TOWARDS A FAIR DEAL
Contracts and Canadian Creators' Rights

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> In almost all countries in the world, copyright contract law as the historically more recent and underdeveloped part or subsystem of copyright law needs adaptation and amelioration. This is true at least if one can accept that the preamble of the old and venerable Berne Convention…shall be taken at face value, namely that the countries of the Union are equally animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works.[1]
>
> *Adolf Dietz*

INTRODUCTION: THE ECONOMICS OF BEING A CREATOR

Despite their rights under the *Copyright Act*,[2] many creators in Canada have minimal control over their published works and are undercompensated for their use. The superior bargaining position of corporate producers when it comes to acquiring individual creators' copyrights significantly speaks to both of these issues. In many cases, corporate intermediaries are able to impose "standard" contractual terms on creators and acquire, often in a no-strings-attached fashion, all rights granted under the *Copyright Act*, to be exploited exclusively in all forms now known or unknown, anywhere, for as long as possible. Creators are frequently required to waive their moral rights as well.

In 2001, the average annual earnings of employed and self-employed Canadian creators were $23,500.[3] Close to one in two creators was self-employed,[4] with earnings

considerably less than this average and without the private and public employee benefits typically associated with paid, full-time work. By contrast, the average income of the entire working population in 2001, of whom fewer than 10% were self-employed,[5] was $31,800.[6]

In most creative sectors there has been no substantial rise in income in decades. For example, the average net professional income of Canadian freelance book and periodical writers was measured at $11,480 in 1998, close to the level it had been in 1979, and this constituted only 39% of the average writer's income, with 61% coming from teaching, editing and other work.[7] Similarly, the annual average net professional income of a Canadian musician has been approximately $15,000 since the mid-1980s.[8]

Back in 1992, the Ministry of Culture and Communications in Ontario reported that between one-quarter and one-third of artists and cultural workers had earnings below the poverty line, for example, a typical lead dancer with a senior company and 10 years' experience earning $12,000 to $15,000 for a 35-week season and an average actor earning $15,000.[9] The authors of the report observed:

> The impact of such low levels of income, when combined with unequal and limited access to the kinds of social security benefits and legal rights enjoyed by the majority of the workforce is serious. While artistic activity generates a significant amount of economic benefit, little of this economic benefit is returned to the individual artist.[10]

Current studies indicate that creators still struggle to get their fair share. In 2005 the Professional Writers Association of Canada (PWAC) found that the average annual income of respondent freelancers to its survey of members and non-members, including part-time freelancers who have other employment, was approximately $21,000. For PWAC members this was $24,035, significantly less than the $26,500 reported in 1995.[11]

Quebec respondents to PWAC's national survey, with an average income of $24,082, were earning the highest pre-tax incomes.[12] Consistent with this finding, a Quebec Government publication shows the annual income reported by creators in Quebec, where approximately 62% of creators reported self-employment income in 2001, to be somewhat higher than that of creators elsewhere in Canada. But, although the average total income of all Quebec creators, both employed and self-employed, in 2001 was $37,710, and $36,540 for self-employed, the average income for many was much less, for example, $20,215 for dancers and $27,741 for visual artists, and the median income of all Quebec creators was only $23,620.[13] In the document releasing these figures, the Quebec Minister of Culture and Communications commented that the socio-economic profile of creators in Quebec reveals that a number of artists and other creators live a precarious economic existence or work at two jobs in order to live decently.[14]

While the earnings that most creators derive from their works stagnate or even decline, developing digital technologies are expanding the ways in which old and new works may be created and distributed and are bringing major change to the cultural industries throughout the world. Many of the abuses of creators' rights have been intensified by the new technologies, but an opportunity exists for creators to benefit from those new technologies and to improve their economic status. However, such opportunity will not be realized so long as creators who remain reliant on publishers or producers to distribute their works are required, as one commentator has stated, "to strip away their rights and get published, or walk away tarred."[15]

The inequality in bargaining power between creators and publishers is reflected in problematic copyright contracting issues and practices in various Canadian cultural

sectors, including the ones set out below, some of which have been dealt with considerably more extensively by Ontario journalist John Lorinc and Quebec lawyer Maryse Beaulieu:[16]

Books, Magazines and Newspapers

- Royalties paid by book publishers are usually insufficient to support trade book authors, even authors of bestsellers, without supplemental jobs and grants.

- In the textbook market, publishers frequently pay minimal royalties to authors who often share little in the success of the books they write, perhaps tolerating this because they gain prestige or career advancement from their writing and most have salaries from teaching.

- Freelance rates paid by magazines have remained stagnant for many years typically ranging from $0.40 to $2 per word.

- In the 1990's, magazine and newspaper publishers began regularly to demand, on a take-it-or-leave-it basis, that freelancers grant electronic rights to their articles in perpetuity, typically in exchange for 5% of the original fee.

- Translators are insufficiently acknowledged by publishers.

Photography

- Photographers are expected to relinquish digital rights to publishers for nominal compensation – their issue being similar to that facing freelance writers.

- Photographs are often cropped or digitally altered without the photographer's consent.

- It is not uncommon for photographers to find their images, only licensed for one-time use, on third-party websites without authorization.

Visual Arts

- Galleries and museums typically ask artists to waive their exhibition right (and fee) and, in some instances, their moral rights as well.

Music

- Music publishers frequently require a complete waiver of moral rights or at least a modified waiver from songwriters.

- Recording companies normally treat the costs of recording as a recoupable advance and do not always share advances they receive from a label or other third party with the songwriters and musicians.

Film

- Film directors are not given any authorship credit for their films and despite this are asked to waive the moral rights accorded by copyright legislation to an author. Nor are screenwriters credited with any authorship of a film, only of their screenplay. Where the moral rights waiver by these creative participants is not express, it may be implicit in other contractual provisions with respect to approvals and credits.

- When producers acquire film rights to an author's book, they almost invariably demand that the author waive his or her moral rights to the integrity of the work.

Theatre

- Theatres that commission or produce the first production of a play often demand participation in the playwright's subsequent earnings from that play – a practice that has spread from the United States.

Performing Arts

- Dancers, actors and musicians engaged and treated by producers as self-employed contractors are sometimes considered by governments to be employed creators and unable to deduct their expenses from taxable income.

All Sectors

- It is not uncommon for producers, including governments and government institutions, to require from the creator a very broad grant of rights or a grant of all rights in a work and then only to make use of a particular right.

- There is frequently confusion over ownership of copyright where a work may have been "commissioned".

- Clauses requiring an author to acknowledge that he or she has been engaged to create a "work-for-hire", a concept codified in and imported from the copyright legislation of the United States whereby the author gives up all rights to the work to the producer, are appearing in more and more contracts between Canadian authors and Canadian producers.

- Producers insist on unexpected and unfair terms of contract after a work or performance has been delivered or given as a condition of its acceptance and payment for it.

- Producers require warranties and indemnities that inappropriately shift legal risks onto creators.

- Producers frequently ask creators to grant them rights for the full term of copyright. There is no automatic reversion of rights to a creator after a fixed period, not even when the producer goes out of business.

- Creators usually lose all accrued royalties and fees still owing when publishers become insolvent, and in many instances their rights as well.

For the most part, Canada's policymakers and judges are seemingly unaware of the prevalence of these problems, and of the fact that the copyrights prescribed by the *Copyright Act* are the essential legal tool enabling creators who are not employed or subsidized to negotiate the contracts that provide them with compensation. They seem similarly unaware that the compensation for most independent creators is low.

In October 2002, Industry Canada published *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act* – which sought to address both cultural and economic policy objectives. The Report, which specifies "remuneration and control for rightsholders" and "dissemination and access to their works" for users as the two fundamental principles of Canadian copyright policy,[17] was much criticized by creator groups, who felt that much more emphasis was placed on the latter than on the former.

Also in 2002, the Supreme Court of Canada boldly declared that the *Copyright Act* is usually presented as a balance wherein the equipoise "lies not only in recognizing the creator's rights but in giving due weight to their limited nature."[18] "In crassly economic terms," the Court continued, seemingly unmindful of the economic circumstances of most Canadian creators, "it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them."[19] Notwithstanding the fact that most Canadian creators are clearly undercompensated, the Supreme Court of Canada has recently found it appropriate to emphasize the "limited nature" of creators' rights and to refer to the statutorily prescribed copyright exceptions as "user rights"[20]. In this way, the Supreme Court's new interest in *creating* and "balancing" copyright policy has arguably resulted in a general derogation of copyright and a creeping alignment of Canada's copyright law with that of the United States.

