it was opportune to quote an excerpt of the arbitrator's ratio referring to the Supreme Court's decision in the case of *Desputeaux v. Éditions Chouette (1987) inc.*²⁰⁷:

[our translation] *In these excerpts, the Supreme Court clearly indicates that the so-called intangibility of copyright is nothing but a facade which well conceals the fact that the financial aspect of the relationship between the copyright owner and those who want to use a work is the main driving force behind the Copyright Act. Yet, one of the consequences of the association's recognition by the Commission is to allow it to "defend and promote the economic, social, moral and professional interests of the artists", to "represent the artists in every instance where it is the general interest that it should do so", particularly through the negotiation of group agreements (ss. 24. 1°, 2° and 7 [SAQA]). In addition, section 41 of the same Act provides that the recognized association may exercise the recourses of the artists it represents under the group agreement without having to establish an assignment of the claim of the member concerned, which is a clear indication of the exclusive representation power of the recognized association. The language of the various provisions in [SAQA] brings us to the conclusion that the*

²⁰⁵ CAPPRT, Decision n°28, Ottawa, November 17, 1998, www.capprt-tcrpap.gc.ca/epic/internet/incapprt-tcrpap.nsf/en/tn00080e.html; application for judicial review dismissed by the Federal Court of Appeal, *Canada (Attorney General) v. Writers' Union of Canada*, 2000 CanLII 16507 (F.C.A.).

²⁰⁶ 2004 IJCan 490 (C.S. Qué.).

²⁰⁷ 2003 SCC 17 CanLII.

*recognized association may qualify as a duly authorized agent as per section 13(4) Copyright Act. One will also conclude that the interconnection between film and television artists and the fact that the Copyright Act provides for moral rights but mostly economic rights are such that the least the tribunal can do is establish in its ruling the minimum conditions as to the exercise of copyright where there is a work, as defined in the Copyright Act.*²⁰⁸ [our emphasis]

Subject to confirmation, according to the foregoing analysis, where the recognized association is a duly authorized agent as per the CA, by virtue of the SAQA²⁰⁹, nothing prevents the association from negotiating minimum conditions regarding copyright in their members' performances. One could further suggest that an association should be readily proactive in this respect, as these minimum conditions belong to the field of interests that the association is in charge of protecting.

Since the group agreement binds the producer and any artist which he hires, the minimum conditions will be binding when comes the time to negotiate an individual agreement²¹⁰. In such an occurrence, the main question is whether a group agreement binds in advance a performer in relation to future uses or future rights. Several problems may arise in this respect.

The first one relates to the scope of the negotiating sector, which, in theory, sets the boundaries of the group agreement. For example, the sector granted to the Québec Musicians' Guild, explicitly excludes copyright:

[our translation] *Any artist who practises the art of instrumental music in any artistic production sphere, including any person who sings while playing music with respect to the instrumental part of his performance, on the Québec territory, excluding the entire field of copyright.*²¹¹

The exclusion of copyright does not appear conclusive in light of the CRAAAP's ruling in the case of *Guilde des musiciens du Québec et Association québécoise de l'industrie du disque, du spectacle et de la vidéo*²¹². According to the Commission, historically, the exclusion of copyright served the objective of avoiding "frictions" with copyright management collectives and to formally acknowledge the agreements between these collectives and the Guilde, which were signed in 1990 for the purpose of confirming that the Guild would not act in this field²¹³. Nevertheless, the Commission asserted that the fact that these private agreements were acknowledged should not have the effect of numbing a definition of the negotiating sector that

²⁰⁸ *Ibid.*

²⁰⁹ S. 41 SAQA: "The recognized association may exercise the recourses of the artists it represents under the group agreement without having to establish an assignment of the claim of the member concerned". At the federal level, though not expressed in the same terms, the association is also deemed to have bargaining powers *ipso jure*. S. 28(5) SACA: "After certification of an artists' association in respect of a sector, (a) the association has exclusive authority to bargain on behalf of artists in the sector". [our translation]

²¹⁰ *Contra*, E. Lefebvre, "Du droit d'auteur au statut de l'artiste : étude comparative des législations applicables dans un contexte de droit civil et examen comparatif des pouvoirs de leur forum décisionnel" in *Institutions administratives du droit d'auteur*, Y. Gendreau (dir.), Cowansville, Yvon Blais, 2002, p. 161 at p. 187: "[...] we consider that an agreement that provides for use rights does not apply to a copyright owner who has not expressly authorized an association to represent him for this purpose".

²¹¹ CRAAAP, decision of November 25th, 1991, G.O. 14-12-91.

²¹² CRAAAP, decision of March 19, 2004, D.T.E. 2004T-563, www.craaap.gouv.qc.ca/fichiers/documents/contenu/decisions/2004_03_19.doc.

²¹³ *Ibid.*, para. 87.

pertains to public order²¹⁴. It follows that if the question arose where a use came under the jurisdiction of the SAQA, the Commission may depart from the agreement, such as it more fully appears from the following passage:

[87] In these agreements, the GUILDE sets out the functions it intends to carry out in respect to the definition of the sector. The agreement's subject matter however concerns something else, the prevention of frictions between associations legally responsible for copyright, on one hand, and labour relations, on the other. According to this agreement, the parties agree that if the Commission were to conclude that some of the artists who fulfil the listed functions are creators in the sense of section 2 of the Act, and hence governed by the Act, there should not be any confusion regarding the role of copyright management collectives and the recognized association. The Commission did not have to carry out this exercise and conclude this way, and no evidence was provided in this respect. The debate did not take place.²¹⁵ [our translation]

Other restrictions in relation to the negotiating sector derive from the definition of the fields of artistic endeavour listed in the SAQA. The Commission has indicated that the list of fields is exhaustive, and that an artist or a producer is only defined by reference to these limited fields of artistic endeavour²¹⁶. Regarding the latter aspect, the Commission specified that, “as opposed to the federal act, section 1 of the Act lists the fields of artistic endeavour and section 2 provides, as an essential condition to the definition of *artist* and *producer*, that each other acts *in a field listed in section 1*”²¹⁷. The Commission took the view that an interactive multimedia production was not mentioned in any of the fields listed in section 1 SAQA. Nonetheless, the Commission recognized that this type of artistic endeavour could indirectly come under the jurisdiction of the Act where it managed to fit in one of its fields. Analysis of section 2 SAQA, regarding the definition of « film », could allow to house multimedia production since the definition refers to any “medium, including video” and to a “cinematographic effect”. The Commission also held that multimedia production could fit in the category of records and other sound recording modes:

[314] Finally, in the fields of records and sound recordings – subject matters which, at face value, take us to the core of the issue – the evidence disclosed by the SPACQ provides a good illustration that interactive media can be used in different ways. The testimony of Mr. Gilles Valiquette on the evolution of sound recordings and on the production which he presented to the Commission clearly shows that the use of multimedia, because of its flexibility, can enter the field of records or sound recordings, with the usual elements of sound, fixed or moving image, text and a varying portion of interactivity. This way of promoting or enhancing the record or the sound recording is well known and reminds us that like “videoclips”, it is technically possible that the multimedia work, seen as a whole, including in its advanced interactive versions, belongs to this field addressed by the Act. [our translation]

During the abovementioned testimony, express reference had been made to MP3 files²¹⁸ and to the difference between an analog and digital recording²¹⁹. Based on this set of considerations, one may be ready to accept that the field of digital sound recordings for online use is covered by the SAQA. At the federal level, it may be permitted to consider that the scope of the SACA

²¹⁴ *Ibid.*, para. 90.

²¹⁵ *Ibid.*

²¹⁶ *Association des producteurs en multimédia du Québec et Union des artistes, CRAAAP*, decision of April 17, 2002, D.T.E. 2002T-613.

²¹⁷ *Ibid.* at para. 292.

²¹⁸ *Ibid.* at para. 178.

²¹⁹ *Ibid.* at para. 177.

regarding sound recordings²²⁰ would be interpreted similarly since, according to the CA, sound recording means “a recording, fixed in any material form, consisting of sounds”²²¹. Any other solution would create a discrepancy in the legislator’s approach to a same subject matter, or even to a connected sphere²²².

The second problem relates to the scope and the effect of the minimum conditions. Because the group agreement binds any association member, these minimum conditions set out a threshold below which a performer cannot negotiate. Depending on how said conditions are construed, they may become adverse to a performer’s interests. Let us consider the example of a group agreement comprising clauses which read as follows:

12.01. The conclusion of a service agreement entails assignment in favour of the PRODUCER of the right to fix any performer’s performance in relation to the contract for services, and, subject to the agreed fee therein, conveys the exclusive, perpetual and irrevocable authorization to use any such fixation by any means and in any medium, known or yet unknown, without any time or territory restriction.

12.02 Provisions of article 12.01 do not preclude the star musician from negotiating, in her exclusivity agreement, restrictions to the use rights granted to the PRODUCER by virtue of section 12.01.

*12.09 Nothing in this agreement shall be construed as a waiver or assignment in favour of the PRODUCER of a right or power of the musician to collect or keep any amount owed to her by virtue of any legislation, convention or agreement, whether Canadian or foreign, or, whether current or future, in relation with the use of her performance performed under this agreement as long as such a use is not subject neither to the performer’s authorization nor to the PRODUCER’s, such as equitable remunerations of for private copying.*²²³ [our translation]

Consequently, when the performer adheres to the contract for services, the payment of the remuneration set out in the relevant tariffs entails the assignment of the fixation right and allows the producer to freely use the artistic performance.

Some agreements provide that the (contractual) remuneration right follows the mastertape, notwithstanding who the owner is²²⁴, thus creating a contractual mechanism closely related to that of section 17(2) CA regarding a contractual remuneration right for a performance embedded in a cinematographic work, which can be enforced against any sub-assignee of the copyright in the cinematographic work. If the contract for services overrides a period preceding and succeeding the date of introduction of new rights, a question as to whether a performer can enforce his remuneration right against a third party may arise. If the conclusion of a contract for services entails the “*exclusive, perpetual and irrevocable authorization to use any such fixation by any means and in any medium, known or yet unknown, without any time or territory restriction*”, it may not, in principle, entail the assignment of future rights, even though, in

²²⁰ S. 6(2)(iii).

²²¹ S. 2 CA.

²²² If one considers that the SACA is related to the CA, one could apply the rules of interpretation on conflict of laws. These rules apply not only to connected federal statutes but also to connected federal and provincial statutes. See P.-A. Côté, *Interprétations des lois*, Montréal, Thémis, 3rd ed., 1999 at pp. 433ff.

²²³ Group agreement between the *Guilde des musiciens du Québec* and the *Association québécoise de l’industrie du disque, du spectacle et de la vidéo pour le phonogramme* (“Guilde-ADISQ Agreement”), 1996-1998, www.adisq.com/doc/pdf/entente-guilde-ADISQ-phono.pdf.

²²⁴ S. 12.11, *ibid*.

practice, it carries the effect of an assignment as a result of exclusivity and of the broad definition of uses which possibly overlap with uses covered by the new right. To illustrate the distinction, one could draw a line between the concept of assigning a right and the concept of authorizing to do something which happens to be covered by a right.

Moreover, abovementioned clause 12.09 could possibly be seen as an indication that the assignment does not include future rights. Such rights, notably the right to make available, which will directly become the property of the performer, may be enforced against a third party unauthorized to do any of the acts governed by the rights or in breach of his contractual obligation to make a payment for the use of the performance.

If the contract for services sets out a remuneration based only, for instance, on the sale of phonograms defined as tangible copies, this will likely prompt the question as to whether the online sale of intangible phonograms by means of digital files entails a right to remuneration in favour of the performer. One could imagine the situation where the contract for services, which addresses the basis for remuneration, is connected to a recording session contract which would contain a clause stipulating that “in consideration of the payment by the producer to the artist of the amount stipulated in this agreement and the group agreement, the artist authorizes the producer to fix the performance in any material form and to reproduce the fixation for the purpose of commercially exploiting the phonogram”²²⁵. In light of the clause of the group agreement regarding payment of royalties, one may be brought to think that the basis for remuneration stipulated in the contract of services is limited to sales of tangible copies²²⁶, whereas the payment of royalties on the sale of tangible copies entails the right to sell digital files of the same sound recording. This interpretation is potentially a ground for dispute, particularly where the distribution of sound recordings becomes exclusively web based²²⁷. This interpretation would however need to be confirmed, following a complete analysis of the whole group agreement, the accompanying recording session agreement and, where applicable, the exclusivity agreement, particularly when the rationale of some of these agreements seem to be limited to the distribution of hard copies²²⁸.

Once the question as to whether the use is in conformity with the set of agreements has been answered, in other words, whether the acts or uses are lawful, the question whether the eviction regime is available remains. Regarding this question, when addressing individual contracts without assignment, we came to the conclusion that it was impossible to assert that such a mechanism could be used against a contracting party, who had been authorized to do acts covered by the new rights.

At the end of the day, the introduction of new rights may affect the minimum conditions related to uses governed by copyright and also affect the definition of certain negotiating sectors or certain fields of artistic endeavour. The issue will be reiterated: may the new rights be deprived of effect by reason of minimum conditions whereas what is sought is to have these minimum conditions extended such as to ascertain the recognition of a maximum protection? An analysis such as the one undertaken in the example of the abovementioned case of *Moul c. Groenings*

²²⁵ See *Annexe B, Entente collective entre la Guilde des musiciens du Québec et l'Association québécoise de l'industrie du disque, du spectacle et de la vidéo pour le phonogramme* (“Entente Guilde-ADISQ”), from September 1st, 1997 to September 30, 2000, www.adisq.com/doc/pdf/UDA-ADISQ-phono.pdf.

²²⁶ See chapter 8-3.00 “Entente Guilde-ADISQ”; arts. 12-05 and letter of agreement No 4 regarding the definition of phonogram “Entente Guilde-ADISQ”; see specially Schedule, Article 9 - Royalties.

²²⁷ See IFPI, *Digital Music Report*, 2006, www.ifpi.com/site-content/library/digital-music-report-2006.pdf.

²²⁸ In addition the Union des Artistes – ADISQ agreement provides for specific letters of understanding covering new uses.

may have to be carried out with respect to the group agreements' conditions, in order to determine whether the operation of these agreements gives rise to situations qualifying as *rights* and *interests*, as per the eviction regimes, in connection with acts protected by the new rights. For example, one could also ask whether the group agreements truly contemplated the online distribution of music files or were limited to the sale of physical copies in a brick and mortar world. Any such analysis would have to be undertaken in accordance with the previously identified appropriate rules of construction.

The arrival of new rights could thus imply reopening negotiations in order to reconsider all minimum conditions, sector by sector, but also in order to provide the necessary conditions for the collective management of these new rights, where applicable. In addition, it may well be that the new rights impact the current collective management regimes.

3.2. Collective Management and its Regimes

Some have come to the conclusion that “the mandate to negotiate conditions solely related to copyright may not be conferred by the simple recognition of the association: a mandate or a written assignment by the right owner – which has not already been given to a collective management society – would appear to be necessary”²²⁹. This comment raises the question as to whether the terms of use that are included in a group agreement preclude the collective management of the rights governing such uses. Nothing would appear to prevent the collective management of the new rights. With respect to contracts for services, considering the lack of legal consequences to such agreements in terms of copyright ownership, which remains with the employee, collective management may create situations where the employer will have to make double payments to the performer-employee, for the use of his performance and for his labour²³⁰. Nonetheless, collective management plays an important role as it provides for a viable solution to minimize transaction costs²³¹. Moreover, collectives have also enabled right holders to increase their bargaining power²³².