The Supreme Court's foray into copyright policy has been celebrated by those who believe that copyright mainly benefits corporations to the detriment of the public's interest in the broad dissemination and use of works. There are also those who believe that the individual creator reliant on copyright to earn a living is largely part of "traditional copyright mythology" -- a fiction or out-dated romantic construction.[21] For those who hold both beliefs, creators are weightless on the scales of "balance": there are simply the interests of corporate "rights-owners" on one side and the "public interest" on the other.

However, there is nothing notional about approximately 140,000 creators who belong to member organizations of the Creators' Rights Alliance/Alliance pour les droits

de créateurs or the 130,700 creators identified in Canada's 2001 Census and the many thousands more presumably not readily reflected in Statistic Canada's occupational categories.[22] And as Dutch law professor Bernt Hugenholtz observes, fostering these very real independent creators is more important than ever before in light of the fact that our information society is increasingly dominated by powerful media interests that seek, through contracts, to "grab" creators' economic and moral rights.[23]

While the "copyright grab" issue is undoubtedly one of great concern, it is a faulty premise upon which some look to dismiss the importance of copyright.[24] In short, copyright matters to creators; they are able to negotiate the contracts that bring them remuneration for the use of their work only because they own copyright, and they are affected directly and indirectly when it is weakened. If Canadian legislators are in fact animated by a desire to protect the rights of creators, they should be more concerned with how to put creators who have little bargaining power in a better position to negotiate fair deals with producers. Relatively speaking, the issue of whether creators need either more copyrights or fewer "user rights" is a moot point.

Largely by way of examination of European copyright laws and consideration of current copyright contracting practices and issues in Canada, it is the purpose of this paper to explore ways in which the status of Canadian creators may be improved. It is suggested here that implementing legislative measures to redress inequalities in Canadian copyright contracting would be consistent with the purpose of Canadian copyright law and its traditions, including Canada's acceptance of *droit d'auteur* principles in domestic and international contexts, and with Canadian labour law.

In Part I we will discuss copyright and its dual origins in Canada and, against this backdrop, some of the unfair contractual practices that work against the interests of Canadian creators, notwithstanding the copyrights they derive from national law in the context of international treaties. In Part II, we will outline legislative provisions designed to ameliorate the effect of structural imbalances in contract negotiations between creator and producer as they are found in the copyright laws of some European countries.[25] In Part III, we will discuss and critique briefly certain aspects of Canadian law that alleviate such structural imbalances to a certain degree. Finally, with reference to the preceding parts, we will conclude with some suggestions on how creators, "the heart of copyright,"[26] may ultimately be enabled to negotiate fair contracts.

PART I - COPYRIGHT'S DUAL ORIGINS IN CANADA AND UNFAIR CONTRACTING PRACTICES

Rights under the Copyright Act

Upon making an "original" work, Canadian authors automatically acquire a bundle of economic rights under the *Copyright Act*. Included in this bundle, for example, is the author's sole right to do, or to authorize, any of the following with respect to the work or any substantial part of it:

- produce, reproduce, perform or publish the work and any translation;
- convert a dramatic work into a novel or other non-dramatic work;
- convert a novel, a non-dramatic work or an artistic work into a dramatic work by performance in public or otherwise;
- make a sound recording of a literary, dramatic or musical work;

- reproduce, adapt and publicly present a work as a cinematographic work (more commonly termed an "audiovisual work");
- communicate the work to the public by telecommunication;
- present an artistic work at a public exhibition; and
- rent a sound recording of a musical work.

These authors' rights are subject to some specific exceptions and fair dealing for specified purposes.

Canadian performers have a much more restricted copyright that, generally, gives a performer the sole right to authorize the communication to the public by telecommunication and the recording (in any form) of his or her live performance (or any substantial part of it) and the reproduction of any recorded performances made without his or her authorization or made for a purpose other than that for which authorization was previously given. A performer also has the sole right to rent out or authorize rental of a sound recording of the performance. A performer's copyright is subject to conditions that largely limit this protection to acoustic or audio performances and does not extend at all to protection of audiovisual performances once fixed in an audiovisual work. Performers' rights, like authors' rights, are subject to exceptions and fair dealing.

The *Copyright Act* also confirms that creators who are authors possess moral rights in their works. These rights, for example, protect the creator to some extent from distortion, mutilation or other modification of a work that is prejudicial to his or her honour or reputation. Authors are able to license or assign their bundle of economic rights in whole or in part. However, their moral rights can never be transferred, although

they can be waived. Producers frequently do require authors to waive their moral rights, and it is debatable how strong those moral rights are, as the *Copyright Act* does not require moral rights waivers to be in writing. Moreover, authors must prove damage to reputation except with respect to changes to certain originals of artistic works (paintings, sculptures and engravings). Performers currently have no moral rights.[27]

Both economic and moral rights exist in Canada for the same length of time, which is generally the lifetime of the author plus 50 years from the end of the year in which the author died.[28] Performers' economic rights in Canada last for 50 years from the end of the year of its first fixation in a sound recording or performance (if not fixed in a sound recording), generally the same as in European Union countries. In some countries of Europe, moral rights for both authors and performers may be unlimited in duration. The civil remedies available in Canada for infringement of economic rights are also available for moral rights.

The ability of authors and some performers to do or authorize certain things in the "marketplace" because they own copyright does not guarantee a reasonable livelihood for Canadian creators, as the 2001 Census figures indicate. To begin to understand why, it is instructive to look at the underlying relationship between the market regime under which Canadian creators are able to "exploit" their rights and the way the rights they possess are conceived and justified in the first instance.

Producers and others arguing for greater copyright protection often place Canadian creators front and centre and sentimentalize them as poor or starving portrayers of Canadian culture to both Canadians and the rest of the world, yet the fact that many are economically ghettoized, at least in part as a result of the way in which their rights are

typically acquired by producers, is ignored. If copyright is truly about ensuring that creators are justly compensated and recognized for the works and performances they create and make available to the public, what can be done to the statutory regime to ensure that this aim is not undermined by the market regime within which the rights are exploited? And as U.K. law professor William Cornish asks with respect to copyright laws that derive their legal and moral force from an individual's creative act, "[i]f we are not prepared to provide legal buttresses for the interest of the author, why are they there at all?"[29]

Copyright's Dual Roots

Copyrights are typically justified with reference to one of two foundational rationales: the Anglo-American copyright tradition or the continental *civiliste* or *droit d'auteur* tradition.[30] As popularly referenced, Anglo-American copyright stems from positive law based on utilitarian, public interest principles, while *droit d'auteur* is conceptually rooted in natural law and, as its name suggests, is centred on the author. Where, under the former, copyright is granted to authors in order to stimulate and maximize the production of, and public access to, "original" works, *droit d'auteur* as a matter of natural justice recognizes personal rights that spring from the author's act of creation.

Copyright viewed from an Anglo-American perspective is solely economic in nature and its function of rewarding the creator has at times been characterized as "secondary"[31] to its primary objective of creating a supply of works for public consumption. Oxford law professor David Vaver, formerly at Ontario's Osgoode Hall,

observes that "[c]opyright is there to help propel works into the market. It is overtly an instrument of commerce rather than of culture, a tool of the media entrepreneur rather than of the author."[32]

Conversely, *droit d'auteur* is primarily about the author and reflects the fact that people, rather than corporations, create works. Inspired by John Locke's writings and fostered by the anti-corporatist sentiment of the French Revolution of 1789, *droit d'auteur* is premised on the principle that the fruits of intellectual labours are the property of their creators.[33]

Generally, creators' rights are more meaningful in jurisdictions that are rooted in *droit d'auteur*. French law professor Philippe Gaudrat argues:

> …droit d'auteur confers on the creator, irrespective of his 'market value', a specific status, which is linked to his special social function. It gives him social prestige and financial responsibility. If we wanted to summarize the difference, we could say that droit d'auteur makes each creator an entrepreneur of the mind, a minor employer, while copyright makes each creator a labourer.[34]

Gaudrat adds that the creator in a copyright jurisdiction has "to hope to become a star vital to the commercial success of an operation, so that he can negotiate on an equal footing with the financial investor. So it is the commercial appeal, his 'rarity' on the market according to the principle of supply and demand that gives him his new prestige; not his social function as a creator." Despite the fact that Canadian copyright law is conceptually influenced by and contains principles associated with each tradition,[35] Canadian creators currently do need to become stars in order to improve their economic status.