²²⁹ C. Matteau & E. Lefebvre, “Les décisions du Tribunal canadien des relations artistes-producteurs visant le droit d’auteur” (1998) 10 *C.P.I.* 461 at p. 482 [our translation]; E. Lefebvre, “Du droit d’auteur au statut de l’artiste : étude comparative des législations applicables dans un contexte de droit civil et examen comparatif des pouvoirs de leur forum décisionnel” in *Institutions administratives du droit d’auteur*, Y. Gendreau (dir.), Cowansville, Yvon Blais, 2002, p.161 at p.188.

²³⁰ C. Doutrelepon, *General Report*, ALAI Montebello at p. 499.

²³¹ See G. Davies, “La gestion collective des droits et l’intérêt general” (March 1989) *Le droit d’auteur* 85. In light of digital technologies, the question as to whether other rights management options are available has been raised: see part. D.J. Gervais & A. Maurushat, “Fragmented Copyright, Fragmented Management: Proposals to Defrag Copyright Management” (2003) 2 *Can. J. of L. & Tech.* 5, http://cjltd.dal.ca/vol2_no1/pdfarticles/gervais.pdf (“[...] it may be that, with the aid of technology, the individual exercise of rights will become not only feasible but a more efficient solution, at least in certain cases”); see also M. Kretschmer, “The Failure of Property Rules in Collective Administration: Rethinking Copyright Societies as Regulatory Instruments” (2002) *E.I.P.R.* 126 (“In short, the transaction cost argument for collective administration from the cost of individual contracting may support a universal rights administration system (to which all rightsholders have access on similar terms), but a system where the major rightsholders selectively decide, supported by sophisticated information technology, whether collecting license fees is worthwhile”), quoted in D.J. Gervais & A. Maurushat, *op. cit.*

²³² See Copyright Board, Decision, *Tariffs 2.A - Commercial Television Stations in 1994, 1995, 1996 and 1997*, January 30, 1998, and the reasons of Michel Héту, then vice-president, observing that collective management “is the only way composers can avoid dealing with powerful users from a position of weakness”, at p. 48, www.cb-cda.gc.ca/decisions/m30011998-b.pdf; see also D.J. Gervais & A. Maurushat, *op. cit.* at p. 18: “[c]ollective management has also allowed authors to use the power of

Beyond these aspects, it is worthwhile to determine how the new rights and traditional practices will intermingle with the various collective management regimes for exclusive rights and remuneration rights. Two trends are anticipated: on the one hand, a trend towards questioning the distribution of collective management regimes (3.2.1), and, on the other, a trend towards challenging the availability of collective management regimes in relation to exclusive and remuneration rights (3.2.2).

3.2.1. The Distribution of Collective Management Regimes in Question

The right to make available and the reproduction right are both exclusive rights. One would hence assume that they both come under the same collective management regime. However, Bill C-60 adds to the definition of communication to the public by telecommunication set out in article 2.4 the act of making available whereas section 15(1.1)e defines the exclusive making available right without referring to communication²³³. Moreover, Bill C-60 expressly excludes the performers' making available right from the communication to the public by telecommunication remuneration right²³⁴ and also excludes it from the collective management regime applicable to the reproduction right, as per section 70.1 and following CA²³⁵. Two scenarios will be contemplated: i) the case where there is no such exclusion, and ii) the case where the exclusion is confirmed, in accordance with Bill C-60. In both cases, certain problems may arise.

i) Without such an exclusion, one could argue that the regime set out in sections 67 to 69 CA would apply with respect to the making available right under Part I CA but would not apply with respect to the making available right under Part II CA. The chief consequence to this discrepancy among regimes is that Part I CA right holders will be subject to a compulsory

collective bargaining to obtain more for the use of their work and negotiated on a less unbalanced basis with large multinational user groups [note 54]. [note 54] For instance imagine if corporations such as MTV or MuchMusic negotiated the use and fee for each song/video it broadcasted with individual artists. While artists like U2 or Madonna would be in a position to negotiate on a balanced power basis, the same would not be said for new groups struggling to find any airtime".

²³³ S. 2.4(1)a):

a person who makes a work or other subject-matter available to the public in a way that allows members of the public to access it through telecommunication from a place and at a time individually chosen by them communicates it to the public by telecommunication.

S. 15:

(1.1) Subject to subsection (2.1), a performer has a copyright in the performer's performance, consisting of the sole right to do the following acts in relation to the performer's performance or any substantial part of it:

e) to make a sound recording of it available to the public in a way that allows members of the public to access it through telecommunication from a place and at a time individually chosen by them.

²³⁴ S. 19(1):

If a sound recording has been published, the performer and maker are entitled, subject to section 20, to be paid equitable remuneration for its performance in public or its communication to the public by telecommunication, except for any making available referred to in paragraph 15(1.1)(e) or 18(1.1)(b) and any retransmission.

²³⁵ See s. 32 Bill C-60, substituting sub-paras. 70.1 a1) and b) CA.

tariff²³⁶ and will not be able to object to a use involving the making available right if a user has paid or offered to pay the royalties specified in an approved tariff²³⁷.

Part II CA right owners may be satisfied with a negotiation carried out without the assistance of the Copyright Board²³⁸. It will be observed that a user or a collective may elect to ask the Board to set a tariff for use royalties, but only where the collective responsible for the right covering the intended use, e.g. the making available right for online distribution, has agreed on the principle of authorizing the use covered by the royalty²³⁹.

Incidentally, it will be noted that the methods of defining the conditions of uses governed by the making available right may be troublesome, which may have an influence on the issue of the negotiation of the authorizations that are sought. This may trigger certain complaints from Part I right owners that would possibly imply an “asymmetry” in the tariff setting process²⁴⁰ or who would possibly question performers’ making available right tariff on grounds of restriction of competition, given that the conditions negotiated under the other regime may be different. It should be remembered that the CA provides that an agreement on a tariff which is not filed with the Copyright Board may trigger the application of section 45 *Competition Act*²⁴¹. The Commissioner of Competition, at the request of third parties, as the case may arise²⁴², may request the Board to examine the filed agreement. The agreement may be modified by the Board. Third parties could also avail themselves of section 36 *Competition Act*, which enables them to bring a civil action, in addition or in the absence of an intervention of the Commissioner of Competition, in relation to any act prohibited under section 45 *Competition Act*. Such a civil

²³⁶ Ss. 67.1ff CA.

²³⁷ Ss. 68.2 (2) and 70.19 CA.

²³⁸ Ss. 70.12, 70.191 CA. On the Copyright Board of Canada, see M. Héту, “La Commission du droit d’auteur : fonctions et pratiques” (1993) 5-3 *C.P.I.* 407; “Administrative Remedies under the New Copyright Act: The Role of the Copyright Board... and of Others” (1997) *Insight*.

²³⁹ S. 70.2. The Copyright Board was asked, on April 12, 2006, whether section 70.2(1) CA grants the Board jurisdiction to compel an agreement where the party with exclusive copyright rights does not wish to enter into such an agreement, in the matter of *Musisélect Inc. v. AVLA Audio-Video Licensing Agency Inc.*, 70-2-2005-01, Copyright Board (following settlement, the case was removed from the Board).

²⁴⁰ On the constraints and the “costs” inherent to proceedings before the Copyright Board of Canada, see *Institutions administratives du droit d’auteur*, Y. Gendreau (dir.), Cowansville, Yvon Blais, 2002; see also s. 92 Report at point B.1.2. Beyond the issue the costs of resources devoted to opposing a proposed tariff, from an economic viewpoint, setting prices outside the market may result in over-pricing or under-pricing the good or service. Some may claim that they have a competitive advantage over those who are subject to a regulated negotiation framework. One could also mention section 90 CA:

No provision of this Act relating to

(a) copyright in performer’s performances, sound recordings or communication signals, or

(b) the right of performers or makers to remuneration

shall be construed as prejudicing any rights conferred by Part I or, in and of itself, as prejudicing the amount of royalties that the Board may fix in respect of those rights.

²⁴¹ Ss. 70.5ff CA. S. 45 *Competition Act*, R.S. 1985, c. C-34, incriminates agreements which unduly restrict competition on the market. See *Institutions administratives du droit d’auteur*, *op.cit.*; see S. Bourque & al., *Loi sur la concurrence annotée*, Cowansville, Yvon Blais, 2000; Y. Bériault et al., *Le droit de la concurrence au Canada*, Scarborough, Carswell, 1999; M. Trebilcock & al., *The law and Economics of Canadian Competition Policy*, Toronto, University of Toronto Press, 2002; *Droit de la concurrence* (1993) 38-3 *R. D. McGill; Competition Act and commentary*, Markham, Butterworths, 2003.

²⁴² S. 9.1(c) *Competition Act*. It appears that only the Commissioner has access to a copy of the agreement (s. 70.5(4) CA). However, it has been reported that the Copyright Board of Canada appears in Schedule 1 of the *Access to information Act*, R.S.C. 1985, c. A-1. See Robic Léger, *op. cit.* under S. 70.5.

action may set grounds for a motion for injunction²⁴³. At the same time, these constraints on the collective management may favour professional associations who, in principle, are not subject to the provisions of the *Competition Act*²⁴⁴. Further, in case a licence request is denied or an exclusive licence is granted to a user by a collective managing performers' making available right, an action could be brought against the collective on the grounds of abuse of dominant position²⁴⁵. It will however be recognized that the application of the *Competition Act* provisions remains theoretical because, in practice, such situations are scarce, not to say non-existent.

It will also be observed that access to the negotiation regime set out in section 70.1 does not depend on publication in the sense of the CA, as opposed to the collective management regime set out in sections 67 to 69 CA in relation to the public performance and communication rights as per section 19 CA. This section provides that the artist is entitled to an equitable remuneration for the performance in public or the communication to the public by telecommunication of a sound recording that has been published. In relation to sound recordings, "publication" means making copies of a sound recording available to the public²⁴⁶. Until this definition is clarified, it may be uncertain whether digital copies are covered by the term "copies". If it were to exclude digital copies, an awkward situation would arise where a performer would not be entitled to claim a remuneration right for the public performance in clubs or for the communication to the public by telecommunication sound recordings by means of webcast²⁴⁷. This would become irrelevant should the CA reflect article 15(4) WPPT which provides that "for the purposes of this Article, phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them shall be considered as if they had been published for commercial purposes".

In any event, the share of the market of "unpublished" sound recordings associated with the online distribution of digital music files may have to be taken into account for the purpose of setting the rate of the equitable remuneration in relation with the same sound recordings, in their published version. This may prove burdensome although solutions may be available in the light of the trend initiated by the Board in relation to the Modified Blanket Licence²⁴⁸. The underlying principle of such a licence is that the tariff may be reduced in order to reflect the existence of rights which do not enter the market of uses covered by a remuneration right. The Board made the distinction between "back-end" and "front-end" markets.

²⁴³ See *Competition Act and commentary*, Markham, Butterworths, 2003 at pp. 21ff.

²⁴⁴ S. 4(1)a) *Competition Act*. See *Cie France-Film v. Guilde des musiciens de Montréal*, [1985] C.S. 1076, to the effect that section 4(1)a) *Competition Act* applies to associations such as the *Guilde*. However, that solution is not irrefutable since the function of the associations may have changed from negotiating working conditions to negotiating conditions of uses protected by copyright. See *supra*, section 3.1.

²⁴⁵ See Competition Bureau, *Intellectual Property Enforcement Guidelines*, www.competitionbureau.gc.ca/internet/index.cfm?itemID=1286&lg=e. See M. Renaud & D. Thérien, "Droit de la concurrence et propriété intellectuelle: antinomie ou complémentarité?" (2003) 197 *Développements récents en droit de la propriété intellectuelle* 329; W.T. Stanbury, "Competition Policy and the Copyright Act in Canada" in *Institutions administratives du droit d'auteur*, *op. cit.*

²⁴⁶ S. 2.2 CA.

²⁴⁷ "Internet Radio", "streaming" or "webcasting". On these notions, see F. Kozamernik, "Webcasting – the broadcaster's perspective" (March 2000) 282 *EBU Technical Review* at p. 23; OECD, *Webcasting and Convergence: Policy Implications*, OECD/GD(97)221 at p.15; B.H, www.oecd.org/dataoecd/12/13/2091391.pdf. Fan, "When Channel Surfers Flip to the Web: Copyright Liability for Internet Broadcasting" (2000) 52-3 *Fed. Comm. L. J.* 626.

²⁴⁸ Copyright Board, decision, January 30, 1998, *Tariffs 2.A - Commercial Television Stations in 1994, 1995, 1996 and 1997*.

Conversely, the question as to whether the existence of the making available right is dependant on that of physical copies may arise for two reasons: the first concerns the principle whereby the making available right is excluded from the public communication right as per article 15 WPPT²⁴⁹; the second concerns the absence of provisions similar to article 15(4) WPPT which creates a presumption of publication. Publication can be a criterion of copyright protection of the performer's performance²⁵⁰ and also of the availability or the type of a collective management regime²⁵¹.

ii) Under the second scenario (Bill C-60), the making available right is excluded from the collective management regime of section 70.1 and following CA. Unless one is prepared to consider that no collective management regime is applicable to this right²⁵², one has to conclude that it comes under the regime set out by sections 67 to 69 CA governing the collective administration of the public performance and communication right.

²⁴⁹ J. Reinbothe & S. von Lewinski, *The WIPO Treaties 1996*, Markham, 2002 at pp. 337 and 385. At p. 337:

[t]he right of making available has not been conceived as a part of a broader right of communication to the public, different from the corresponding right under Article 8 WCT. This is primarily due to the fact that that Contracting Parties did not want to provide for a broad, exclusive communication right to the public for performers and phonogram producers; and

at p. 385:

[a]s may be seen from the context between Articles 10 and 14 WPPT on the one hand and Article 15 on the other hand, the right of making available for access as described under Articles 10 and 14 WPPT is not covered by Article 15 WPPT. Accordingly, the definition of Article 2(g) WPPT, which was designed for the purposes (in particular) of Article 15 WPPT, must be interpreted as not covering the acts defined in Articles 10 and 14 WPPT, even if the wording of the definition in Article 2(g) WPPT might be considered to be broad enough to cover such making available.

²⁵⁰ 15(1) (see *supra* footnote 33):

15 (2) Subsection (1) applies only if the performer's performance

(a) takes place in Canada or in a Rome Convention country;

b) is fixed in

(i) a sound recording whose maker, at the time of the first fixation;

(A) if a natural person, was a Canadian citizen or permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act, or a citizen or permanent resident of a Rome Convention country, or

(B) if a corporation, had its headquarters in Canada or in a Rome Convention country, or

(ii) a sound recording whose first publication in such a quantity as to satisfy the reasonable demands of the public occurred in Canada or in a Rome Convention country;
or

(c) is transmitted at the time of the performer's performance by a communication signal broadcast from Canada or a Rome Convention country by a broadcaster that has its headquarters in the country of broadcast.

[our emphasis]

²⁵¹ S. 70.1 refers to s. 15 which may require publication, and access to ss. 68 to 69 is subject to the conditions of s. 19 which requires publication.

²⁵² See *infra*, para. 3.2.2.

Applying sections 67 to 69 CA to the making available right is challenging because of the fact that, as indicated, such a right is not recognized as a right of communication to the public by telecommunication²⁵³. It is startling that the latter's regime applies to a right that does not apparently belong there²⁵⁴. Further, it is no less startling to observe that the collective management regime which would hence apply to the making available right, *viz.* an exclusive right, is typically the same regime which governs the public performance and public communication by telecommunication rights of performers, *viz.* remuneration rights. The same comments regarding the issue of publication would apply here²⁵⁵.