An observer of the bifurcated roots of Canadian copyright law might not expect this reality. Quebec lawyer Pierre-Emmanuel Moyse observes the following about the dual nature of copyright in Canada:

> What the term "copy-right" very certainly reveals is the actual function of copyright. It is an exclusive right and, as it applies to the part that relates to the commercial exploitation of the work, a true monopoly on reproduction…. Canadian law inherited that aspect while remaining receptive to the French doctrines, particularly because of Quebec's influence. This does great credit to our law since the Canadian Parliament is more inclined than any other legislature to stay attuned to external developments in order to mould its own rules.
>
> . . . . Thus, in Canadian statutes, the intention is to establish both a right that is centered on the person of the author, this being derived from the civil structures of the right of ownership, and a definitely dynamic right centered on its economic function, which reflects the theories underlying the concept of monopoly.[36]

Support for Moyse's statement on Canada's acceptance of *droit d'auteur* can be found very early on in Canadian jurisprudence. In *Morang and Co. v. LeSueur* (1911), 45 S.C.R. 95, Fitzpatrick C.J. addressing the interpretation of a contract between a publisher and the author of an unpublished work on William Lyon Mackenzie stated:

> I cannot agree that the sale of the manuscript of a book is subject to the same rules as the sale of any other article of commerce, *e.g.*, paper, grain or lumber. The vendor of such things loses all dominion over them when once the contract is executed and the purchaser may deal with the thing which he has purchased as he chooses. It is his to keep, to alienate or to destroy. But . . . [a]fter the author has parted with his pecuniary interest in the manuscript, he retains a species of personal or moral right in the product of his brain.[37]

Acceptance of *droit d'auteur* is also found in the first major Canadian study of copyright in the post-World War II period. The 1957 Report on Copyright,[38] produced by a Royal Commission chaired by James Lorimer Ilsley, stated:

> Copyright is in effect a right to prevent the appropriation of the expressed results of the labours of an author by other persons. That an author should have this right, at least for a limited period, is generally recognized – on the ground of justice, expediency or both.[39]

In effect, the Commission's view on copyright reflected both a utilitarian and author's rights perspective, although the Commission found it "unnecessary to go on record with a confession of faith in either doctrine to the exclusion of the other."[40]

Canada's accession in 1928 to the *Berne Convention for the Protection of Literary and Artistic Works* provides yet another example of Canada's implicit acceptance of the author's primacy in the copyright field. Entered into in 1886 by a handful of countries including Great Britain on behalf of her North American colonies Canada and Newfoundland, and last amended in 1971, the *Berne Convention*[41] is an instrument by which member nations agree to provide their authors with certain minimum protections and foreign authors with "national treatment" - protections no less favourable than those extended to their own national authors.

The preamble to the *Berne Convention* reveals an unequivocal purpose: "to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works."[42] Moreover, Article 2(6) provides that protection under the *Berne Convention* is to operate for the benefit of the author and his successors in title.[43] This comes as no surprise, given that the Convention was based on the 1883 draft text of an international copyright agreement produced by the Association Littéraire et Artistique Internationale (ALAI), which had been formed earlier in Paris in 1878 by influential authors like Victor Hugo.[44] On this *droit d'auteur* prominence within the *Berne Convention*, Vaver states:

> Its title is not now, nor has it ever been, the Berne *Copyright* Convention. The word 'copyright' makes the occasional cameo appearance in the English version of the text but, more significantly, the opening language of the treaty creates a Union for 'the protection of the rights of authors in their literary and artistic works'. The formula is repeated throughout the

> Convention. The French language version of the Convention, which prevails in any dispute on interpretation, naturally uses 'droit d'auteur'. The structure of the Convention reflects this French usage.[45]

In addition to its accession to the *droit d'auteur*-based *Berne Convention*, Canada also acceded to the *United Nations Covenant on Economic, Social and Cultural Rights* in 1976 (UNCESCR).[46] Similar to Article 27(2) of the 1948 *Universal Declaration of Human Rights* (UDHR),[47] the UNCESCR recognizes the natural rights creators have in their works. Specifically, Article 15 of the UNCESCR guarantees everyone "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."[48] With reference to these Articles in the UNCESCR and the UDHR, U.K. law professor Lionel Bently argues as follows:

> According to these definitions, copyright protection is granted not because we think the public will benefit from copyright but simply because we think it is 'right' or proper to recognize this property. More specifically, we believe it is right to recognize a property in intellectual productions, *because* such productions emanate from the mind of an individual author. For example, a poem is seen as the product of a poet's mind, their intellectual effort and inspiration, and an expression of their personality…Copyright is the positive law's realization of this self-evident, ethical precept.[49]

The *Agreement on Trade-Related Aspects of Intellectual Property Rights*, an agreement annexed to the *World Trade Organization Agreement* and known as TRIPs, which has bound Canada since January 1, 1996, can be viewed as a recent counterbalance to these longstanding international statements celebrating authorship. The TRIPs agreement requires members to comply with some requirements found in the *Rome Convention*[50] and, by reference, all of the substantive requirements of the *Berne Convention* (1971) with the exception of Article 6*bis*, which provides for moral rights:

> Independently of the author's economic rights, and even after transfer of said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory

> action, in relation to, the said work, which would be prejudicial to his honour or reputation.

With minor modifications, this wording found its way into Canada's *Copyright Act* in 1931. By contrast, despite eventually joining the *Berne Convention* in 1989, the United States does little (except to a limited extent through the law of individual states[51]) to protect the moral rights of authors other than visual artists, and it was to a large extent responsible for the omission of a moral rights protection requirement in the TRIPs agreement.[52]

Bargaining Imbalance

Despite support for *droit d'auteur* in Canada, the copyrights Canadian creators obtain under the *Copyright Act* do not protect them from "market" or contractual practices that generally lead to their undercompensation and neglect of their moral rights, and much needs to be done to protect creators' interests. The inequalities that may result in the market interaction between creators and corporate producers were recently acknowledged by the Ontario Court of Appeal in *Robertson v. Thomson Corp*., the Court stating that "allowing powerful corporations to deprive authors of the fruits of their labour is unjust"[53].

The imbalance in bargaining power between creators and producers is probably best demonstrated by the freelance journalists' and photographers' disputes with newspaper and other database publishers and aggregators, which developed in the 1990s.[54] At that time, publishers began to offer contracts to freelancers that do little or nothing to compensate them for digital uses of their works in addition to the usual payment for initial first use in print publications. Creators who signed, and continue to

sign, such contracts do not share in the advertising and e-commerce revenue generated by content on media websites. The most frequent result of a refusal to sign was that the job went to another writer who would sign, and in some instances creators who refused to sign were blacklisted.[55]

Canadian freelance journalists have brought class actions against media corporations to protest against the use of their articles, written for print use in newspapers, in commercial databases without permission and further compensation. In its decision in October 2006 in *Robertson v. Thomson Corp.*, the Supreme Court of Canada confirmed the need for the authors' consent for use of their works in online databases but left it to the trial judge to decide whether or not that consent had been given or could be implied.[56] Although the courts in Canada have not yet determined this issue of whether older, non-explicit licences granted by freelancers to newspapers cover digital as well as print rights, it is possible, if not likely, that they will come to similar conclusions as courts in the United States, the Netherlands and elsewhere, which have found in favour of the freelancers. However, even if the writers are as successful in the Canadian lawsuits, most publishers are now issuing revised contracts that scoop up all rights and, with very few exceptions, only those freelancers who are prepared to accept these terms get work. A final decision in *Robertson v. Thomson Corp.* in favour of the freelancers will put money in their pockets for past, infringing online uses but do little or nothing to resolve the difficulty of negotiating adequate payments for licensed online uses in the future.

A further instance of imbalance in bargaining strength between creator and producer has emerged with respect to a right that was introduced into the *Copyright Act*

in 1988. The exhibition right is the creator's right "to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan". In 2000 the Department of Canadian Heritage engaged a consultant to study the exhibition right (ER), who concluded that "overall, Canadian visual artists are not benefiting from the Exhibition Right…primarily because exhibitors are not respecting the ER."[57] The report states:

> While the practice of aggressive negotiating by exhibitors does not infringe the *Copyright Act*, it is not consistent with the spirit of the ER or that of copyright. An important component of the ER is that artists receive respect for their rights and recognition for the value of their work. The aggressive negotiating approaches of some exhibitors were taking advantage of artists' vulnerability, since most artists have few options but to comply with exhibitors' demands.[58]

The report continues:

> Given that the ER was included in legislation in 1988, it would be reasonable to expect that much more progress would have been achieved by now.[59]

The authors of the report conclude:

> …. Exhibitors are not complying primarily because they are concerned about the associated direct and indirect costs associated with the ER. Also, there is no motivation for them to change their current practices. In the current situation, exhibitors hold the advantage in negotiations since they have the ability to deny purchase and/or the exhibition of artists' work, depriving visual artists of revenue and/or exhibition of works and the much needed exposure. In these situations, exhibitors are taking advantage of artists' vulnerability.[60]

> Canadian directors are also vulnerable when comes to negotiating with producers.

Paradoxically, despite the fact that the *Copyright Act* does not accord the director of a film the status of an author, they are commonly asked to waive their moral rights of authorship. In most jurisdictions, with the United States as a notable exception, directors are recognized as authors or co-authors of audiovisual works. Lack of authorship status means that they are not entitled to share with producers and other creators in any

revenues from the retransmission of copyright works by cable and satellite companies in Canada and makes it difficult to collect moneys allocated to directors in foreign jurisdictions for retransmission and lending or rental of audiovisual works. The practical effect of all of this would seem to leave directors in Canada in a position not much different from directors in the United States, where the corporate producer is usually recognized as the legal "author" of an audiovisual work under the U.S. "works made for hire" rule. Although in both countries, film producers have the upper hand when it comes to bargaining, it is interesting to note that under the provisions of the Independent Production Agreement of the Writers Guild of Canada (WGC), Canadian screenwriters retain the copyright in their scripts. By contrast, American screenwriters working under the provisions of the comparable agreement of the Writers Guild of America cede copyright to the film producer as a work-for-hire. In short, both directors and screenwriters as well as actors working in the motion picture industry in the United States are contracted as employees.[61]

The term "work-for-hire" is increasingly appearing in the contracts offered to independent creators in Canada, sometimes after a work has been completed. Since this is a term that is defined in the American copyright statute and that is not part of Canadian law, if it is not fully defined in the offered contract, it is unclear what the producer is asking the creator to agree to and how a Canadian court might interpret such language. Under the American work-for-hire doctrine, the producer owns all of the author's rights outright, including the right to make further works based on the original work, and is considered to be the "author" of the work. As well as giving the producer total

ownership, the work-for-hire doctrine serves as a shield against moral rights claims by creators.

Whatever the legal rights of creators, it must be recognized that the real value of authors' rights is drastically diminished where an individual author cannot afford either to enforce his or her rights through legal action or to risk loss of work or future work by challenging a producer. For this reason, creators look to their organizations for assistance. Organizations representing creators support their members in endeavouring to counteract the types of the power imbalance we discuss in this paper by negotiating minimum terms or "scale" agreements with producers or recommending model contracts for their members' guidance.

Scale agreements are negotiated between producers' organizations and creators' organizations to establish minimum terms of the engagement of the independent creator by the producer. The creator may negotiate better terms but the producer may not offer less favourable terms. Such agreements have been negotiated, for example, by the WGC, Alliance of Canadian Cinema, Television and Radio Artists (ACTRA), Canadian Actors' Equity Association and the American Federation of Musicians of United States and Canada (AFM).

A number of other organizations have not been able to negotiate scale agreements but have "model contracts" and recommend that their members endeavour to obtain terms comparable to the recommended terms. Such agreements are recommended, for example, by PWAC, The Writers' Union of Canada (TWUC), Literary Translators Association of Canada and Canadian Artists Representation Ontario.

It seems that the contractual issues faced by creators in Quebec and the rest of Canada do not differ significantly. This is illustrated by the fact that the Writers Guild of Canada in May 2006 was able to negotiate a single agreement with the Canadian Film and Television Association and the Association des producteurs de films et de television du Québec. It is also seen in model contracts, for example, the contracts of TWUC and Union des écrivaines et écrivains québécois (UNEQ) are generally similar in their approach to protecting the rights of book authors with some differences, most more in form than substance. Where TWUC advises authors to reserve important derivative rights such as film or multimedia, UNEQ specifies that a separate contract should be signed if such rights are to be given to a book publisher and that a separate contract should be signed for each right - perhaps the influence of French law. However, where the UNEQ contract contemplates a termination date; the TWUC contract accepts the common practice of English-language publishers inside and outside Canada to demand rights that will last as long as a book remains in print or continues to sell a specified number of copies annually. English-language Canadian publishers have not been willing to limit the contract period to a fixed term of years.

It is open to Canada's policymakers to mitigate the effect of problematic contractual practices and issues referred to in this Part I and in the introduction of this paper by implementing legislative solutions and according more statutory expression to *droit d'auteur* principles Canada has always embraced. It is towards some of the principles, as they are found in the laws of certain European jurisdictions, to which we will now turn.

PART II – EUROPEAN LEGISLATIVE REMEDIES FOR STRUCTURAL IMBALANCES

Many European countries have provisions in their copyright legislation intended to protect creators from unfair contractual practices, including rules of restrictive interpretation providing interpretations that favour authors and performers in cases of doubt.[62] Germany's recent changes to its copyright law in 2002 are particularly noteworthy among such European laws that could serve as referential starting points for Canada. We discuss some of the more common provisions affecting copyright contracting below.

Ownership Rules Favouring Authors

There are many European copyright laws containing provisions favouring authors, especially in those jurisdictions rooted in *droit d'auteur* based on a "monistic" theory – meaning that copyright is inalienable from the natural author and can never be entirely transferred by the author to another person. Although copyright may be inherited, it may not be assigned either in whole or in part. German law professor Adolf Dietz explains:

> …German law provides rules that prevent authors from fully alienating all economic interests protected by copyright, while it limits even the waiver of moral rights protected by copyright, thus assuring that contractual transfers never fully deprive authors of their core rights.[63]

Consequently, in German copyright law there is no concept like the Anglo-English "assignment" or the French "cession". Countries like France, and also like Canada where moral rights have been grafted onto the economic rights, have a "dualist" conception of copyright, in which economic rights and moral rights are separable.

In Germany, the author or co-authors own copyright, even of works made in the course of employment or on commission, "in the absence of anything to the contrary in

the object or nature of the employment or commission" – statutory language which has however sometimes allowed courts to find implied clauses favouring employers.[64] Participants in the creation of an audiovisual work, such as a director, screenwriter, cinematographer or music composer, acquire a copyright in that work as co-authors and consequently, because copyright in Germany is not assignable, have rights to control uses of that work. Although some statutory limitations on transfer of rights by the producer cease to apply once production of the audiovisual work has begun and, in cases of doubt, the law presumes these co-authors to have granted the producer an exclusive right to adapt and utilize the audiovisual work, authors are not precluded from bargaining for more favourable clauses in their contracts and they do not waive their moral rights of integrity that enable them to prohibit gross distortions of their contributions to the audiovisual work, while taking into account the legitimate interests of their co-authors and the producer.[65]

Since only a natural person may be an author, France also rejects the notion that initial authorship could vest in an employer or a person who has commissioned a work, unless there is an express agreement to the contrary, and even if the work was created under the employer's instruction. Without such an agreement to the contrary, an employee writing for newspapers and other periodicals retains copyright, including the right to re-use his or her own works separately from the employer provided the use does not compete. This specifically includes the right to publish an anthology of his or her own works. The general rule of the author's ownership of copyright is subject to an exception for collective works, restrictively interpreted to mean a work in which the contributions of a number of employed or commissioned authors cannot be disentangled.[66]