The making available right may involve several events, including the communication to the public by telecommunication that occurs "when the music is transmitted from the host server to the end user"²⁵⁶. In this respect, the following comments on the WPPT are to be mentioned:

*The right of making available is defined by several elements. First of all, the act of 'making available' to the public for access covers the offering of performances for access and extends to the entire transmission to the user, if such transmission takes place. Accordingly, the mere establishment of a server which may be accessed individually by members of the public and at their choice regarding time and place constitutes the act of making available under Article 10 WPPT. If a performance is actually accessed, the whole act of making available is covered by the exclusive right, including the offering of the performance in a server and its entire transmission up to the terminal from which the member of the public gets access to the performance.*²⁵⁷

Furthermore, the making available right may also include a third event involving the reproduction right²⁵⁸ or the private copying exception²⁵⁹.

²⁵³ See J. Reinbothe & S. von Lewinski, *op.cit.* at p. 337; see *infra*, para. 3.2.2.

²⁵⁴ Yet, the subtitle "Collective Administration of Performing Rights and of Communication Rights" above section 67 CA refers to a "right of communication".

²⁵⁵ Bill C-60 provides that the making available right can only be invoked when certain conditions have been met. One of these conditions requires, in the absence of a producer, that the performance be fixed in a sound recording whose first publication in Canada was made available in such a quantity as to satisfy the reasonable demand of the public.

²⁵⁶ *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427 at para. 42.

²⁵⁷ J. Reinbothe & S. von Lewinski, *op. cit.* at p. 338.

²⁵⁸ The online music distributors reproduce musical works in digital files. See *Statement of Proposed Royalties to Be Collected by CMRRA/SODRAC Inc. for the Reproduction of Musical Works, in Canada, for the years 2006 to 2009, Webcasting Services*, Supp. C. Gaz. 2005.I. The *Agreed Statements concerning articles 7, 11 and 16 WPPT* provides that: "The reproduction right, as set out in Articles 7 and 11, and the exceptions permitted thereunder through Article 16, fully apply in the digital environment, in particular to the use of performances and phonograms in digital form. It is understood that the storage of a protected performance or phonogram in digital form in an electronic medium constitutes a reproduction within the meaning of these Articles", www.wipo.int/treaties/en/ip/wppt/statements.html.

²⁵⁹ The question whether a user can benefit from the private copy exception notwithstanding the legality of the reproduction is uncertain. The case of *BMG Canada Inc. v. John Doe* (F.C.), [2004] 3 F.C. 241, 2004 FC 488 and the decision of the Copyright Board in the File: *Private Copying 2003-2004*, Dec. 12, 2003, www.cb-cda.gc.ca/decisions/c12122003-b.pdf, have both held that the private copy exception applies notwithstanding the legality of the reproduction. However, see *BMG Canada Inc. v. John Doe* (F.C.A.), 2005 FCA 193:

[49] When the Motions Judge stated that, under subsection 80(1) of the Copyright Act, R.S. 1985, c. C-42, "downloading a song for personal use does not amount to infringement," he gave no consideration to the possible application of subsection 80(2) and the circumstances in which the defence of "private use" will not be available, such

It hence becomes particularly tricky to decompose the act of making available for the purpose of setting its own tariff whereas, by definition, such tariff should take into account, either positively or negatively, the proportion of each of the other events of which it is composed and which are nonetheless entitled to warrant a specific, distinct tariff.

The tariff would also have to correspond exactly to the situations where a performance embedded in a sound recording is made available "in a way that allows members of the public to access it through telecommunication from a place and at a time individually chosen by them". As mentioned by some authors, since the signing of the WPPT in 1996, new business models have emerged, thus requiring scrutiny over the ability of the user to choose the content of a series of performances and the time of use²⁶⁰. Indeed, these new business models now enable the user to select a programme and its contents which schedule was originally imposed by the provider. For example, it is possible to select, for listening purposes, a live DJ performance among others that had been broadcasted previously²⁶¹. The fact that the content of this performance, *viz.* each sound recording constituting the selection of mixes of recorded performances, cannot be selected should not affect the application of the making available right²⁶². To sum up, the difficulty in distinguishing, either conceptually or materially, the act of telecommunication from the act of making available to the public affects the determination of the appropriate collective regime.

3.2.2. The Availability of Collective Management Regimes in Question

In parallel, several elements bring us to consider that the availability of collective management of some equitable remuneration rights and, more arguably and less clearly, of the exclusive making available right are being put into question.

Regarding equitable remuneration, the first issue relates to the scope of the communication right that, as defined in the WPPT, would be required to ensure that performers and producers "enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public"²⁶³. Currently, under section 19 CA, where a sound recording has been published, the performer and producer are entitled to be paid equitable remuneration for its performance in public or its communication to the public by telecommunication, except for any retransmission. It had been suggested that Canada would be inclined to avail itself of the option offered by article 15(3)

as, inter alia, where the reproduction of a musical work embodied in a sound recording onto an audio recording medium is done for the sale, rental, distribution, communication by telecommunication or performance to the public.[...]

[50] The Motions Judge also did not appear to consider whether all the requirements for the application of the exemption relating to personal use contained in subsection 80(1) of the Copyright Act were satisfied. For example, if the users were not using an "audio recording medium", the defence of private copying would not be available. (See Copyright Board, Private copying 2003-2004 (December 12, 2003) and Canada (Canadian Private Copying Collective) v. Canadian Storage Media Alliance, 2004 FCA 424.)

Furthermore, see *Canadian Private Copying Collective v. Canadian Storage Media Alliance*, 2004 FCA 424, reviewing the decision of the Board.

²⁶⁰ J. Reinbothe & S. von Lewinski, *op. cit.* at p. 339.

²⁶¹ See for ex. www.d-i-r-t-y.com/index2.html?first=http://www.d-i-r-t-y.com/mixes.

²⁶² J. Reinbothe & S. von Lewinski, *op. cit.* at p. 340.

²⁶³ Art. 15 WPPT.

WPPT to issue a proviso to equitable remuneration in relation to sound recordings' retransmission²⁶⁴. This is confirmed by section 19(1) CA in Bill C-60.

The second issue, which calls into question the availability of collective management, concerns the exception regarding the transfer of a sound recording for the purpose of transferring it to a format appropriate for broadcasting²⁶⁵. As a format transfer entails the reproduction of a sound recording embedding a performer's performance, it may require the payment of a tariff. This issue may be troublesome where there is no *copy* of the fixed performance²⁶⁶ or no tariff²⁶⁷ readily available. As previously mentioned, it is not unrealistic to have sound recordings only available in digital files, particularly if the new rights were to effectively serve their purpose. This, in return, may require clarifying the definition of a "copy". Furthermore, as of today, no tariff appears to have been filed by any Part II CA right owner.

The third issue, which also brings into question the availability of the collective management regime, relates to the introduction of protections of technological measures ("TM"). Inasmuch as TM will allow the control of the use of performers' performances, one may need to ask whether their use should be taken into consideration in the process of setting a tariff for private copying. In this respect, it is worthwhile mentioning that Bill C-60 provides, under a projected section 34.02 CA, that the owner of copyright in a performer's performance is entitled to a broad set of remedies against anyone who circumvents, removes or in any way renders ineffective a technological measure protecting any material form of the performer's performance, including for the purpose of making a private copy²⁶⁸. Where TM protect a performer's performance and where the protection of TM proves effective, the rate of the remuneration for private copying may have to be modified, as indicated by the Copyright Board²⁶⁹.

One could also argue that the making available right cannot be managed collectively. This stems from the fact that, being formally excluded from the regime set up by sections 70.1 and following CA, the making available right would also be excluded from the regime set up by sections 67 to 69 CA, as this regime concerns the communication right. When reviewing the provisions of the WPPT, one will notice that performers' making available right was understood as a right separate from the communication to the public by telecommunication right²⁷⁰. This

²⁶⁴ Y. Gendreau, ALAI Budapest at p. 807. On retransmission in Canadian law, see Y. Gendreau, "Exporting Copyright Models: The Canadian Retransmission Regime and the Internet" (2003) 16 *I.P.J.* 547; see also J.-A. Français, "De l'adaptabilité des droits des organismes de radiodiffusion à l'adaptation du droit d'auteur" (2004) 16-3 *C.P.I.* 659 at pp. 708ff.

²⁶⁵ Ss. 30.8 and 30.9 CA.

²⁶⁶ S. 30.9(1) CA:

It is not an infringement of copyright for a broadcasting undertaking to reproduce in accordance with this section a sound recording, or a performer's performance or work that is embodied in a sound recording, solely for the purpose of transferring it to a format appropriate for broadcasting, if the undertaking:

(a) owns the copy of the sound recording, performer's performance or work and that copy is authorized by the owner of the copyright [our emphasis].

²⁶⁷ S. 30.9(6) CA:

This section does not apply if a licence is available from a collective society to reproduce the sound recording, performer's performance or work.

²⁶⁸ S. 27 Bill C-60.

²⁶⁹ Copyright Board, *File: Private Copying 2003-2004*, www.cb-cda.gc.ca/decisions/c12122003-b.pdf

²⁷⁰ J. Reinbothe & S. von Lewinski, *op. cit.* at p. 337:

seems to be reflected in Bill C-60 wherein, after a careful review of the provisions on the making available right, the recognition in favour of performers of an exclusive communication right cannot be detected²⁷¹. Although Part I CA right owners may “discover” a making available right in their pre-existing communication right, Part II CA right owners may not follow the opposite route and “discover” within their making available right an exclusive communication right in the fixed performance. Nonetheless, for the purpose of collective administration, shouldn't we rely on the new sub-paragraph 2.4 (1)(a) CA introduced by Bill C-60? It provides that “a person who makes a work or other subject-matter available to the public in a way that allows members of the public to access it through telecommunication from a place and at a time individually chosen by them communicates it to the public by telecommunication”²⁷². Based on this provision, the making available right may be reconciled with the conditions set out in sections 67 and 68 CA. Another question remains: doesn't the fact that the making available right is to be governed by this special collective management regime affect its exclusive nature? One could sketch a negative answer by observing that Bill C-60 does not provide for any incentive to administer the right collectively or to file a tariff. Section 67.1 (4) CA²⁷³ is not modified by the Bill so as to deprive the owner of the making available right of infringement remedies, should he decide not to file a tariff.

The foregoing questions should not shroud other options to assist in the negotiation process on conditions of uses governed by exclusive rights. These options may complement the solutions offered by collective management and further serve the reform's objectives.

[t]he right of making available has not been conceived as a part of a broader right of communication to the public, different from the corresponding right under Article 8 WCT. This is primarily due to the fact that that Contracting Parties did not want to provide for a broad, exclusive communication right to the public for performers and phonogram producers.

²⁷¹ It is the sole right in relation to the performer's performance “to make a sound recording of it available to the public in a way that allows members of the public to access it through telecommunication from a place and at a time individually chosen by them”. The right would hence be a right to allow access by telecommunication, viz. a right distinct from the right of communication to the public by telecommunication.

²⁷² Our emphasis.

²⁷³ S. 67.1(4) CA:

Where a proposed tariff is not filed with respect to the work, performer's performance or sound recording in question, no action may be commenced, without the written consent of the Minister, for

(a) the infringement of the rights, referred to in section 3, to perform a work in public or to communicate it to the public by telecommunication; or

(b) the recovery of royalties referred to in section 1.

4. COMPLEMENTARY OPTIONS WITH RESPECT TO REFORM EFFECTS

Artistic creation may be driven by motives other than financial ones, such as contributing to the common cultural heritage²⁷⁴. The primary model, however, remains property which gives an incentive to create through trade, which indirectly contributes to enriching the collective cultural heritage²⁷⁵. One could ask whether granting new rights to performers actually achieves the policy objectives underlying the legislative reform or, whether it is merely an empty promise, resulting in a shortfall. This relative application of the reform would ensue from the idea that any right granted to a group is inevitably acquired by another in the course of trade, according to contractual modalities which, more often than not, exclude terms of payment based on the success of the sales and which, instead, provide for a single buy out fee²⁷⁶. This triggered the following comments:

*Right owners are a split family, and thus a weakened family. Why? Simply because in the area of exclusive rights, producers seek the locks which guarantee the exclusive rights – and which will generate profit. But the performer has been bought out from the outset. And the exclusive right will not provide him with any additional wealth after this. Whereas, if he can avail himself of a remuneration right, it is the law that imposes the payment of a sum and even its percentage. In other words, if a producer has an interest in being under an exclusive right regime, a performer has an interest in being under a remuneration right regime.*²⁷⁷

As indicated, the CA seems to integrate the “back-end” relation between a producer and a performer. Indeed, in providing that the arrangements necessary for the first fixation of the sound recording include the arrangements for entering contracts with financial arrangements and technical arrangements, it is implicit that the contract will be drafted such as to ensure a return on investment²⁷⁸.

²⁷⁴ It has been observed that humanity’s cultural heritage could not be dependant on copyright as it existed long before the latter. See C. Geiger, *op. cit.* at pp.39ff.

²⁷⁵ This approach corresponds to an “utilitarian” justification of copyright, which favours incitement as a means for cultural policies. This approach seems largely recognized in industrialised countries and is not exclusive to a single legal tradition. See A. Françon, “Le droit d’auteur au-delà des frontières : une comparaison des conceptions civiliste et de common law” (1991) 149 *R.I.D.A.* 3.; C. Geiger, *op. cit.* at pp. 27ff.

²⁷⁶ See J.M Guilloux, *Guide de la négociation des contrats d’artistes - Les contrats d’enregistrement de phonogrammes*, Paris, ADAMI, 2005, 176pp. See M. E. Crespin (Moderator), W F. McDonough, N. Taylor, and P. Brennen (Panelists), “Restoring the Balance: Panel on Contracting and Bargaining” (2005) 28-4 *Colum. J. L. & Arts* 419.

²⁷⁷ P. Sirinelli, “Reproduction et dissémination sur les réseaux numériques du point de vue de la loi française” in ALAI Budapest at p. 269.

²⁷⁸ S. 2 CA:

“maker” means

(a) in relation to a cinematographic work, the person by whom the arrangements necessary for the making of the work are undertaken, or

(b) in relation to a sound recording, the person by whom the arrangements necessary for the first fixation of the sounds are undertaken.

S. 2.11 CA:

For greater certainty, the arrangements referred to in paragraph (b) of the definition “maker” in section 2, as that term is used in section 19 and in the definition “eligible

Rationally, one can expect that the higher the risks associated with the initial investment are, the higher the sought guarantee is, and the lower the consideration for the exclusivity will be. A divergence of interests appears clearly to the extent that one can wonder if performers' protection will really be increased where they are granted exclusive rights. Whereas the introduction of new rights provides for an improvement of the legal protection, it remains unsure whether it achieves the cultural policy objectives of improving the socio-economic status of performers. An eminent scholar observed in this respect that:

Under the sole conditions of the free market and freedom of contract, in the large majority of cases, an increasing extent of "substantive" protection leads to the paradox result that what is given to the author or performer by the right hand (or the legislators) is often taken from him at a ridiculous consideration by the left hand (or his contractual partner).²⁷⁹

Taken for granted that performers are, in a large number of cases, lacking bargaining power, the introduction of new rights may not give rise to any remuneration. This is all the more paradoxical given that the making available right, because of the uncertainties regarding its collective management regime, may not provide a remuneration. In any case, the nature of the right may, under certain circumstances, deprive the performer of a remuneration.

Solutions for a more balanced access to the wealth associated with the improvement of the legal status of performers may be available. *A priori*, there are two types of solutions: collective management as a means to balance contractual relationships and resorting to certain regimes providing a framework for the transfer of rights. The first solution must be examined in the light of the points addressed in the previous section. The second group of solutions should be examined in light of their availability or legal compatibility.

The CA sets up a minimal framework with respect to transfer of rights. Canada would hence simply follow the tradition of so called *copyright* countries which are traditionally barely interventionist²⁸⁰. Nonetheless, the constitutional jurisdiction of Provinces in contractual subject matters also explains this traditional reserve²⁸¹. As a result, the CA requirements regarding the validity of a transfer of copyright is limited to a contract in writing²⁸².

This minimalism may be questionable when exposed to the following statement:

maker" in section 79, include arrangements for entering into contracts with performers, financial arrangements and technical arrangements required for the first fixation of the sounds for a sound recording.

²⁷⁹ A. Dietz, "Amendment of German Copyright Law in Order to Strengthen the Contractual Position of Authors and Performers" (2002) 33 *I.I.C.* 828; see also W. Nordemann, "Towards a Basic International Regime of Copyrights Contracts" in *Intellectual Property and Information Law – Essays in Honour of Herman Cohen Jehoram*, La Haye, Londres, Boston, Kluwer Law International, 1998 at p. 217; W. Nordemann, "New Imperative Contract Rules Implemented Into the German Copyright Law" in *Mélanges Victor Nabhan*, (Special Issue) *C.P.I.* 309; B. Hugenholtz, "The Great Copyright Robbery", paper presented at *A Free Information Ecology in a Digital Environment Conference*, New York University School of Law, April 2nd, 2000, Institute for Information Law, University of Amsterdam, www.ivir.nl/staff/hugenholtz.html.

²⁸⁰ J.-P. Mikus, ALAI Montebello at p.131. See Y. Gendreau, "La civilisation du droit d'auteur au Canada" (2000) 1 *R.I.D.C.* at p.116.

²⁸¹ Y. Gendreau, *ibid.*

²⁸² Ss. 25 and 13(4) CA. This requirement has been broadly interpreted by the courts. See J.-P. Mikus, *Canadian Report* (on Cd-Rom), ALAI Budapest; *Turgeon v. Michaud* (2003), REJB 2003-43940 (C.A. Qué.).

*The exploitation of performers rights inevitably involves contractual arrangements in which, representing a somewhat less attractive aspect of the concept of closest neighbours, the performer is almost invariably the weaker bargaining party, not only in terms of sheer economic power but also in terms of available information and expertise. The importance of legislative provisions on the contractual terms of exploitation cannot, therefore, be over-emphasised as they may well be the last line of defence against an unreasonably exhaustive transfer of rights.*²⁸³

It also stands out against the protection measures in favour of the weaker party in force in foreign legislations, which are openly protective. The legal options implemented in some foreign jurisdictions (4.1) as well as the limits of these measures in regard to the Canadian standpoint (4.2) will be examined below. A comparative law approach allows us to put in perspective the scope of these measures as well as the apparent domestic minimalism.

4.1. Rights Transfer Rules

Protective measures such as rules of form (4.1.1), pro performer interpretation rules and public order considerations (4.1.2), transfer limitations rules (4.1.3), labour law influenced rules (4.1.4) and the German regime expressly aiming at strengthening contractual position of authors (4.1.5) will be examined below.

4.1.1. Rules of Form

One of the main protection measures is the requirement of an agreement in writing. This requirement has been presented as a means to satisfy three objectives: first, it provides the assignor with a time to ponder before any undertaking; second it favours an exchange of all the relevant information in relation to the agreement prior to signing; third, a written agreement will support evidence as to the intent of the parties with respect to the terms of the agreement²⁸⁴. Under Canadian law, the writing requirement is a condition to the validity of the transfer and not simply a rule pertaining to evidence. This approach is contrary to French law which requires the agreement to be in writing only for evidence purposes. Authorities have indicated that it would be logical that only the performer would be allowed to invoke conformity with this requirement so as to ensure that the formalism does not turn against the person which it is supposed to protect²⁸⁵. The writing requirement may have under Canadian law a very limited reach given that any written document clearly indicating the parties' intent is sufficient. The Courts have indicated that reference to an assignment or to copyright is not necessary to comply with the relevant provision²⁸⁶. In reality, the courts do not appear to favour the assignee but simply

²⁸³ P. Tomori, ALAI Budapest at p. 661. See also L. Guibault & P.B. Hugenholtz, *Study on the conditions applicable to contracts relating to intellectual property in the European Union*, Institute for Information Law, Amsterdam, Netherlands, 2002, study prepared for the European Commission, <http://www.ivir.nl/publications/other/contracts.html>; "Copyright Contract Law: Towards a Statutory Regulation?", Institute for Information Law, Amsterdam, Netherlands, 2004, study prepared for the Government of the Netherlands, www.ivir.nl/index-english.html. For an *in concreto* analysis of contractual practices, see Part V of the Schedule; for a "opinionated" critical analysis, see Future of Music Coalition, "Major Label Contract Clause Critique" (2001), <http://futureofmusic.org/contractcrit.cfm>; S. Albin "The Problem with Music", www.negativland.com/albin.html; see also www.downhillbattle.org.

²⁸⁴ L. Guibault & P.B. Hugenholtz, *Study on the conditions applicable to contracts relating to intellectual property in the European Union*, Institute for Information Law, Amsterdam, Netherlands, 2002, study prepared for the European Commission, <http://www.ivir.nl/publications/other/contracts.html>.

²⁸⁵ H.-J. & A. Lucas, *Traité de la propriété littéraire et artistique*, Paris, Litec, 2nd ed., 2001 at p. 684.

²⁸⁶ See J.-P. Mikus, ALAI Budapest, *op. cit.*

endeavour to apply a solution in conformity with the parties' intent. There are situations where a narrow interpretation of the writing requirement would have led to an unjust ruling against the assignee²⁸⁷. One may hence consider that the writing requirement is under Canadian law a flexible tool which will be aptly used by the courts in accordance with the requirements of good faith and justice²⁸⁸.

4.1.2. Pro Performer Rules of Interpretation and Public Order

The Supreme Court of Canada in the case of *CCH Canadian Ltd. v. Law Society of Upper Canada* stated that the exceptions provided by the CA are users' rights, and that, in order to maintain the proper balance between the rights of a copyright owner and users' interests, they must not be interpreted restrictively²⁸⁹. This interpretation rule seems to explicitly discard any rule of interpretation in favour of the artist such as the one that can be found in German law²⁹⁰ or in French law²⁹¹. It should however be noted that the German law combines this rule with a

²⁸⁷ In the case of *Turgeon v. Michaud, op. cit.*, formalism was invoked and applied against the author. Whether the ruling is fair may be discussed in light of the facts of the case. However, a decision by the England and Wales Court of Appeal, in the case of *Griggs v. Evans*, [2005] EWCA Civ. 11, www.bailii.org/ew/cases/EWCA/Civ/2005/11.html, offers a precise example where a strict interpretation of the writing requirement would have led to a iniquitous situation, unfavourable to the artist's assignee. The Court applied the "implication" theory (note that the *Copyright, Designs and Patents Act 1988*, s. 90(3), requires a writing for all transfers). In this respect the following passage in *Turgeon v. Michaud* is noteworthy:

Sur cette dernière question, le professeur David Vaver, précité, écrit (à la p. 97):

[...] a document signed by X, saying "X hereby assigns all her worldwide copyright in work Y to Z", should work to achieve precisely what it says. Explicit language of this kind has even been said to be essential, but this view seems too radical. An implied assignment can be as effective as an express one, if the implication is clearly discernible from some writing signed by the copyright holder or her agent.

Whether such an implication may properly be made depends on the standard legal principles relating to the interpretation of documents. The signer's intention to assign must be clearly inferable from her writing.

[emphasis by the Court]

²⁸⁸ See D. Vaver, *Intellectual Property Law*, Concord, Irwin Law, 1997 at pp. 61-62 (at p. 62: "The writing requirement, intended partly to protect freelancers from imprudent assignments, should not work as a trap for unsuspecting clients").

²⁸⁹ [2004] 1 R.C.S. 339, at para. 48.

²⁹⁰ The "Zweckübertragung" principle, according to which an author may not have assigned more rights than required by the subject matter of the contract, indicated by Y. Gendreau in "La civilisation du droit d'auteur canadien", *op. cit.* at p. 110. Note that this principle also applies to interpreters, see M. Salokannel, *Study on audiovisual performers' contracts and remuneration practices in France and Germany*, WIPO, AVP/IM/03/3B, March 31st, 2003 referring to s. 31(5) of the *German Amendment of Copyright Law in Order to Strengthen the Contractual Position of Authors and Performers* of March 22, 2002, c.i.f. July 1st, 2002. Re. this act, see A. Dietz, "Amendment of German Copyright Law in Order to Strengthen the Contractual Position of Authors and Performers" (2002) 33 *I.I.C.* 828.

²⁹¹ The rule of interpretation *in favorem auctoris* or *in dubio pro autore* according to which the contract is interpreted in favour of the author. See H.-J. & A. Lucas, *op. cit.* at p. 423. The same rule applies to performers, see J. Ginsburg & A. Lucas, *Study on transfer of the rights of performers to producers of audiovisual fixations – Multilateral instruments; United States of America; France*, WIPO, AVP/IM/03/4, 30 April 2003 at p. 35.

set of quite broad exceptions²⁹². Beyond this example showing that there is no contradiction in having pro artist interpretation rules and broad exceptions, one may consider that under Canadian law the interpretation rules regarding exceptions are distinct from the set of rules of interpretation applicable to contracts. Hence, if one takes the view that a contracting partner will not draft terms which are contrary to his interests, one may eagerly resort to the provisions of the *Civil Code of Québec* (“CCQ”). Article 1432 therein provides, for instance, that in case of doubt, a contract is interpreted in favour of the person who contracted the obligation and against the person who stipulated it. In addition, a performer could avail herself of the provisions on contracts of adhesion, viz. “a contract in which the essential stipulations were imposed or drawn up by one of the parties”²⁹³, particularly the provisions on the nullity of illegible or incomprehensible clauses²⁹⁴, or abusive clauses²⁹⁵.

The concept of adhesion contracts seems foreign to the common law where contractual freedom and the right to dispose of one’s property or interests with certainty and definitively prevail²⁹⁶. Nonetheless, it seems that the common law may at times allow similar results to be reached. According to Professor Vaver:

*Traditional contract principles may allow courts to take some account of how freelancers are often economically dependant on media distributors and so are placed in an inferior bargaining power when dealing with them. There may also be room for manoeuvre if the contract is entered irregularly – for example if reasonable steps were not taken to bring onerous boilerplate to the other’s party attention before the contract was concluded. [...] But, in the end, an agreement a transferor had ample time to read or get legal advice on before signing will usually be enforced. Avoidance is likely only where there was misrepresentation, fraud, undue influence, unreasonable restraint of trade, unconscionability, or a breach of trust. Only a union or the occasional persistent author with a deep pocket and a finely honed sense of grievance is likely to pursue cases like these.*²⁹⁷

If the occasional swallow does not necessarily make a summer, following the words of Professor Vaver²⁹⁸ commenting on the case of *Bishop c. Stevens*²⁹⁹ where a pro author stance

²⁹² See Y. Gendreau, “La civilisation du droit d’auteur au Canada”, *op. cit.* at p. 111; see C. Geiger, *Droit d’auteur et droit du public à l’information – Approche de droit comparé* (preface de Michel Vivant), Paris, Litec / IRPI, 2004 at p. 234: “[a]lthough the author is also at the centre of the operation of the copyright law, it is striking that, contrary to the French law, the German law provides for a larger number of exceptions which are warranted by freedom of expression and the right of the public to information” [our translation].

²⁹³ S. 1379 C.C.Q.

²⁹⁴ S. 1436 C.C.Q.

²⁹⁵ S. 1437 C.C.Q. Re. the application of civil law, see J.-P. Mikus, ALAI Montebello at pp. 140ff. The author cites *Lapointe v. Disques Gamma Québec Ltée* (1996), J.E. 96-834 (C.S. Qué.) where the Court refused to characterize the contract as a contract of adhesion because of the extensive negotiations that had taken place between the producer and the artist’s agent.

²⁹⁶ S. Handa, *Copyright Law in Canada*, Markham, Butterworths, 2002 at p. 344.

²⁹⁷ D. Vaver, *op. cit.* at p. 238.

²⁹⁸ D. Vaver, *op. cit.* at p. 238.

²⁹⁹ [1990] 2. S.C.R. 467. See S. Handa, *op. cit.* at p. 336.

was taken³⁰⁰, the questions as to whether two swallows do make a summer and whether the case of *Robertson v. Thomson*³⁰¹ is a swallow remain open.

Other theories may also be available at common or civil law, which could be relied upon by a performer to rightfully exit an unbalanced relationship. For instance, the *unreasonable restraint of trade* theory could be invoked, not only in common law Provinces, but also in Québec via articles 1373, 1411, 1413 and 1437 CCQ and the theory of public order³⁰².

Performers which are governed by a sector group agreement will benefit from the so-called “most advantageous clause” rule of interpretation³⁰³.

4.1.3. Transfer Limitation Rules

Section 13(4) CA, as imported by section 25 CA in performance rights transfer matters, provides that the “owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof”. However, there is no obligation to identify the uses intended by the assignee or licensee. The French law has such a requirement. It requires that the fields of uses of the rights assigned be delineated regarding its scope, its purposes, its term and its territory³⁰⁴. French courts have applied these same requirements to performers’ performances transfers although no specific provision applies to this category of right owners³⁰⁵. For example, it has been held that the authorization to use a performance in a cinematographic work could not be construed such as to extend it to a television adaptation of the cinematographic work³⁰⁶.

³⁰⁰ In this case, the judges refused to validate the assignment of rights which had not been formally mentioned. See S. Handa, *op. cit.* at p. 336, note 1186.

³⁰¹ (2004), 34 CPR (4th) 161, 2004 CanLII 32254 (C.A. On.) (application for leave to appeal to the Supreme Court of Canada granted April 21st, 2005; case heard Dec. 6, 2005); see G. D’Agostino, *op. cit.* In the United States, two decisions, apparently in conflict, but similar to the issue in the Robertson case, were dismissed by the Supreme Court. See *Greenburg v. National Geographic Society*, 244 F.3d 1267 (11th Cir.2001); *Faulkner v. Mindscape, Inc.*, 2005 U.S. App. LEXIS 3642, (2d Cir. 2005); see M. H. Osterreicher, “Supreme Court’s Refusal to Hear National Geographic CD-ROM Case Leaves Conflicting Copyright Rulings”, www.nppa.org/news_and_events/news/2005/12/ngs.html; see also www.arl.org/info/frn/copy/ctcases.html#faulkner.

³⁰² See D. Desjarlais, “La doctrine de la restriction déraisonnable de la liberté de commerce dans l’industrie de la musique”, April 1997 in M. Prupas, *McGill Law Faculty Entertainment Law Casebook*, December 23, 1997; see also D. Heurtel & D. Desjarlais, “Introduction au contrat de gérance d’artiste” (1998) 111 *Développements récents en droit du divertissement* 4; see the trilogy quoted: *Schroeder Music Publishing Co. Ltd. c. Macaulay*, [1974] 3 All E.R. 616 (H.L.); *Clifford Davis Management Ltd. c. W.E.A. Records Ltd.*, [1975] 1 All E.R. 237 (C.A.); *O’Sullivan c. Management Agency and Music Ltd.*, [1985] 3 All E.R. 351 (C.A.).

³⁰³ S. 8 SAQA and 33(4) SACA. See *supra* section 3.1.

³⁰⁴ Art. L. 131-3 *CPI*.

³⁰⁵ J. Ginsburg & A. Lucas, *op.cit* at p.35. Cass. Civ. 1^{re}, 6 mars 2001, *Bull. civ.*, n°58; D. 2001,1868, note Edelman; *JCP* éd. G, 2002, II, 10014, note Pollaud-Dulian; CCE 2001, Comm. n°44, note Caron; obs. S. Pessina-Dassonville in *Les grands arrêts de la propriété intellectuelle*, M. Vivant (dir.), Paris, Dalloz, 2004, n°16 at p. 211.