Restrictions on Rights Transfers

The copyright laws of a number of European countries, whether dualist or monistic in tradition, take care to protect creators' economic interests in their copyrights by requiring specificity in contractual arrangements dealing with rights transfers. For example, the French Intellectual Property Code requires that each right granted by a creator be specifically mentioned in the contract and that the exercise of the rights conveyed be limited as to extent and purpose, as well as to place and duration.[67] A contract does not have effect to the extent that it does not specify rights and, in this regard, broad standard form contracts may in practice be unenforceable.[68]

Similarly the German Copyright Law of 1965 (German Copyright Act) contains a principle of purpose-restricted transfer. In other words, a contract that does not expressly enumerate authorized uses will be interpreted to mean that the author has not granted rights that extend beyond what would have been required to achieve the purpose the contracting parties contemplated at the time the agreement was made. Additionally, where there is doubt about the scope of a given transfer, Section 37 of the German Copyright Act provides, for example, that the author retains the right to disclose or exploit any derivative work based on that work.[69] Variations on the foregoing laws concerning rights transfers are also found in Belgium,[70] Greece,[71] Spain[72] and the Netherlands.[73]

German and Italian laws also specifically do not allow a contract to cover rights with respect to means of exploitation that are unknown when the contract is signed.[74] In the Netherlands, which does not have a provision of this sort, a court nevertheless ruled

in favour of freelance journalists in a lawsuit similar to *Robertson v. Thomson Corp*., rejecting the argument that the freelance journalists had implicitly authorized the newspaper for electronic uses of articles submitted in the 1980s when electronic reuses could not have been foreseen.[75] Perhaps this was an easier decision for the Dutch court than for Canadian judges for two reasons. First, a restricted transfer rule in Dutch law specifies that only those rights that are specifically mentioned in a contract, or are necessarily implied from the nature or purpose of an underlying transaction at the time of agreement, are conveyed thereby.[76] Second, Dutch law provides a moral right of first publication ("*droit de divulgation").* The Dutch court found breaches of both the journalists' economic and moral rights – ruling that *droit de divulgation* covers first publication in every separate new medium.[77] Based on a requirement that a grant to use a work in a future form of use must be explicit and provide for profit participation in such use, a Belgian court also found that the copyrights of journalists in their articles were infringed where the articles were used without authorization in a database operated by newspaper publishers.[78]

It is also noteworthy that the legislation of some countries places limits on the duration of some copyright contracts. For example, in Italy this is generally 20 years for publishing contracts.[79] In Spain, this is 15 years after manuscript delivery for most publishing contracts, but five years for other copyright contracts where no duration is specified. With respect to performers, five years is the maximum length of an exclusive transfer of the performance right.[80] France provides that a copyright contract must specify its duration, although it is more specific in limiting exclusive rights granted by a playwright to five years. Belgium and Spain also have limits of three and five years

respectively on some performance contracts. Greek and Spanish laws limit contracts to five years if not otherwise specified.[81] In the 1980s some book publishers in the United Kingdom agreed with the U.K. Society of Authors on a 20-year maximum term for their contracts, subject to renegotiation and renewal if agreed, but without legislation to back this up, it did not evolve into a widely accepted industry practice.

Finally, the copyright laws of some countries including Belgium,[82] France,[83] Germany[84] and Italy[85] provide that a copyright contract cannot be assigned without the author's agreement, with an exception being made for contracts that are transferred as part of the transfer of a publisher's enterprise. In some instances a similar rule also applies to authors' performance contracts and also to performers.

Producer Obligations

It is not uncommon to find certain publisher obligations statutorily expressed in the laws of certain European countries. For instance, Articles L. 132-11 through 132-14 of the French Intellectual Property Code prescribe a publisher's obligations to the author, which must be reflected in contracts conveying the right to reproduce literary, artistic or musical works for distribution to the public. These principally include the obligation to publish, to ensure permanent and continuous exploitation of the published work, to pay royalties for the copyright and to provide an accounting.[86] In Germany, a 1901 publishing act, as amended up to 2002, provides an important source of copyright law, establishing a comprehensive set of rules governing the rights and duties of authors and publishers of literary and musical works which, except for mandatory bankruptcy provisions, apply to individual agreements between author and publisher in the absence

of agreement otherwise.[87] These rules include an obligation on the publisher to exercise the rights it has been given to publish.

Some European laws also specify the moral rights obligations of the author's contractual partner; for example, the Italian law provides that the licensed producer of a dramatic work shall not present a work with additions, cuts or modifications not consented to by the author and that the advertising will contain the name of the author, title of the work and, if applicable, the names of the translator and adapter.[88] Even a work created for an employer, once accepted and approved, cannot normally be modified without the author's consent.[89]

Proportional or Reasonable Remuneration

Certain countries further protect the economic interests of creators by legally providing for recourse to proportional remuneration. French law, for example, prescribes that the author is entitled to participate proportionally "in the receipts resulting from the sale or exploitation of the work" to which the author has transferred rights.[90] The purpose of this provision, which cannot be contractually waived, is to permit the author to share in the commercial success of the work, such share generally to be calculated in relation to the retail or sale price to the public.[91] In keeping with this provision, it is permissible for assignees to be granted the right to exploit a work in a media neither foreseeable nor foreseen at the time of the contract if such contract expressly provides for a "correlative participation in profits of exploitation."[92] Lump sum agreements are void with certain exceptions including in the field of publishing, where the author may demand revision of the agreement if the lump sum does not amount to a certain percentage of what would

have been earned from a proportional royalty.[93] A related provision requires the publisher to keep the work for sale, with promotion consistent with industry practice.[94] Unless the contract provides otherwise, the author also has the right to an accounting at least once a year and the right to inspect the publisher's accounts.[95]

Article 46(1) of Spain's *Ley de Propiedad Intelectual* is similar to France's law in so far as it provides that an author transferring rights shall receive "a proportionate share in the proceeds of exploitation, the amount of which shall be agreed upon with the transferee."[96] The retail price of copies of a work or performance tickets (less value-added tax) usually constitutes the basis upon which a proportionate share is determined.[97] A so-called "bestseller" clause of this sort exists in at least five countries of the European Union, including France as described above, Belgium and Spain, but generally only allows modification of the contract where the author has been paid a lump sum disproportionate to the revenues received by the producer.[98] This provides a potential remedy for the author who has signed a "buy out" contract and is therefore unable, on the basis of that contract, to benefit from a big success of his or her work in the marketplace. At least in some countries, including Belgium and Poland, a statutory provision requiring publishers and holders of performance rights to provide accountings assists authors in obtaining benefit from the bestseller clause.[99] According to Hugenholtz, Germany's bestseller clause did not apply to creators in all sectors and the courts were reluctant to find a gross disproportion.[100]

In Germany, after a fierce, protracted battle between creators and publishers, the German Copyright Act was amended in 2002 for the purpose of "strengthening the contractual positions of authors and performers" (Amendment).[101] This Amendment was

designed to redress the structural imbalance in contractual relationships between creators and their licensees and reflected the fact that "freedom of contract" is illusory when the parties to an agreement have grossly disproportionate economic strength. Dietz makes the following related observation:

> …the Amendment…is the result of an increasing awareness of the fact that simply granting more and more protection rights to authors and performers in the field of traditional or 'substantive' copyright law is far from a sufficient answer to the actual and professional protection needs. 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).[102]

In order to enable authors and performers to participate equitably in the benefits derived from their works, the German legislature amended Section 11 of the German Copyright Act[103] to provide expressly, in respect of an author or performer, that copyright "serves to secure an equitable remuneration for utilization of his work."[104]

Section 32 of the German Copyright Act stipulates that an author may require that his contracting partner agree to alter their contract in order that the author is assured reasonable remuneration. Section 32 further provides that remuneration is reasonable if it is determined by "a common remuneration standard" referenced in the German Copyright Act or otherwise "if it conforms at the time of contracting to what is regarded as customary and fair in business having regard to the type and scope of the permitted uses, and in particular their length and timing, as well as to all other circumstances."[105] Unlike the bestseller provision in other countries and previously existing in Germany, this can lead to the modification of an agreement based on royalties, other than royalties agreed in a collective labour agreement.