³⁰⁶ *Ibid.*

Under Canadian law, the field of uses are in theory delimited by the rights set out in the CA³⁰⁷. The question is whether, under Canadian law, there is any requirement to explicitly identify each right transferred. In comparison, under French law, each right needs to be individually specified in the transfer agreement³⁰⁸. Under Canadian law, such a requirements is applicable with respect to transfers which took place before April 25, 1996. It should be noted that section 58.1 *An Act to Amend the Copyright Act* provides that “no agreement concluded before April 25, 1996 that assigns a right or grants an interest by licence in a right that would be a copyright or a right to remuneration under this Act shall be construed as assigning or granting any rights conferred for the first time by this Act, unless the agreement specifically provides for the assignment or grant”³⁰⁹. It has been suggested that this provision could have an influence on the courts in relation to agreements subsequent to this date³¹⁰.

Some difficulties may arise regarding the juxtaposition of the rights set out in the CA defined exhaustively and the practice of global transfers³¹¹. In such a case, from a Civil law perspective, one may ask whether the application of article 1453 CCQ will carry the obligation to identify individually each different right given the language of the article which provides that:

The transfer of a real right in a certain and determinate property, or in several properties considered as a universality, vests the acquirer with the right upon the formation of the contract, even though the property is not delivered immediately and the price remains to be determined.

The transfer of a real right in a property determined only as to kind vests the acquirer with that right as soon as he is notified that the property is certain and determinate.

A copyright being analysed as movable incorporeal property from a civil law standpoint, the argument that, where it is not individualized, for example, the making available right, may not be validly transferred by means of a clause referring to “any right in the performance”, may be considered. Conversely, the assignment of a catalogue of rights in sound recordings may exclude such an individualisation inasmuch as the catalogue can be considered as a universality. In any case, confirmation that article 1453 is not limited to corporeal property may be required.

Regarding the equitable remuneration right, it was previously indicated that the Copyright Board addressed the issue of its transferability and had taken the view that, unless express terms are provided, the assignment of an exclusive right does not include the remuneration right³¹².

³⁰⁷ See for example s. 3(a) to (i) CA. Also, the making available right is aimed at a certain type of exploitation.

³⁰⁸ Art. L. 131-3 *CPI*.

³⁰⁹ S.C. 1997, c. 24 (Bill C-32). See *supra* section 2.

³¹⁰ Y. Gendreau & D. Vaver, “Canada”, *op. cit.* at para. 9[1][a][i]; however, see S. Plante, “Les nouveaux droit d’auteur : les droits voisins” (1998) 111 *Développements récents en droit du divertissement* 61 at p. 67, regarding the inapplicability of section 58.1 after that date.

³¹¹ See *supra* 2.1.1.2.

³¹² *Retransmission of Distant Radio and Television Signals for the years 1992, 1993 and 1994*, www.cb-cda.gc.ca/decisions/r14011993-b.pdf, using the conclusions in the case of *CBS., Inc c. Viacom Int'l, Inc.* (1993), N.Y.S.C.

4.1.4. Labour Protection Related Rules

The integration of labour law in copyright has been presented as a means to increase contractual bargaining power³¹³. In France, the *Code de la propriété intellectuelle* provides that the authorization to fix, reproduce or communicate to the public a performance and their corresponding remunerations are governed by the Labour Code (*Code du travail*)³¹⁴. Under this regime, each mode of use of a fixed performance gives rise to remuneration³¹⁵. However, the nature of the remuneration remains undefined given that the law does not explicitly provide for a *pro rata* remuneration, viz. one that would be contingent on the sales of sound recordings³¹⁶. It has been observed that:

[our translation] [...] as opposed to the audiovisual sector, in the field of sound recordings, there hasn't been since 1994 any collective agreement that determines the remuneration minimum rate. There is also no administrative board of the type provided for in article L. 212-9 C.P.I.

As a result, freedom of contract, which, in reality, benefits unilaterally the financially stronger contractual partner (viz. the producer investor) seems greater in the field of sound recordings. However, it is noticed that this fact is countered by the increased intervention of neighbouring rights collective administration societies which contribute to balancing the distribution of powers.³¹⁷

If one were to substitute the role of professional associations for the role of French collectives, the Canadian situation would not be very different. Moreover, the Canadian and Québec regimes provide for an arbitration process for the purpose of setting the minimum remuneration³¹⁸, although, in practice, there does not seem to be any distinct remuneration for each mode of use, according to the group agreements in force that do not include any explicit clause in this respect³¹⁹.

³¹³ See P. Tomori, ALAI Budapest at p. 666.

³¹⁴ Art. L. 212-3 CPI. Re. the extent and complexity of this regime, see S. Pessina-Dassonville, *op. cit.* at para. 605.

³¹⁵ S. Pessina-Dassonville, *ibid.*

³¹⁶ *Ibid.*, the author identifies legal justifications for proportional remuneration, i.e. contingent on the sales of the phonogram. *Contra* H.-J. & A. Lucas, *op. cit.* at p. 648, n°826. The latter agree that the remuneration can be paid out as a lump sum.

³¹⁷ *Ibid.*

³¹⁸ *Supra* 2.2.2.

³¹⁹ For a critical evaluation of the Canadian legislation on the status of the artist, see Y. Gendreau, ALAI Budapest at p. 804. Professor Gendreau refers to formal evaluations of these statutes, e.g. Government of Canada, Canadian Heritage, *Evaluation of the Provisions of the Status of the Artist Act*, 2002, www.pch.gc.ca/progs/em-cr/eval/2002/2002_25/tm_e.cfm?nav=0. The following excerpt was selected: "[...] the Act's ability to improve the socio-economic circumstances of self-employed artists is limited by its restriction to federal producers, by the fact that it addresses only labour relations, and by the fact that it does not apply to producers sub-contracted by producers within federal jurisdiction".

4.1.5. The General Right of Remuneration

Germany has amended its law on copyright for the purpose of strengthening the contractual position of authors and performers³²⁰. The main aspect of this amendment is the introduction of a principle of equitable remuneration as a condition of the performance's use agreement. Where no such remuneration is provided for in a use agreement, its beneficiary may ask his contracting partner to consent to modify the agreement for the purpose of rendering the remuneration equitable or, where no provisions on remuneration are included, for the purpose of setting an equitable remuneration³²¹. The German law provides for two mechanisms in order to determine what constitutes an equitable remuneration. The first refers to "common remuneration standards"³²², such as defined in sector or labour group agreements entered by performers' and producers' professional associations. Group agreements take precedence over sector agreements. A mediation process is compulsory, although the mediation panel's decision may be refused in writing within a certain timeframe³²³. Professor Dietz observed that the mediation panel's decision will carry a strong symbolic value as to what constitutes an equitable remuneration in the circumstances, and may guide the courts who will try the question³²⁴. The second mechanism is supplementary of the first. Hence, where no "common remuneration standards" are available, the remuneration is deemed equitable if, at the time of signing the contract, it is fair and in compliance with standards regarding the types and modes of uses allowed and, in particular, to their term as well as to any other circumstance. It has been observed that this double criterion should allow going beyond the remuneration standards of certain sectors which are not necessarily equitable³²⁵.

Finally, the German law provides that the equitable remuneration right is evolutionary, which means that the rate may be modified *ex post* in the case of a discrepancy between the revenues derived from the use of the performance and the initial remuneration³²⁶. This right to share in the profits may be enforced against subsequent assignees³²⁷. It is noteworthy that the law

³²⁰ See M. Salokannel, *op. cit.*; A. Dietz, *op. cit.*; W. Nordemann, "New Imperative Contract Rules Implemented Into the German Copyright Law" in *Mélanges Victor Nabhan, op. cit.*

³²¹ S. 32(1) of the *German Copyright Law in Order to Strengthen the Contractual Position of Authors and Performers* ("GCA").

³²² S. 32(2) and s. 36 GCA.

³²³ Ss. 32(3), 32(4) and 36a GCA.

³²⁴ A. Dietz, *op. cit.* at p. 837.

³²⁵ *Ibid.* at p. 838. See also Schedule and the standards in the phonographic sector in relation to price reductions.

³²⁶ S. 32a GCA:

(1) If an author has granted an exploitation right to another party on conditions which cause the agreed consideration to be conspicuously disproportionate to the returns and advantages from the use of the work, having regard to the whole of the relationship between the author and the other party, the latter shall be required, at the demand of the author, to assent to a change in the agreement such as will secure for the author some further equitable participation having regard to the circumstances. It is not relevant whether the contracting parties foresaw or could have foreseen the level of such returns or advantages. [our emphasis]

This provision applies *mutatis mutandis* to performers as per s. 75 GCA. The translation of the GCA amendments is by W. R. Cornish, Cambridge, England, in A. Dietz, *op. cit.* at pp. 842ff.

³²⁷ S. 32a(2) GCA. See A. Dietz, *ibid.* at p. 839.

originally referred to a “gross disproportion” as a criterion of discrepancy. The amendment substituted the less strict criterion of a “conspicuous disproportion”³²⁸.

The equitable remuneration right may not be compatible with the domestic law of some jurisdictions³²⁹, particularly since the German law comprises a constitutional provision in favour of property as “a means to provide citizens with a sphere of material freedom and financial independence in the planning of their personal lives”³³⁰. It has been indicated that the “Constitutional Court inferred from that provision that with respect to copyright, the core of the constitutional protection consisted in the allocation to the author of the financial revenues generated by his creation and the right to be able to benefit from them”³³¹. It should be further noted that under German law, the legislator is required to actually implement these objectives³³².

Further, countries which do not accord a constitutional value to property may nonetheless include similar provisions³³³.

An equitable remuneration right could also be rooted in *The Universal Declaration of Human Rights*³³⁴ or in the *UNESCO Recommendation Concerning the Status of the Artist* (Belgrade, 27 October 1980), both to which Canada is a signatory. The latter provides that:

*3. Member States, recognizing the essential role of art in the life and development of the individual and of society, accordingly have a duty to protect, defend and assist artists and their freedom of creation. For this purpose, they should take all necessary steps to stimulate artistic creativity and the flowering of talent, in particular by adopting measures to secure greater freedom for artists, without which they cannot fulfil their mission, and to improve their status by acknowledging their right to enjoy the fruits of their work. Member States should endeavour by all appropriate means to secure increased participation by artists in decisions concerning the quality of life. By all means at their disposal, Member States should demonstrate and confirm that artistic activities have a part to play in the nations' global development effort to build a juster and more humane society and to live together in circumstances of peace and spiritual enrichment.*³³⁵

³²⁸ See A. Dietz, *ibid.* at pp. 836-837.

³²⁹ See L. Guibault & P.B. Hugenholtz, “Copyright Contract Law: Towards a Statutory Regulation?”, Institute for Information Law, Amsterdam, Netherlands, 2004, Study commissioned by the Dutch Government, www.ivir.nl/index-english.html. The authors recommend that such a measure should not be transposed into the domestic law as it interferes with contractual freedom.

³³⁰ C. Geiger, *op. cit.* at p. 143. One should note that France recognized the constitutional value of property: Decision n° 81-132 DC, January 16, 1982, see *Les grandes décisions du Conseil constitutionnel*, Dalloz, 13th ed., 2005, n° 28, § 33 at p. 447; see also arts. L. 131-4 and L. 131-5 *CPI*. The first article provides that the assignor will share in the profits generated by the work, save exceptions. Art. L. 131-5 provides for a nominal threshold for lesion and for revising the consideration. The price can only be revised where the consideration was a lump sum.

³³¹ *Ibid.*; A. Dietz, *op. cit.* at p. 832.

³³² *Ibid.*

³³³ See L. Guibault & P.B. Hugenholtz, *Study on the conditions applicable to contracts relating to intellectual property in the European Union*, Institute for Information Law, Amsterdam, Netherlands, 2002, Study commissioned by the European Commission, www.ivir.nl/publications/other/contracts.html.

³³⁴ See A. Dietz, *op. cit.* at p. 832. referring to article 27(2) *The Universal Declaration of Human Rights*: “Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”. See CAPPRT, Decision N°28, Ottawa Nov. 17, 1998 at para. 52, www.capprt-tcrpap.gc.ca/decisions/tribunal/28-f.html.

³³⁵ See also CAPPRT, Decision N°28, *ibid.* at para. 51.

Canadian law is familiar with equitable remuneration considered as a concept aiming at balancing different interests, through the case law of the Supreme Court³³⁶ and of the Copyright Board, which is concerned with conciliating or reconciling the interests of the author [and performer] and those of investors and of the public³³⁷. Germany follows the same approach as the property right, which fathered the equitable remuneration right, is “put in balance” with the public interest³³⁸. Equitable remuneration stems from the communication to the public right and from the reproduction right with respect to private copying³³⁹.

In addition, the right to revise a contract following changes to the circumstances in which it originally took place, such as the German law which provides a right to modify *ex post* the amount of the equitable remuneration, does not seem to be a solution available in Canada, under the general law of contracts, neither at common law nor at civil law³⁴⁰. Nonetheless, under special contract law, it will be observed that in Québec, some laws have provisions for the purpose of protecting the weaker partner against certain forms of lesion. For example, section 8 *Consumer Protection Act* provides that “[t]he consumer may demand the nullity of a contract or a reduction in his obligations thereunder where the disproportion between the respective obligations of the parties is so great as to amount to exploitation of the consumer or where the obligation of the consumer is excessive, harsh or unconscionable”³⁴¹. In Ontario, section 15(1) *Consumer Protection Act*³⁴² provides that “[i]t is an unfair practice to make an unconscionable representation”, referring to the common law theory of *unconscionability*. The Act however provides express criteria in order to determine what qualifies as an *unconscionable representation*³⁴³. It is worthwhile mentioning that the Act provides for the contracts rescission when such criteria are met³⁴⁴.

³³⁶ Particularly, *CCH Canadian Ltd v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13.

³³⁷ S. Martin, *op. cit.* at p. 452.

³³⁸ C. Geiger, *op. cit.* at p. 144.

³³⁹ See s. 83(9) CA: “In exercising its power under paragraph (8)(a), the Board shall satisfy itself that the levies are fair and equitable, having regard to any prescribed criteria”.

³⁴⁰ See S. Martin, “Pour une réception de la théorie de l’imprévision en droit positif québécois” (1993) 34 *C. de D.* 599. The author refers to the implicit clause *rebus sic stantibus*.

³⁴¹ R.S.Q. P-40.1. It would be interesting to consider whether the provisions in favour of the consumer apply to a performer, who would have entered a contract of “services” provided by a promoter.

³⁴² S.O, c. 30, Sch. A.

³⁴³ S. 15(2) Ontario *Consumer Protection Act*.

Without limiting the generality of what may be taken into account in determining whether a representation is unconscionable, there may be taken into account that the person making the representation or the person’s employer or principal knows or ought to know,

(a) that the consumer is not reasonably able to protect his or her interests because of disability, ignorance, illiteracy, inability to understand the language of an agreement or similar factors;

(b) that the price grossly exceeds the price at which similar goods or services are readily available to like consumers;

(c) that the consumer is unable to receive a substantial benefit from the subject-matter of the representation;

(d) that there is no reasonable probability of payment of the obligation in full by the consumer;

(e) that the consumer transaction is excessively one-sided in favour of someone other than the consumer;

This wide range of measures aiming at balancing the private distribution of rights may face certain specific hindrances and limitations.

4.2. Limitations on Rights Transfer Rules

The first and main limitation is constitutional. According to section 92(13) *Constitution Act, 1867*, Provinces may exclusively make laws in relation to contracts³⁴⁵. It was, however, argued that the CA provisions on contracts³⁴⁶ did not encroach upon provincial powers³⁴⁷.

The second limitation pertains to the fact that the laws on contracts are not uniform throughout Canada even though both legal traditions allow similar results to be reached. Special contract law in Québec includes specific legislation which provides a framework for transfer of copyright, although this act does not apply to performers³⁴⁸. Any similar legislation does not seem available elsewhere in Canada.

The third limitation relates to the scope of the statutes providing for collective negotiation frameworks, given that the federal legislation is limited to federal agencies and institutions and that the Québec legislation has not yet been followed elsewhere in Canada. Both statutes have also been questioned in light of their relative success rate in achieving their underlying policy objectives³⁴⁹. In addition, the review of the minimum conditions set out in certain group agreements suggests a double standard in regards to remuneration as those who are not stars or beneficiaries of an exclusivity contract are subject to specific rates and have very little

(f) that the terms of the consumer transaction are so adverse to the consumer as to be inequitable;

(g) that a statement of opinion is misleading and the consumer is likely to rely on it to his or her detriment; or

(h) that the consumer is being subjected to undue pressure to enter into a consumer transaction.

³⁴⁴ S. 18 *Consumer Protection Act*.

³⁴⁵ See S. Martin, "Rémunération équitable : l'équité pour qui? Réflexion sur la philosophie du droit d'auteur au Canada" in *Institutions administratives du droit d'auteur*, Y. Gendreau (dir.), Cowansville, Yvon Blais, 2002 at p. 450; J. Léger, "Lois sur le statut de l'artiste : une approche constitutionnelle ou l'art de l'ubiquité" (1993) 5-2 *C.P.I.* 267 at p. 281.

³⁴⁶ Ss. 13 and 25 CA.

³⁴⁷ J. Léger, *op. cit.* at pp. 283-284.

³⁴⁸ *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. See J.-P. Mikus, ALAI Montebello at pp. 131ff, reviewing its provisions. it was observed that "[t]his initiative which stems from what one generally qualifies as protection public order public, reflects the legislator's concern about "re-balancing" contractual relationships which, in the past, may have been stamped with abuse" [our translation], S. Martin, "Rémunération équitable : l'équité pour qui? Réflexion sur la philosophie du droit d'auteur au Canada", *op. cit.* at p. 451.

³⁴⁹ See Y. Gendreau, ALAI Budapest at p. 804 and the reference to formal reviews of the operation of these statutes, including, Government of Canada, Department of Canadian Heritage, *Evaluation of the Provisions and Operations of the Status of the Artist Act*, 2002, www.pch.gc.ca/progs/em-cr/eval/2002/2002_25/tmd_e.cfm?nav=0.

bargaining power³⁵⁰. Nevertheless, one should be aware that nothing prevents performers from setting up a collective framework in the absence of a legislative one³⁵¹.

This prompts the fourth limitation, which, essentially, pertains to economic considerations. It has been observed that, in a nutshell, the market is characterized by an oversupply of creative ambitions³⁵², which consequently brings about a weak bargaining power, except for those who can convince others of their particular talent³⁵³. Perceived talent being assimilated to scarcity, talented artists are able to negotiate the best remunerations³⁵⁴. When resorting to mechanisms based on copyright provisions for the purpose of guaranteeing remuneration, notwithstanding the talent of the performer, one bears the risk of interfering with the market's balance and its appreciation of talent. Yet, the said limitation is also related to the market's perception of talent which may be influenced by objectives of risk management and profit maximization that do not necessarily induce artistic diversity. Observing that 10% of the market generates 90% of revenues and analysing the cultural products yielding these revenues, Professor Kretschmer makes the following conclusion: "Products accounting for the top 10 percent segment include blatantly industrial products (such as singles tied in to populist TV shows), but also cultural classics (such as the Beatles). It is evident that much that is culturally worthwhile is not reaching, and will never reach this Top 10 segment. Diversity of cultural production, and support for niche communities is not a major effect of copyright"³⁵⁵.

Copyright law economic analysis has further indicated that the principle of an unassignable and unwaivable equitable remuneration right may confine its beneficiaries in a place where they may not want to be inasmuch as this principle revolves around a royalty scheme which implies a distribution of financial risks that favours the promoter and hinders the performer:

*[w]hy do publishers prefer a royalty system, though? An obvious answer is that entrepreneurs do not have to bear all the risk; nor do they have to put up the capital outlay to buy up rights that in some industries could be prohibitively high [...]. Clearly, artists' willingness to accept a share of the risk eases the way for firms in the cultural industries. This again brings us back to artists' attitude to risk. Not only is a career in the arts inevitably risky, artists also overestimate their chances of success. They prefer a royalty to an actuarially equivalent flat fee because they have a chance to 'win the lottery'. Artists appear to be risk-takers in the textbook sense of preferring a gamble to a fair payment based on known probabilities. What we do not know is whether they like risk or whether it is forced upon them by habit and custom in the arts and cultural industries. If they do not like risk, cultural policy makers should place less emphasis on copyright as a means of supporting artists' incomes and certainly should not make rights to royalties unwaivable because that forces artists to take risks.*³⁵⁶

³⁵⁰ See *supra* section 2.2.2.

³⁵¹ See Copyright Board, *Public Performance of Music – Tariff 2.A – Commercial Television Stations in 1994, 1995, 1996 and 1997*, Jan. 20, 1998. A majority stated: "[...] the experience with ACTRA clearly shows that collective bargaining can successfully take place even in the absence of any such legislation" at p. 22.

³⁵² R. Towse, *Creativity, Incentive and Reward*, E.E., Cheltenham, R.-U., Northampton, É.-U., 2001; M. Kretschmer, "Artists' earnings and copyright: a review of British and German music industry data in the context of digital technologies" (2005) Vol 10, N°1 *Firstmonday*, www.firstmonday.org/issues/issue10_1/kretschmer/index.html.

³⁵³ *Ibid.*

³⁵⁴ See R. Towse, *ibid.* at p. 6.

³⁵⁵ M. Kretschmer, *op. cit.*

³⁵⁶ R. Towse, *op. cit.* at p.165.

Conversely, the right to share in the proceeds from the commercial exploitation of the artistic performance causes a partnership between the promoter and the artist in the sense that the latter will have an incentive to advance his reputation and maintain his level of artistic quality, which, in return, will benefit the consumers as well as the two partners who will both take advantage of the recent success which will likely trigger an interest in previous creations, thus enhancing the value of the *back-catalogue*³⁵⁷. This is probably why some argue that the artist cannot benefit from her success if she has entirely assigned her rights in all her performances³⁵⁸ or for all known or unknown uses³⁵⁹. Such a partnership may have acquired a special dimension under the influence of digital networks' logic. From this perspective, it has been suggested that although the state of oversupply of performances makes them easily interchangeable and even though digital technologies' evolution has created inexhaustible means of distribution, it remains that "within abundance, true rarity becomes the users ability to pay attention. To draw and keep the user's attention, content diversity becomes the key to success. The economy of creativity not only nurtures the so-called "catalogue effect" but, it is also the quintessence of the differentiation effect which will draw the client"³⁶⁰. Based on these premises, the analysis reveals that mutual solidarity relationships develop among artists and promoters and the revenues derived are more likely to be conceived as a co-ownership rather than the result of a debtor-creditor relationship stemming from a contract of services, a fee or a proportional remuneration³⁶¹. It is indicated that in the short term, abundance causes conflicts as one partner will try to draw part of the surplus of wealth away from the other. This trend is further strengthened by an increased degree of concentration among entities, which belong to sectors that were traditionally separated³⁶², thus creating an opposition between global operators and isolated artists³⁶³. Two conclusions are finally drawn from the analysis: the first is

³⁵⁷ *Ibid.* The *back-catalogue* comprises previous performances and the corresponding rights.

³⁵⁸ *Ibid.* at p.118.

³⁵⁹ *Ibid.* at p. 165.

³⁶⁰ P. Gaudrat & G. Massé, *La titularité des droits sur les œuvres réalisées dans les liens d'un engagement de la création, synthèse du Rapport à la ministre de la culture, à la garde des sceaux, ministre de la justice et au secrétaire d'État à l'industrie*, www.culture.gouv.fr/culture/cspla/audrat.pdf.

³⁶¹ *Ibid.* at p.47.

³⁶² Re. media concentration, see S. Sauvageau & D. Giroux, *Media Cross-Ownership in Canada*, Report presented to the Canadian Radio-television and Telecommunications Commission and Canadian Heritage, Feb. 2001, http://www.pch.gc.ca/progs/ac-ca/progs/esm-ms/crois1_e.cfm.

³⁶³ P. Gaudrat & G. Massé, *op. cit.* at p.48. Some have cherished the hope that the advent of new telecommunication technologies would allow performers to reach a global market without having to deal with distributors, thus levelling the playing field through "disintermediation", viz. the decrease of intermediaries and of their bargaining power. Yet, intermediaries remain necessary, though they may be independent, by reason of the abovementioned catalogue effect (see for instance the business model adopted by www.vitaminic.co.uk). In addition, it has been observed that there is little evidence of a decrease of intermediaries' bargaining power. The reasons presented are "the difficulty for individual aspiring artists of getting noticed among the "noise" of creative ambition; and, the reluctance of many artists to engage with alternative forms of copyright exploitation", M. Kretschmer, *op. cit.* The question remains open such as it appears from the different positions taken on the issue tried in the case of *Metro-Goldwin Mayer Studios, Inc., & al. v. Grokster, Ltd., & al.*, No. 04-480, (US). The *amicus curiae* brief filed by an independent artists' association, including personalities such as Brian Eno, supporting *Grokster* is noteworthy. It claims that Peer to Peer networks provide artists with substantial opportunities for distributing their creations, www.eff.org/IP/P2P/MGM_v_Grokster/20050301_artists.pdf. The fact that the question remains open prompted the following comments:

Perhaps the reason for this unrealised potential can be found in the sets of constraints that are embedded in the construction and development of new technologies. Technology is often understood to be liberating and enabling. It is my position that packaged alongside liberation and enablement come new sets of constraints and restrictions.

that the intervention of the law is particularly needed so as to bring some ethics in a turbulent economic game; the second is that “neither the contract of services nor the proportional remuneration – at a constant rate – are able to respect the principle of equitable contribution which should apply when sharing in the created value”³⁶⁴. The authors further conclude that the parties involved should become aware of their interdependence and see the law from a logic of solidarity perspective rather than one of confrontation³⁶⁵.

The last limitation is international and rooted in section 1705(3) of the *North American Free Trade Agreement*³⁶⁶ which provides that:

Each Party shall provide that for copyright and related rights:

(a) any person acquiring or holding economic rights may freely and separately transfer such rights by contract for purposes of their exploitation and enjoyment by the transferee; and

*(b) any person acquiring or holding such economic rights by virtue of a contract, including contracts of employment underlying the creation of works and sound recordings, shall be able to exercise those rights in its own name and enjoy fully the benefits derived from those rights.*³⁶⁷ [emphasis added]

Technologies are often spoken of as either monsters (dystopia) or angels (utopia). [...] Very few attempts have been made to overcome this dichotomy. The Internet both enables and constrains. It allows files to be shared instantaneously on a global scale while simultaneously creating a cacophony of competing voices crying in the wind.

D. Beer, « Reflecting on the digit(al)isation of music » (2005) Vol 10, N°2 *Firstmonday*, http://www.firstmonday.org/issues/issue10_2/beer/index.html#b5. See Berkman Center for Internet & Society at Harvard Law School, *Content and Control: Assessing the Impact of Policy Choices on Potential Online Business Models in the Music and Film Industries*, Jan. 2005, http://cyber.law.harvard.edu/media/content_and_control.

³⁶⁴ P. Gaudrat & G. Massé, *op. cit.* at p. 48.

³⁶⁵ The confrontation logic may also appear through the differences of views regarding the repression policy on illegal downloading of music files. In a state of abundance, producers are not concerned about the relationship between an artist and its public given that, in theory, a producer will tend to rapidly replace a performance by a “novelty”. Artists, on the other hand, wish to maintain a special relationship with their public, such as it expresses itself during live performances where a special exchange takes place between the artists and the fans. See M. Madden, “Artists, Musicians and the Internet”, Pew Internet & American Life Project, Dec. 2004, www.pewinternet.org/pdfs/PIP_Artists.Musicians_Report.pdf; see ADAMI’s standpoint, www.adami.fr/portail/affiche_article.php?arti_id=188&rubr_lien_int=174; see the petition set up by the *Nouvel Obs*, a French weekly, <http://archquo.nouvelobs.com/cgi/articles?ad=culture/20050201.OBS7675.html&host=http://permanent.nouvelobs.com/>; see the petition “Pour une utilisation légale du P2P” and Spedidam’s standpoint, www.spedidam.fr/actu/PetitionP2P.pdf; see also Alliance Public-Artistes, www.lalliance.org/pages/1_1.html. The case of *Metro-Goldwin Mayer Studios, Inc., & al. v. Grokster, Ltd., & al.*, No. 04-480, (US), prompted opposed reactions to this issue. For example, the American Federation of Musicians of the United States, and Canada, www.eff.org/IP/P2P/MGM_v_Grokster/050125_AFM_AFTRA_Grokster_Amici_Brief.pdf, and the Recording Artists’ Coalition, http://www.eff.org/IP/P2P/MGM_v_Grokster/20041109_Grokster-ArtistAmicusBrf.pdf, took a position against *Grokster* (*Amicus curiae* briefs were available at www.eff.org/IP/P2P/MGM_v_Grokster). In Canada, see the stance taken by the Canadian Music Creators Coalition, *A new voice: Policy Positions of the Canadian Music Creators Coalition*, April 26 2006, www.musiccreators.ca/docs/A_New_Voice-Policy_Paper.pdf.

³⁶⁶ Text available at www.dfait-maeci.gc.ca/nafta-alena/agree-en.asp.

³⁶⁷ See V. Nabhan, “L’accord de libre-échange nord-américain et sa mise en oeuvre en matière de droit d’auteur” (1993) 6-1 *C.P.I.* 9; C. Ouellet, “Où en est la protection des droits connexes au droit d’auteur? Partie I – Les textes internationaux” (2003) 15-3 *C.P.I.* 905 at pp. 941ff.

This provision may need to be interpreted so as to determine whether it would prevent from enacting a provision which aims at limiting free transfer of related rights. The issue would have been raised, but for the fact that the rights transfer issue was excluded from the negotiation framework of the 1996 WIPO Treaties³⁶⁸. This same issue seems to be one of the reasons why the December 2000 WIPO Diplomatic Conference held for the purpose of adopting a treaty on the protection of audiovisual performers failed³⁶⁹. Finally, notwithstanding any domestic legislation, in the absence of an harmonized international regime, any right transfer framework remains uncertain by reason of the application to the contract of a foreign law, either voluntarily or by virtue of private international law rules³⁷⁰.

³⁶⁸ See J. Reinbothe & S. von Lewinski, *The WIPO Treaties 1996*, Markham, ON, 2002 at p. 5, referring to the *Memorandum on Copyright 1993*, pp. 142ff, part. at paras. 58 and 72. A proposal to include provisions on transfer of rights was refused by a majority of countries and was no longer discussed.

³⁶⁹ See K. Thompson, "Copyright Law: Rights in Audiovisual Performances", 12th Fordham Annual Conference, New York, April 15 and 16, 2004; S. von Lewinski, "International protection for Audiovisual performers : a never-ending story? A resume of the WIPO diplomatic conference" (2001) 189 *R.I.D.A.* 3; see also L. Nanobashvili, "Performers' International Protection with Regard to their Audiovisual Performances" (2004) 7 *Georgian L. Rev.* 399.