Section 36 of the German Copyright Act states that remuneration is reasonable if it is set by a common remuneration standard concluded between representative, independent and authorized associations of authors and similarly qualified associations of users of works or individual users.[106] If negotiations fail, application can be made by one or both parties to an arbitration panel which may set remuneration standards. The arbitration panel is to consist of an equal number of panelists chosen by each party and an independent chairperson, who should be agreed by both parties. The arbitration process must take place upon the written request of one party if (a) the other party has not commenced negotiations within three months after the first party's request; (b) there is no result from negotiations one year after their commencement has been requested in writing; or (c) one party declares that the negotiations have wholly failed.[107]

It is still premature to comment fully on the efficacy of the Amendment. Common remuneration standards were established in the publishing industry for the first time in June 2005. The establishment of these standards was, predictably, difficult, drawn out and politically charged. Ultimately the Federal Minister of Justice's intervention was necessary for the conclusion of the standards.[108] However, one might expect that over time the Amendment will lead to stable, equitable contractual relations similar to those existing in the Nordic countries (as discussed below in the *Standard Contract* section).

Termination of Contract

Most European Union countries allow for early termination of a fixed term contract in the event of substantial breach of the other party's obligations, including non-use.[109] Germany, for example, permits termination for non-use or even inadequate use

where there is serious injury to the legitimate interests of the author (excepting some contributors to audiovisual works) after two to five years, subject to some further conditions including reasonable notice to the producer and an opportunity to exercise the right.[110] A somewhat similar provision in Austria also extends to the reproduction of performances on videocassettes and audiocassettes but not to exclusive exploitation rights in audiovisual works.[111] Finnish, Swedish and Danish contracts can be terminated for non-use after two years from delivery of the work and four years in the case of musical works.[112] In France, non-use for two years triggers an automatic reversion of performance rights in audiovisual works.[113] In Italy, there are specific time limits for publication. For example, if a new edition of a book is not published within two years or if an article is not acknowledged within a month or reproduced within six months of acceptance, the author can terminate the agreement. There is a similar rule regarding contracts for the performance of a work. If an audiovisual work in Italy is not completed within three years or not shown within three years of completion, the licence from a contributing author becomes non-exclusive.[114]

A few European Union countries expressly allow bankruptcy or similar insolvency as grounds for reversion of rights or other provisions protective of authors. In Italy, for example, a publishing contract generally terminates if activities of the publisher are not resumed or transferred to another publisher within a year of a declaration of bankruptcy.[115] On bankruptcy in Austria the author may terminate an exclusive contract where exploitation has not begun, and in Germany and Spain the author may terminate if the user has not yet begun to reproduce the work for publication.[116] In Portugal, the bankruptcy of the publisher may be considered to imply termination of the contract and,

in Belgium, authors may ask for termination on bankruptcy or liquidation of an audiovisual producer if the producer has not been active for more than twelve months or the work has not been sold. France provides that the author may terminate in cases of judicial liquidation of a publisher or where the producer's activities ceased more than three months earlier and has a similar rule for audiovisual production and perhaps by analogy to other types of contract.[117] In Italy and in Finland and Sweden, as long as copyright remains the property of the author, it cannot be pledged as security or seized, although copies can be.[118] This is also the case in Germany with respect to copyright (which cannot be assigned), but not to rights of use.[119]

Standard Contract

A model contract known as the "Scandinavian Standard Contract" was approved by both authors' and publishers' organizations in Denmark, Finland, Norway and Sweden in 1947, with similar provisions in all four countries.[120] This was of great importance for individual authors in asserting rights against their more powerful contractual partners. In the mid-1960s, the artistic community was successful in achieving substantial government support as well as compensation for photocopying and public lending, but standard contracts with publishers remain important and are the main source of writers' incomes.[121]

Following the shared Nordic model, for example, the Norwegian Authors' Union had concluded its first collective agreement with the Norwegian Publishers' Association in 1948. There are now five main writers' associations, all with collective agreements with clauses "prescribing fair deals and inalienable rights of *droit moral*".[122] The

agreements also include a dispute resolution mechanism involving the authors' and publishers' organizations and arbitration if a dispute is not resolved by negotiation. The organizations now regard the agreements that have been negotiated as "reasonably successful" and the government recognizes artists' interests as legitimate in a permanent negotiation structure.[123] There are nevertheless still desirable improvements in authors' protection; for example, the Swedish Union of Journalists deplores "free-use contracts" that allow the media company to use freelancers' material on the Internet for a long time without extra compensation and believes that the author's bargaining position should be enhanced along the lines of the new German model.[124]

Droit de suite

Droit de suite provides artists in many countries with an inalienable right to receive a percentage of the revenues when an original work of art is resold. First introduced in France following World War I, it is optional for members of the *Berne Convention* and subject to "reciprocity", not "national treatment", so countries do not have to treat foreign authors in the same way as their own, unless the author's own country provides a similar right. Despite fierce opposition from art market professionals, it became mandatory as of January 1, 2006 for those countries of the European Union (EU) which already had *droit de suite* legislation and no later than January 1, 2010 for countries for which it would be a new right.[125] The preamble of the EU Directive refers to this right as "an integral part of copyright" and "an essential prerogative for authors".[126] *Droit de suite* also exists in Australia, Mexico, the Philippines and the state of California.

To earn their living, young, emerging or needy artists are under pressure to sell their works to art dealers, galleries and collectors at low prices, and many of them watch as others subsequently buy and sell their art for prices far in excess of what they were paid. Fairness invites some mechanism to allow artists to share in the increase in value. However, the *droit de suite* has been controversial. The EU Directive establishes a high minimum threshold of 3000 euros above which the right applies, a sliding royalty scale beginning at 4% and declining to 0.25% as the price of the work increases, a cap of 12,500 euros on the royalty payment, and applicability to non-EU artists on the basis of reciprocity, not national treatment.

The Directive's ceiling has been criticized by visual arts collectives as too low and its minimum resale price tag as too high, as almost half of all eligible sales are below 1000 euros. However, the threshold triggering a royalty payment in most EU member states is greatly lower, in Denmark 270 euros, in Finland 250 euros and in Germany 51 euros.[127] In France the threshold is only 15 euros – which resulted in 17 million francs being distributed to 1700 artists and artists' estates in 1990.[128] In 1998, 2.3 million euros were distributed to artists and their estates in France and 2.2 million euros in Germany.[129] The right, sometimes based on the gross price as in France or on capital gain as in Italy, has been criticized by economists because of its transaction costs, but collection and distribution by collective societies minimize this expense. Although collective management is not mandatory, it has been the *de facto* basis for *droit de suite* in the EU, with administrative expense ranging between 10% and 25%.[130] *Droit de suite* was also criticized because of the possibility that it could distort the art market, but this was what led to the efforts to harmonize the scheme at least within the European Union, and it

seems likely in any case that the costs of shipping and taxation as well as the cap on the amount payable have discouraged the migration of works of art to markets without *droit de suite*.[131]

Droit de suite in the EU is an interesting example of an author's right that is inalienable and cannot be waived even in advance of the work being created. By this means, creators are ensured some benefit when their artistic works reappear in the market and others profit from their resale.

Equitable Remuneration

Although they may not initially seem to have an obvious place in a study of contracts, mention must be made of levies as a means of remunerating creators and other rightsholders where lawmakers have recognized the difficulty experienced by copyright owners faced with widespread dissemination of their works because of technologies, and where voluntary licensing of rights by individuals and collective societies is clearly unworkable. Levies – or royalties arising from a remuneration right - may be imposed on the manufacture, importation or purchase of copying or recording equipment or on the medium (for example, a blank disk) onto which works are copied.