³⁷⁰ See J. Ginsburg & A. Lucas, *Study on Transfer of the Rights of Performers to Producers of Audiovisual Fixations – Conclusions*, WIPO, AVP/IM/03/4 Add., May 12, 2004, www.wipo.int/documents/en/meetings/2003/avp_im/index.htm; see also A. Lucas, *Private International Law Aspects of the Protection of Works and of the Subject Matter of Related Rights Transmitted Over Digital Networks*, WIPO, WIPO/PIL/01/1 Prov., Dec. 17, 2000, www.wipo.int/pil-forum/en/documents/pdf/pil_01_1p.pdf.

5. SCHEDULE: COMPARATIVE ELEMENTS OF PROTECTION

Standard clauses in exclusivity contracts / UDA-ADISQ Agreement / Copyright Act, WPPT Treaty

<p>Standard clauses in exclusivity contracts</p>	<p>UDA/ADISQ Agreement Collective agreement pursuant to the <i>Act respecting the Professional status and conditions of engagement of performing, recording and film artists</i> (R.S.Q., c. S-32.1). It applies to any person performing or called upon to be seen or heard as a performing artist, as specified in the acknowledgement given to the Union by the <i>Commission de reconnaissance des associations d'artistes et des associations de Producteurs</i> in its April 1993 decision in the production areas of phonograms (audio or audio-visual) and in video recordings associated to phonograms (Renewal, Article11-1.03).</p>	<p>Copyright Act (CA) World Intellectual Property Organization Performance and Phonograms Treaty (WPPT)</p>
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ARTICLE 1 - CONTRACT SUBJECT MATTER

<p>1.1. The Producer hereby retains the exclusive professional services of the Artist for the duration of the present contract and according to the terms and conditions mentioned herein, across the entire territory hereinafter described and in every language, on a vocal, musical, instrumental, visual and any other basis, in order to do any recording necessary for the production of master tapes.</p>	<p>Written agreement by which the Artist gives the Producer his exclusive services for a defined and limited period and exclusive privilege on the production and commercial exploitation of a phonogram, in exchange for payment of recording sessions and royalties. (1-1.22) Section 8 (Series of articles) The Agreement presents the Artist in many categories: artist, supporting artist, performing artist, variety artist and star artist but also mentions singer, lead singer, solo chorister, duet chorister, chorister, choir leader, group leader, choir and actor (1 and 9) as well as extra/walk-on (9).</p>	<p>Exclusive rights given on all creative activities in exchange for remuneration by the Producer may raise issues pursuant to the following provisions: CA. Art. 15: sole right to communicate and fix, if not fixed, of initial fixation or of reproduction of reproduction of unauthorized fixations or other rights pursuant to parts III and VIII, to rent. Art.16: contractual arrangements in cases of broadcasting, fixation or retransmission. Art.17: right to remuneration if the performance is incorporated in cinematic works.</p>
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		<p>Art.19: right to equitable remuneration for public performance or broadcasting, except for retransmission of a published recording (Art. 67 ss.: collective management except for situations described at Art. 31(2))</p> <p>Art.23: duration of rights (50 years)</p> <p>Art.24: ownership</p> <p>Art.25: assignment: application of articles 13(4) to (7) with necessary adaptations.</p> <p>Art.26: rights in performances in a WTO country.</p> <p>Art.27: constitutive elements of violations giving rise to civil (Art. 34 ss.) or criminal (Art. 42 ss.) recourses.</p> <p>Art.30.8 and 30.9: royalties in cases of ephemeral recordings (Art.70.2 collective management)</p> <p>Art.31(2): tariff in case of distant signal retransmission (Art.71: collective management)</p> <p>Art.81: tariff in case of private copy (collective management)</p> <p>WPPT</p> <p>Preamble: foundations of protection</p> <p>Art.2: definition</p> <p>Art.3 and 4: beneficiaries and national treatment</p> <p>Art.5: moral rights (Art.22: possible to limit the application to performances occurring after the coming into force of the Treaty)</p> <p>Art.6: exclusive right to broadcast, transmit or fix unfixed performances</p> <p>Art.7: exclusive right to reproduce</p> <p>Art.8: exclusive right to distribute</p> <p>Art.9: exclusive right to rent</p>
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<p>1.2. The Artist grants an exclusive interest to the Producer, and during the term provided for herein, in his rights in his recordings for the purpose of reproducing them in any material form, including but not limited to phonograms and videograms, by any method known or subsequently perfected, and their exploitation or communication to the public by any means.</p>		<p>Art.10: exclusive right to make fixed performances available to the public Art.15: right to remuneration for broadcasting and communication to the public Art.16: limitations and exceptions (three-step test) Art.17: term of protection (50 years) Art.18: obligations concerning technical measures Art.19: obligations concerning rights management information Art.22: application to future performances Art.23: provisions on enforcement of rights. CA Art.25, 15, 16, 17. WPPT Art.5,6,7,8,9,10,15,17,18,19.</p>
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ARTICLE 2 - TERM OF CONTRACT

<p>2.1. The present contract will come into force on the date of signing, and will end fourteen (14) months following the commercial release date of the last recording produced in accordance with its conditions.</p> <p>2.2. It is understood that some of the parties' rights and</p>	<p>The exclusivity agreement is effective from the signature date until fourteen (14) months following the commercial release of the album produced in accordance with its conditions (8-2.01)</p> <p>The agreement must provide that, within 15 months following the signing, sufficient master tapes must for the production and commercial release of an album must be produced(8-2.02)</p>	<p>The term of the exclusivity may raise issues pursuant to the following provisions: CA. Art.23 WPPT Art.17</p>
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obligations will survive the termination of this agreement, including but not limited to, the Producer's right to use or exploit the Artist's recordings in any way, the Producer's obligation to provide the Artist with account statements and to pay all royalties due, as well as the Artist's obligations provided for herein.

2.3. The present contract is concluded for the entire world.

The exclusivity agreement must specify the territory (8-2.06)

Exclusivity agreed upon for a territory may raise issues pursuant to the following provisions:
CA Art. 25
WPPT 3,4.

ARTICLE 3 - EXCLUSIVITY

3.1. The Artist undertakes to respect each and every obligation incumbent upon him pursuant to the present contract, including but not limited to the obligation not to record his performances for his own benefit or the benefit of a third party during the term provided for herein with the purpose of producing master tapes, phonograms, videos or videograms, and not to use or permit others to use his name, whether real or fictitious, any logo adopted by the Artist, his picture or other representation of himself or his signature in association with phonograms, videos or videograms, during the term provided for herein;

3.2. The artist is precluded from recording anew works covered herein, or other versions of these works, for any person other than the Producer during a period of five (5) years following the commercial release date of the album produced for the benefit of the Producer.

See above, clause 1.
More specifically:
CA Art.25,15,16,17.
WPPT: 5.

Exclusivity extending to the recording anew can raise new issues pursuant to the rights identified in clause 1.

ARTICLE 4 - RECORDINGS

4.1. The Producer undertakes to produce and release a first album by the Artist as well as a related video within fifteen (15) months following the signing of the present contract or any other date which may be agreed upon by the Producer and the Artist.

4.2. The Producer reserves the right to produce and release four (4) other albums by the Artist if the expected results of the commercial release of each preceding album appear satisfying. If the Producer does not inform the Artist that he intends to produce and release another album within fourteen (14) months following the release of the preceding album, the Artist will then be free of his obligations towards the Producer, as of the end of said term. The release of any optional album must start within thirty-two (32) months following the release of the previous album.

The agreement must provide that, within 15 months following the signing, sufficient master tapes for the production and commercial release of an album must be produced (8-2.02)

The agreement can include a maximum of four (4) options. The Producer's right to produce an optional album is subject to the following conditions:

a) notice that the Producer intends to exercise an option must be sent to the Artist, in writing, by registered mail with proof of delivery, no later than fourteen (14) months following the release of the preceding album;

b) the commercial release of any optional album must start within thirty-two (32) months following the release of the previous album;

Barring a mutual agreement in accordance with 8.2.04 and on condition that the star Artist has respected his own obligations, if the release or notice periods provided for in Articles

Exclusivity binding the Producer to a certain number of albums can raise issues pursuant to the provisions relating to the Producer: CA.
Art.2: definition of producer and compilation
Art.18: exclusive reproduction, publication and rental rights
WPPT Art.11,12,13,14.

8.2.02 and 8.2.03 are not respected, the exclusivity agreement is automatically terminated as of right regarding the Artist, without prejudice to the Producer and star Artist's rights regarding phonograms already released (8.2.03)

Should a dispute arise regarding the star Artist's right to be so released of his exclusivity agreement, an arbitrator must be called upon and render a decision as soon as possible as to that right.

ARTICLE 5 - PRODUCER'S UNDERTAKINGS

<p>5.1. The Producer undertakes to choose the musical pieces in close collaboration with the Artist and with his approval.</p>	<p>Only the final version of the recording chosen by the Producer, after mandatory consultation with the star Artist, may be reproduced on a phonogram, and in case of disagreement, the Producer's decision prevails. (8-1.08)</p>	<p>The agreement stating the producer's selection prerogative may raise issues pursuant to the following provisions: CA. Art.2.1, 15.</p>
<p>5.2. The Producer undertakes to promote, at his own costs, the phonograms provided for herein, following the best standards of the music industry.</p>	<p>The Producer is responsible for the promotion of the Artist's album. He must make sure that the record label with which he deals respects the conditions provided for herein and in the exclusivity agreement. (6-7.02)</p>	<p>The agreement stating promotional activities may raise issues pursuant to the following provisions: WPPT Art.5.</p>
<p>5.3. The Producer undertakes to assure that the Artist is featured as recording artist on the sleeves of the phonograms and videograms reproducing the recordings made pursuant to the present contract. However, the Producer cannot be held responsible for eventual lapses by third parties with respect to this obligation.</p>	<p>The name of the lead singer, host, variety Artist, actor, reader and narrator must appear on the sleeve or insert of any phonogram. (6.5.01)</p>	<p>WPPT Art.5.</p>
<p>5.4. The Producer will entirely assume the payment of mechanical</p>		

reproduction rights for the musical works reproduced on phonograms or videograms, pursuant to the present contract.

5.5. The Producer guarantees that the licensee will assure high quality in the fabrication, commercialisation and distribution, in accordance with professional standards.

The Producer must offer a guarantee to the licensee that the master tapes have been produced in accordance with the present contract. (3-4.02)
Furthermore, the Producer must make sure that the licensee meets each and every obligation provided for in the present contract as to the fabrication, release and commercialization of the phonogram. The licence contract must include a clause certifying that the commercial exploitation activities relating to the phonograph will respect the minimal conditions provided for in the present contract.

See above, clause 1.
More specifically:
CA .Art.15,16,17.
WPPT Art.6,7,8,9,10,18,19

ARTICLE 6 - PRODUCTION BUDGET

6.1. All costs related to the production of master tapes (studio, equipment rental, technical services, musicians, arrangers, Artists, directors, mastering, film for the creation of the sleeve, etc.) will be borne by the Producer and he must provide the Artists with all conditions necessary for the production of a quality recording.

6.2. All costs related to the production of master tapes (studio, equipment rental, technical services, musicians, arrangers, Artists, directors, mastering, film for the creation of the sleeve, etc.) will be borne by the Producer and he must provide the Artists with all conditions necessary for the production of a quality recording.

6.3. The Producer undertakes to pay the Artist, for the production of each recording, a recording fee in the amount provided for by the *Entente collective du phonogramme entre l'UDA et*

The fee paid to the Artist in accordance with the present agreement covers only his work-related performance provided for in the present agreement. (3-1.06)

CA.Art.16

l'ADISQ and to conclude a recording session contract with the Artist in accordance with the provisions of this *Entente*.

The star Artist always receives royalties. The fee paid in accordance with articles 7.1.02 a), 7.1.03 a), 7.1.04 and 7.1.05 can be considered an advance on the payment of royalties, if it is so stipulated in the recording session contract and the exclusivity agreement. (7-1.06)
 According to the agreement, the Producer must pay a fee for recording sessions, but he can recuperate this fee, as well as other production costs, as an advance. The *Entente* presently establishes the fee at 160.50\$ for every 5 minutes or less of a recorded work for a lead singer (in terms of the *Entente*) in sectors other than lyrical.

ARTICLE 7 - PROMOTION

7.1. The Producer undertakes to promote the phonograms covered herein according to common practice in the music industry.

The Producer is responsible for the promotion of the star Artist's phonogram. He must make sure that the record label with which he deals respects the conditions stipulated in the present contract and the exclusivity agreement. (6-7.01)
 6-7.02 The star Artist has the obligation to provide the Producer with his biographical information. On the biographical level, only given information can be used by the Producer for the promotion of the phonogram.
 The Producer can also use the name, photographs or other images representing the star Artist for the promotion of the phonogram.
 The star Artist who must

WPPT. Art.5

7.2. The Artist undertakes to promote the phonograms released pursuant to the present contract and to participate in the promotional events brought forth by the Producer, barring any explicit contrary obligations to the Producer, without payment aside from what would eventually be given by the publicists, if need be. It is, however, agreed upon that these promotional activities will not include concerts or concert tours, unless the Artist had previously agreed to them. The Producer also undertakes to assume the Artist's promotional travel costs, including but not limited to, transport, lodging and food as well as cost arising from specific requests by the Producer according to the tariffs provided for in the *Entente*.

7.3. The Artist gives the Producer the exclusive and irrevocable right to use and publish, for advertising and promotional reasons related to the exploitation of the master tapes, phonograms, videos or videograms, his name, whether real or fictitious, any symbol or logo used by the Artist, his photograph, signature, biographical information and, generally, any representation of the Artist's image chosen with the Artist's approval.

travel to participate in the promotion of his recordings will be reimbursed for the travel and stay expenses provided for in article 6.6.00. (6-7.04)

Promotional activities for the phonogram do not bring about additional remuneration. However, the provisions of the present agreement cannot prevent the Artist from collecting fees, rights or royalties to which he may be entitled, pursuant to other collective agreements by the Union, or in accordance with the law (for example, a guest appearance on a television show). (6-7.08)

The star Artist has the obligation to provide the Producer with his biographical information. On the biographical level, only given information can be used by the Producer for the promotion of the phonogram.

The Producer can also use the name, photographs or other images representing the star Artist for the promotion of the phonogram. (6-7.02)
The Producer must make sure that any advertising or promotion implicating in any way the Artist's image or relating in any way to his private life respects the Artist's integrity and has his prior approval. (6-7.03)

Exclusivity compelling the artist to certain promotional activities can raise new issues pursuant to rights identified in clause 1.

WPPT.Art.5

ARTICLE 8 - OWNERSHIP OF THE MASTER TAPES AND EXPLOITATION PERIOD

<p>8.1. The Artist accepts and recognizes that the Producer maintains full and absolute material and intellectual property of the master tapes and that he can exploit them in any way whatsoever for an unlimited term; The parties agree that the present contract includes the authorization to fix any artistic performance by the Artist on master tape or video during the term of said contract and to reproduce said performances on any medium, known or unknown at the present date.</p>		<p>See above, clause 1. More specifically: CA.Art.15,16,25. WPPT.Art.5,6,7,8,9,10,18,19</p>
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ARTICLE 9 - ROYALTIES

<p>9.1. Royalties payable to the Artist by the Producer are payable after recuperation of all production costs incurred by the Producer pursuant to this contract.</p>	<p>The Producer must pay royalties to the star Artist or any other Artist bound by an exclusivity agreement. (8-1.01 – 2nd paragraph) 3-3.-01 Any assignment resulting in the transfer the of Producer’s rights, pursuant to the present agreement or the exclusivity agreement, to a third party, can only be accomplished if the assignee undertakes, beforehand and in writing, to respect the obligations resulting from said rights provided for in said agreements, being therefore bound by these obligations in the same way as the assigning Producer. 8-3.04 The royalties owed to the Artist by the Producer are payable after recuperation of the production costs of the master tapes and, if the need arises, any related video</p>	
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9.2. In exchange for services and rights granted by the present contract and as of the moment when the Producer recuperates all the aforementioned disbursements, as well as production costs, he will pay the Artist the following royalty for each phonogram sold and not returned:

For albums sold in traditional distribution circuits, in Canada, a royalty of <>%.

For albums sold outside of Canada, the royalty will be reduced to <>%.

In the event that some of the recordings covered by the present contract appear on a "compilation" phonogram with other recordings, the royalty will be reduced to <>%.

In the event that the recordings covered by the present contract are sold at a reduced cost, the royalty will be reduced to <>%.

noted in the detailed report provided for at article 8.3.03. This recuperation is taken from the Producer's gross revenue.

The Producer's gross revenue consists of any sum he receives from the record label. When the Producer is also the record label, or when the label is a parent, subsidiary or associated company, or when the Producer has control over the company (or vice versa), the Producer's gross revenue is deemed to never be inferior to twenty percent (20%) of the gross price for every phonogram sold, paid and not returned.

Any subsidy obtained specifically for the production of the master tapes or any related video reduces by the same amount the costs incurred by the Producer for said master tapes or video.

As long as the phonogram is commercially exploited, the Producer must pay royalties to the Artist, unless a fixed fee was negotiated in a case permitted by the present agreement (except in the case of a solo chorister, duo chorister or chorister), subject to his right to negotiate such royalties.

(8-1.07)

Barring particular provisions respecting reductions, royalties owed to the Artist for each phonogram sold, paid and not returned are never inferior to the following minimum royalties:

0 to 25 000 units: 4 % of the gross price

25 001 to 50 000 units: 5 % of the gross price

The exclusivity holding the Producer responsible for the payment of royalties and the production of an account statement can raise issues pursuant to the aforementioned provisions of Clause 1.

9.3. In the event that the sale of recordings covered by the present contract is promoted by an intensive television and/or radio and/or poster campaign, the royalty for promoted recordings will be set at <>%.

For phonograms sold and not returned by the Producer or by his distributor through a record club, by long-distance or mail-order sales companies, the royalty will be <>%.

No royalty will be owed to the SOCIÉTÉ for sales at cost price (i.e. with no profit to the Producer).

In France, certain exclusivity and recording contracts provide for a reduction in the case of download and remote transmission of recordings embedding the Artist's performance. Here is an example: « In the event that the Producer should exercise the right to rent the phonograms or distribute and/or broadcast the Artist's recordings (including, but not limited to, by telephone service or online data transmission service), the normally applicable royalty will be calculated on the net sum collected by the Producer pursuant to the exercise of said rights; if the Producer collects directly from the consumer at a retail price, the royalty will be calculated on 2/3 of said retail price before taxes. In the event of remote distribution or broadcasting, the Producer can apply the reductions accepted by authors' societies for the calculation of reproduction rights; in the absence of a specific rate applicable to remote distribution or broadcasting, the Producer can apply the deductions applicable to the payment of mechanical reproduction rights for minidisks. In the event that the recordings are made available through digital data transport networks (except for the sale of a medium) at the

50 001 to 74 000 units: 7 % of the gross price
75 001 units and up: 8 % of the gross price

In the case where the services of many Artists are retained for the production of one phonogram, minimum royalties owed, if need be, apply to the group of Artists as a whole as if it were one star Artist. (8.3.09)

Royalties (or percentages) paid to the Artist in exchange for the right, granted to the Producer, to commercially exploit the phonogram. (1-1.41)

For the commercial exploitation of the phonogram on Canadian territory, the reduction can be subtracted to the royalties payable to the Artist if the following conditions are respected:

a) in the case of the Producer who is not the record company, if the reduction is passed on to the royalty paid to said Producer by a record company or a distributor;

b) in the case of the Producer who is also the record company, if the reduction is recognised by the industry. The Producer has the onus to prove that the reduction is recognised by the industry;

c) the total of the reductions subtracted from the royalties payable to the Artist cannot reach the sum of 50% if the payable royalties are the minimum royalties provided for at article 8-3.09. (8-3.11)

For the commercial exploitation outside the Canadian territory, the reduction can always be applied to the royalties owed

request and for the private use of the public, the royalty rate will be identical to the base rate, the basis of assessment being the download catalogue price, before taxes, collected by the Producer, minus a fixed sum of 25%, corresponding to commissions of intermediaries and technical costs.

In any case, if the SNEP/SDRM agreements provide for specific deductions applicable to such sales, said specific deductions will apply in lieu of the reduction to which this paragraph refers, as of their coming into force date.

to the Artist and the conditions provided for in the present article do not apply.

Fabrication, promotion, commercialisation, distribution and retail of any phonogram produced from a master tape. (1-1.23)

The Agreement raises the faculty to reduce the royalty in certain promotional or secondary market situations, for example: if the recordings are sold at a reduced price; if the recordings are sold through a club; if the recordings are sold in the context of a publicity campaign; if the recordings are sold outside of Canada. The Agreement does not provide for terms as to online digital exploitation.

The Agreement indicates terms for the payment of royalties in the case of a band.

ARTICLE 10 - ADVANCES

10.1. The Producer accepts to pay the Artist a fixed sum of <>\$, as an advance on the royalties payable to the SOCIÉTÉ and the Artist according to this contract.

The star Artist always receives royalties. The fee paid according to articles 7.1.02 a), 7.1.03 a), 7.1.04 and 7.1.05 can be considered an advance on the payment of royalties if it is so stipulated in the recording session contract and the exclusivity agreement. (7-1.06)

ARTICLE 11 - TARIFF AND PAYMENT

11.1. The royalties provided for herein are calculated using one hundred percent (100%) of the sales, paid and not returned.

The minimum royalties are established according to the number of phonograms sold, paid and not returned, as

11.2. The royalties owed to the SOCIÉTÉ being paid on net sales, and clients having the possibility to return and be reimbursed for phonograms and videograms, within a certain period, the Producer will keep twenty-five percent (25%) of the sales for each semester as a reserve for returns. Regularisation (reserve minus actual returns) will occur during the following semester.

11.3. The royalty statements will be tabulated on June 30th and December 31st of each year and addressed to the SOCIÉTÉ in the three (3) months following each of the two dates.

long as the Producer commercially exploits the phonograms. The Producer has the onus to prove that a phonogram was not sold or has been returned.

The Producer can deduct, while calculating the royalties owed, a reserve for returns not exceeding thirty percent (30%) of the phonograms sold during each period until the phonogram is taken off the market. Reserves for each period will be reintegrated to the sales of the subsequent period.

Notwithstanding the aforementioned, in the case of a phonogram benefiting from a publicity campaign (TV-AD), the Producer can deduct, while calculating the royalties owed, a reserve for returns equivalent to sixty percent (60%) of the phonograms sold during the first two exploitation periods, after which the reserve can be maintained at thirty percent (30%) until the phonogram is taken off the market. The reserves for each period are reinstated during the following period.

Notwithstanding the aforementioned, the Producer can retain a higher reserve percentage, in certain cases, with the Union's authorization. (5-3.04)

The Producer transmits to the Artis and the Union, no later than ninety (90) days following the end of each semester, a report of phonogram sales for the given period. (5-3.01)

The periods are established as follows, according to the Producer's choice:

- from January 1st to June 30th and from July 1st to December 31st

or

- from April 1st to September 30th and from October 1st to March 31st

The report sent to the Artist by the Producer is accompanied, if need be, by payment of royalties.

The breakdown will be reduced by the amounts paid to the SOCIÉTÉ as well as any sum debited from its account.

Subject to the laws applicable in Canada, The Artist, including his legatees and successors, has the perpetual right to receive from any owner of the master tape, the royalty provided for in the exclusivity agreement for any performance extracted from said tape, proportionally adjusted to the number of used works if need be, no matter the number and each time a phonogram is commercialized, notwithstanding the title, graphic presentation, identification number or label/tag. (8-3.12)

As long as the phonogram is commercially exploited, the Producer pays royalties to the Artist. (...). (8-1.07)

11.4. Royalties on phonograms and videograms sold abroad are paid in Canadian currency and calculated according to the exchange rate applied to the Producer. These royalties are payable only after the Producer has cashed them in Canada.

11.5. If a government authority deducts any tax from these

payments or if a law, a state regulation or any restriction affects the amount of the payments an affiliate or licensee makes to the Producer, said Producer can deduct this tax or levy from the royalties, in the same proportion.

ARTICLE 12 - VIDEOS

12.1. The Producer undertakes to produce, at his own costs, at least one (1) video per album produced and commercially released pursuant to the present contract. It is understood that the Producer and the Artist must agree on the musical work for each video.

For the purpose of the present section, the term Producer of the video represents the Producer of the master tape and any other person having property rights in the video. The Producer of the video must make sure that any production company to which he delegates the production of the video respects each and every obligation provided for in the present agreement, and this delegation does not relieve the Producer of the video of his own obligations provided for in the present agreement.

The Producer recognizes the Performing Artist's right to be remunerated for the communication of the video to the public.

Despite the aforementioned, considering the actual context and the low return of videos for the Producer, said Producer can allow the communication (cable/television broadcasting) to the public of a video without paying royalties to the participating artists.

However, the ADISQ undertakes to work in cooperation with the Union, without prejudice to the Producer's rights, toward the

acknowledgement of the Performing Artist's right to be remunerated for such usage and the payment of royalties by the users. (4.1)

ARTICLE 13 - REPRESENTATIONS AND WARRANTIES

<p>13.1. The SOCIÉTÉ and the Artist declare that they are authorized to commit themselves to the terms of the present contract and that they are not presently bound by contract to another record label and relieve the Producer of all responsibility for any actions, claims or any other proceeding of any nature whatsoever, taken against him with respect to the fulfillment of this contract.</p>	<p>The Artist who reaches an exclusivity agreement with a Producer must be free of any commitment having the same purpose as the one provided for in said agreement. (8-1.02)</p>	<p>Exclusivity concerning certain warranties can raise issues pursuant to the following provisions: CA.Art.15,70ss,19,67.1ss,81,83. WPPT Art. 6,7,8,9,10,15,16,18,19.</p>
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ARTICLE 14 - TERMINATION

<p>14.1. In the event that the Producer should go bankrupt or definitively cease doing business, the present contract is then terminated as of right and the Artist then automatically recovers all rights assigned or transferred to the Producer according to the present contract.</p>	<p>The Artist's exclusivity agreement is terminable as of right if the Producer becomes insolvent in terms of the Bankruptcy and Insolvency Act, (R.S.C. 1985 c. B-3), if he ceases business activities or if he is otherwise unable to act for a period exceeding six (6) months. (3-3.05)</p> <p>Furthermore, in the case of insolvency, the master tapes must first be offered to the Artist, according to the conditions provided for at article 3.3.04, and the Producer can only sell his rights to another Producer who undertakes in writing to respect the obligations resulting from said rights set out in the present agreement and in the exclusivity</p>
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agreement , according to the conditions provided for in the present section.

ARTICLE 15 - TRANSFERABILITY/ASSIGNABILITY

15.1. The Producer has the right to assign the benefits of the contract or any right, title or interest that he detains pursuant to the said contract, in whole or in part, to a third party, as he has the luxury to co-produce the master tapes with a third party. However, said Producer is only released by said assignment from the obligations incumbent upon him toward the Artist, pursuant to said contract, to the extent at which the third party has committed himself toward the Producer or the Artist to assume said obligations himself, for the benefit of the Artist.

The Producer who wishes to sell, assign or otherwise alienate one and only one Artist's master tapes to a third party, or assign the exclusive services of one and only one Artist, must offer them to the Artist first, at the same price and conditions that a third party would be willing to offer and that the Producer would be willing to accept. The price and conditions that the third party is willing to offer must be transmitted to the Artist by certified or registered mail.

The Artist who has not responded, in writing, within fifteen (15) days of reception is deemed to have refused the offer. (3-3.04) Any assignment having the effect of transferring to a third party the Producer's rights pursuant to the present agreement, can only be accomplished if the assignee undertakes, beforehand and in writing, to respect the obligations resulting from said rights set out in said agreements and to be bound by said obligations in the same way as the assigning Producer. (3-3.01)

15.2. The Artist acknowledges that the present contract is based on his personal and distinctive qualities, for which reason said Artist cannot assign in any way whatsoever, any right or obligation

set out in said contract.

ARTICLE 16 - NEIGHBOURING RIGHTS / SECONDARY USAGE RIGHT

<p>16.1. The Producer shall exercise the rights recognized by applicable laws, International Agreements or interprofessional collective agreements for any usage of the phonogram, other than private usage, whether it be communication to the public (broadcasting or cable distribution) or reproduction (soundtracks, private copies, audio-visual synchronization...).</p> <p>16.2. The present provisions do not prevent the Artist from collecting directly, through a collection society which he may be a member of, the royalties owed pursuant to the present contract, the law or collective agreements.</p>	<p>Each time an Artist receives royalties from a collection society, pursuant to copyright legislation or resulting reciprocity agreements, for any form of exploitation of the master tape other than the sale of a phonogram or video, the royalties received by the Producer for said forms of exploitation are not considered gross royalties subject to recuperation. Each party maintains his respective rights over said other forms of exploitation mentioned herein. (8-3.06) Nothing herein shall be interpreted as a relinquishment, in favour of the Producer, of an Artist's right or ability to collect sums owed to him personally pursuant to Canadian or foreign legislation or resulting from a current or potential agreement between users and collection societies. (8-4.01)</p>	<p>Exclusivity granted with respect to rights recognized by international agreements can raise issues pursuant to the aforementioned provisions of Clause 1.</p> <p>No relinquishment. International private law issues?</p>
<p>16.3. Remuneration for usages which do not give rise to the Producer's prior authorization right (right to fair remuneration, private copy) will be split half way by the</p>		<p>Exclusivity relating to certain collective copyright regimes can raise issues pursuant to the following provisions: CA Art.19,81</p>

Artist and the Producer.

16.4. In the event that the Artist and the Producer directly collect their part of the remuneration as Performing Artist and Record Producer for the same usage, said remuneration will remain with each party, and in no case can one claim any participation in the other's part,

16.5. When the Producer exercises his individual or collective authorization right, in order to grant secondary usage to a third party, the Artist collects thirty percent (30%) of the net sums received by the Producer pursuant to said usage, as long as he is not covered by a collective remuneration agreement.

Any sum or royalty relating to synchronization rights collected by the Producer are included in the Producer's gross revenues. However, when the Producer is also the record company, or when the record company is a parent, sister, affiliate or associated company, or when control is detained by the Producer (or vice versa), the Producer's revenues relating to synchronization rights are deemed never to be inferior to fifty percent (50%) of revenues relating to synchronization rights collected by the record company. (8-3.05)

WPPT.Art.3,4,15,16.

CA.Art.17.
WPPT. Art.5,10.

ARTICLE 17 - OTHER PROVISIONS

17.1. This exclusivity agreement is subject to the *l'Entente Collective du Phonogramme UDA/ADISQ*.

Any exclusivity agreement between a Producer and an Artist is governed by the present collective agreement and must include the following clause:

This exclusivity agreement is subject to the *l'Entente Collective du Phonogramme UDA/ADISQ*. (8-1.03)

17.2. The present contract represents the entire agreement between the parties and revokes any previous agreement.

17.3. The present contract shall be interpreted in accordance with the laws of Quebec and Canada and

the parties attribute exclusive jurisdiction to the Courts of the district of Montreal.

17.4. Any publicity or promotion implicating in any way the Artist's image or relating in any way to his private life respects the Artist's integrity.

The Producer must make sure that any publicity or promotion implicating in any way the Artist's image or relating in any way to his private life respects the Artist's integrity and has his prior approval. (6-7.03)