In some countries including Germany, where levies are the basis of payment to rightsholders for both reprographic copying (mainly photocopying) and private copying (audio recording), this scheme of remuneration is referred to as a "legal licence", although it can also be viewed as a copyright exception or suppression of the exclusive right justified by compensation to rightsholders. Creators are certain of receiving a share of the revenues – in accordance with the European concept of "equitable remuneration" -

as collection is entrusted to collective societies. Levies may be set by law or a government authority or, as in Austria, France, the Netherlands and Switzerland, the levies are negotiated by collective societies representing rightsholders and associations representing users, at least sometimes subject to the approval of a decision-making body to verify fairness.[132]

The European Rental and Lending Right Directive[133] points to a new function for collective societies along similar lines. As described by Silke von Lewinski, a law professor at the Max-Planck Institute in Germany:

> …the author and the artist enjoy a right to equitable remuneration for the rental right, which subsists after the transfer of the exclusive right. In order to assure that this right would be valuable in practice, it is provided that the author and the artist cannot waive this right. In addition, it seems essential for the realisation of this aim to provide, above all, that a collecting society is interposed between the author/artist and the exploiting person, in such as way that the right to obtain an equitable remuneration can only be administered by, and only transferred to a collecting society.
>
> As a consequence of this regime, the typical weakness of the author and artist within the licensing negotiations is compensated by the stronger position of a collecting society, which is mandated to negotiate remuneration….[134]

The Directive encourages but does not require an administrative model based on this intervention of collective societies. Depending on their national law, the authors, performers and producers may remain free to contract themselves although it may be that "their freedom lies in choosing to subject themselves to certain legislation"[135] and opting into (possibly mandatory) collective administration.

PART III - CANADIAN SOLUTIONS?

In Part II of this paper we discussed legislative provisions in European law that can help to protect creators from unfair practices by stronger negotiating partners. In Part III we will discuss certain aspects of Canadian law that alleviate to a certain degree the structural imbalances which exist between creator and producer in Canada. However, for reasons discussed below, most are insufficient in themselves to do much to improve the status of creators.

In addition to a few provisions in the *Copyright Act* governing transfers of copyright, there are legal doctrines found in Anglo-Canadian case law that may from time to time benefit the rare Canadian creator with the economic means to litigate on grounds such as the unconscionability of a contract, inequality of bargaining power, and restraint of trade. As well, collective administration of rights and the labour relations component of "status of the artist" legislation can be important mechanisms for many creators.

Legislative Provisions Intended to Favour Authors

The *Copyright Act* provides that no assignment or grant of an interest in a copyright is valid unless it is in writing signed by the owner of the right or the owner's agent, and also that where author is employed by a newspaper, magazine or other periodical, the author shall be deemed to have reserved a right to restrain publication of his or her work other than as part of that newspaper or other publication. As well, the *Copyright Act* also provides that moral rights may be waived but not assigned. Unless otherwise provided in the author's will, copyright reverts to the author's heirs 25 years following his or her death.

There will be some increased protection for photographers and moral rights for audio performers when Canada amends the *Copyright Act* to implement the *WIPO Copyright Treaty* and the *WIPO Performances and Phonograms Treaty*, but neither of these treaties concluded in 1996 mainly to address the challenges of digital technologies will otherwise do anything to change the imbalance in contractual relations existing between creators and producers in Canada. These so-called "Internet treaties" have not yet been implemented or ratified by Canada.[136]

The *Bankruptcy and Insolvency Act* provides for the reversion of rights in an unpublished book without financial cost to the author if no expense has been incurred by a bankrupt publisher or if the author reimburses the trustee for the expense incurred or if, after six months, the trustee decides not to carry out the contract. In the case of a published book, the author has no entitlement to reversion but the trustee may not assign the copyright or license the work except on terms that will guarantee the author royalties. This legislation does not apply in insolvencies other than a bankruptcy and does not specifically assist authors other than book writers, but in *Re: Song Corp.* a court was prepared to extend the benefits of this provision to the copyright in musical works.[137]

Legal Doctrines

That certain legal doctrines can be used to override inequitable contracts was demonstrated in a series of important United Kingdom cases, which include *Schroeder Music Publishing Co*. v. *Macauley* (1974)[138] (*Schroeder*), *Zang Tumb Tuum Records Ltd. and Another* v. *Johnson* (1988)[139] (*Zang*), and *Silvertone* v. *Mountfiel*d (1993)[140] (*Silverstone*). In *Schroeder*, the House of Lords determined that a standard-form

agreement that had resulted from inequality in bargaining power between a songwriter and a corporation was unenforceable as a restraint of trade. The agreement contained a number of one-sided, "unfairly onerous" provisions which, among other things, granted the publisher a worldwide assignment of copyright and permitted the publisher to enjoy the exclusive services of the songwriter for a five-year term with an option for a second five-year term if royalties from the first term exceeded a stipulated modest amount. Moreover, the songwriter was unable to terminate the agreement in the event that the publisher chose not to publish the compositions. In rendering its decision, the House of Lords saw to it that the publisher was unable to uphold the unconscionable bargain that it had been able to strike because of its superior bargaining power.

For similar reasons, a similar conclusion was reached in *Zang* where the English Court of Appeal was concerned by a number of the terms in agreements between the band Frankie Goes to Hollywood and two related publishing and recording companies. Included in these concerns was the fact that Holly Johnson, the lead singer of the band, would be unable to perform his own songs owing to the world-wide assignment of copyright in the publishing agreement.

Interestingly, in connection with the United Kingdom Government's current review of intellectual property issues, there is currently a call to legislatively address some of the issues arising in *Schroeder, Zang* and *Silverstone*. In this vein, U.K. lawyer Ben Challis has suggested that any extension of copyright term in sound recordings should be accompanied by provisions that protect and encourage the people who actually make sound recordings. In the view of Challis, these would include the following:[141]

- An automatic and irrevocable re-assignment of copyright in sound recordings to the recording/performing artist(s) after 25 years and earlier return of copyrights to recording artists (and indeed songwriters) where the work is not commercially exploited by a record label (or a music publisher).

- A legal recognition of recoupment by artists in terms of a return of ownership of masters and/or joint control with labels when an artist recoups.

- A fiduciary duty placed on labels to account to the recording artist(s) on a regular basis for an equitable share of all revenues for the life of the copyright term and/or an obligation placed on record labels to account transparently to artists and account on source income.

- The automatic return of copyrights where there is a failure to account.

Collective Administration

Acting collectively is an important way for creators to gain bargaining strength they do not have as individuals. Where it is not economical for individual creators to license particular uses of their works, it has proved advantageous for them to form a collective society that can license a work either on a transactional basis or as part of a blanket licence covering the works of many rightsholders, collect royalties and pay the creator or other rightsholder. Provisions in the *Copyright Act* except the operations of collective societies from certain provisions of the *Competition Act*, which excepts the collective bargaining of trade unions from being considered in restraint of trade but not collective societies.

Many collective societies today are at a crossroads, as the extent of their role in the digital environment is not yet clear. They are seriously engaged in developing new ways of licensing the works of creators, and for some collective societies this will depend, to a large extent, upon revisions to the *Copyright Act* that would encourage or

facilitate collective administration. At a more fundamental level, the continuing success of collective licensing will also depend on whether individual creators perceive an advantage to themselves in entrusting the licensing of digital rights to a collective society – that is, greater benefit from the deal the collective society can make than from the deals creators can make individually.

Most collective societies grant licences to users or apply to the Copyright Board for a tariff applicable for certain uses. However, the Canadian Private Copying Collective collects a levy from manufacturers and importers on blank tapes and other blank recording media, intended to provide compensation to rightsholders – both authors and performers of musical works embodied in sound recordings as well as sound recording producers - for the copying of a sound recording by individuals for private use. These rightsholders are entitled to remuneration in respect of such copying, which is not an infringement, and the levy is based on a tariff approved by the Copyright Board. This right of remuneration, also granted to foreign authors on the basis of reciprocity, amounts in effect to a compulsory or statutory licence for the downloading of music for private use. Although compulsory licences in Canada have been generally viewed as a last resort and only legislated where neither collective nor individual licensing is practicable, it should be noted that a levy can be used to ensure fair compensation for authors and performers, as long as producers do not require creators to sign contracts transferring to them this right to remuneration.

Collective administration of copyright began in Canada as early as 1925 with the formation of the Canadian Performing Rights Society, a precursor of the Society of Composers, Authors and Publishers of Canada (SOCAN), which today represents more

than 35,500 active composers, lyricists, songwriters and music publishers (with a total membership of over 80,000). The *Copyright Act* has provided for performing rights collective societies with respect to musical works and dramatico-musical works since 1931, but for collective societies administering a repertoire of works for other uses only since 1988, retransmission rights and off-air taping for educational institutions since 1989, and the equitable remuneration rights of performers and producers of sound recordings since 1997.

There is bargaining strength in numbers but it is not usual for all of a creator's rights to be dealt with by a collective society. There will always be instances where it is more appropriate for the creator to negotiate his or her own deal, control the terms and conditions, and sign the deal. The drawback is that the average individual creator has little bargaining power where there is no labour relations framework. For creators in some sectors, this may be provided by "status of the artist" legislation, which is unique to Canada.

"Status of the Artist" Labour Relations Regimes

History. In 1976 the UNESCO General Conference suggested that a worldwide study on the "status of the artist" be undertaken. This was followed, a year later, by a joint meeting of UNESCO and the International Labour Organization to consider artists' working conditions. Canadian Paul Siren, for many years secretary general of ACTRA, chaired a Joint Committee of Experts, which worked on a draft recommendation for consideration by UNESCO member states. In 1980 Canada signed the *Recommendation Concerning the Status of the Artist* (UNESCO Belgrade 1980). This international

document, known as the *Belgrade Recommendation* – something short of a convention – committed Canada to improve the socio-economic position of creators in Canada. Its Guiding Principles include the following:

> Member States should ensure, through appropriate legislative means when necessary, that artists have the freedom and the right to establish trade unions and professional organizations of their choosing and to become members of such organizations, if they so wish, and should make it possible for organizations representing artists to participate in the formulation of cultural policies and employment policies, including the professional training of artists, and in the determination of artists' conditions of work.

By signing on, countries were acknowledging that artists should be entitled to proper remuneration, social recognition and social security, and be entitled to control their work. The document encouraged its signatories to promote and protect the status of artists and to recognize the right of trade union and professional organizations of artists to represent and defend the interests of their members.

> Recognizing the part played by professional and trade union organizations in the protection of employment and working conditions, Member States are invited to take appropriate steps to: (a) observe and secure observance of the standard relating to freedom of association, to the right to organize and to collective bargaining, set forth in the international labour conventions listed in the appendix to this Recommendation and ensure that these standards and the general principles on which they are founded may apply to artists;….

This *Belgrade Recommendation* led, in 1986 in Canada, to the Siren-Gélinas *Task Force on the Status of the Artist* [142] and in 1992 to the enactment of the federal *Status of the Artist Act*, not fully proclaimed in force until 1995, which dealt with "professional relations" between independent creators and federal producers. Several years earlier, in 1987, the Quebec legislature had enacted legislation which served as a model for its labour relations component. Canada was the first – and today remains the only – country to provide a collective bargaining rights regime for self-employed creators. [143]

Quebec "Status" Legislation. In 1987 the Quebec legislature passed *An Act respecting the Professional Status and Conditions of Engagement of Performing, Recording and Film Artists.*[144] This act resulted, to a large extent, from pressure from Union des Artistes (UDA) and other unions representing self-employed artists working in the performing arts, for the most part in sectors in which voluntary collective bargaining was already well established. Following a provincial labour board decision in 1982 which threatened to erode the ability of UDA to represent certain of its members who could be viewed as salaried rather than independent workers, UDA began to push the Quebec Government for a labour law covering independent artists in categories represented by UDA. The demand by the unions for special labour legislation for artists reinforced the international status of the artist activities sponsored by UNESCO and resulted in 1986 in a provincial legislative commission on status of the artist and in legislation the following year.

This 1987 Quebec act on status of the artist created a labour relations regime applicable to professional artists working mainly in theatre, opera, music, dance and variety entertainment, film, sound recording and, since 2004, multimedia,[145] mostly self-employed artists but also some deemed to be self-employed for the purpose of the act.[146] A tribunal known as the Commission de reconnaissance des associations d'artistes et des associations de producteurs was appointed by the Quebec Government, with responsibilities that included granting and withdrawing recognition to artists' associations, appointing mediators and arbitrators and advising the Quebec Government on the administration of this act.

Where the Commission is satisfied that an association that has applied for recognition comprises the majority of artists in a particular sector, it will grant recognition to it, subject to certain by-law requirements.[147] Twelve associations are currently recognized for bargaining. The following rights and powers are conferred on artists' associations by recognition:

- to defend and promote the economic, social, moral and professional interests of the artists;
- to represent the artists in every instance where it is in the general interest that it should do so, and to co-operate for that purpose with any organization pursuing similar ends;
- to conduct research and surveys on the development of new markets and on any matter which may affect the economic and social situation of the artists;
- to fix the amount that a member or non-member of the association may be required to pay;[148]
- to collect any amounts due to the artists whom it represents, and remit the amounts to them;
- where there is no collective agreement, to establish model contracts for the performance of services and make agreements with the producers as to the use of such contracts; and
- to negotiate a collective agreement, which must include a model contract for the performance of services by the artists.[149]

This last provision is the one that allows for the negotiation of collective agreements with producers or associations of producers stipulating minimum terms and conditions for the engagement of artists, while removing the risk of this collective bargaining from being viewed by competition authorities as monopolistic and in restraint of trade. Producers may form associations for the purpose of negotiations, and if there is a recognized producers' association, the recognized artists' association may only

negotiate with it.[150] Unfortunately producers are not required to form associations for this purpose and no producers' associations have been recognized.[151] Consequently collective or minimum terms agreements must be negotiated producer by producer. A key provision of the 1987 act leaves an artist free to negotiate and agree on terms of engagement with a producer, but an artist and producer bound by the same collective agreement cannot stipulate a condition less advantageous to the artist than the condition stipulated in the collective agreement.[152] The collective agreement binds the producer and every artist in the negotiating sector who is engaged by the producer, not just members of the artists' association. It also would all bind producers who are members of an association of producers at the time of the signing or subsequently. If a producers' association were to be recognized as the "most representative" in its field of economic activity, its collective agreements would have wider application, as they would bind non-member producers as well as member producers working throughout that field.[153]

When notice to negotiate is given by the recognized artists' association or by the producer or association of producers, the parties must begin to negotiate at the time fixed in the notice and negotiate in good faith.[154] At any stage of negotiations, either the artists' association or the producer may request the Commission to appoint a mediator, who is paid by the Commission, and if the mediation has not resulted in an agreement during the negotiation of a first collective agreement, either the artists' association or the producer may ask the Commission to appoint an arbitrator, again paid for by the Commission. An arbitration award has the same effect as a collective agreement.[155] In the course of a negotiation for a subsequent collective agreement, the request for arbitration can only be made jointly by the parties.[156] However, an amendment in 2004

provided that a collective agreement can stipulate that the minimum terms and conditions continue to apply until a new agreement is signed. [157] If no agreement is reached and no arbitration commenced, the recognized artists' association may initiate concerted action to induce the producer to conclude a collective agreement. Producers have a similar right.[158] Copies of collective agreements must be filed with the Commission.[159] The 1988 act was amended in 1997 to include a grievance arbitration procedure.[160]

A second Quebec act on status of the artist followed in 1988, entitled *An Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters.*[161] This 1988 act was intended to facilitate the negotiation of agreements between recognized associations representing self-employed professional artists and individual producers (called "promoters" in the unofficial English language version of the act) or an association representing a group of producers that would establish minimum terms for agreements between individual creators and producers. Initially welcomed by creators as a tool to protect their rights concerning the "circulation" of their works, including the "sale, lending,…exhibition… public presentation, publication or any other use of the works of artists" in their dealings with a "promoter",[162] artists and their associations and artists eventually discovered that the rights and protections it offers are of little practical help.

The Commission already established under the first act was given responsibilities under this subsequent act as well, but its authority was significantly more limited. These responsibilities include recognition of the association or group that is "most representative" of all the professional artists working in a particular field of visual arts, arts and crafts and literature. The Commission's lack of powers is reflected in the

wording of the listed duties of a recognized association, which "may…represent its members for the negotiation and performance of their contracts with promoters" and "may…draw up model contracts for the circulation of the works of professional artists and propose the use of such contracts to promoters."

Nothing in this 1988 act requires a producer to negotiate with the artists' association despite the association's recognition by the Commission or requires producers to form groups for the purpose of negotiations with artists' associations. Nor is there any provision for recognition of producers' associations (recognition is a possibility although not a reality under the 1987 act). A recognized artists' association is therefore faced with the prospect of negotiating with a great number of individual producers, albeit a theoretical prospect since none wish to negotiate at all. In any case, without the possibility of recognition for a producer's association, whatever might be negotiated with such an association would not extend beyond its membership to the whole sector.

Association nationale des éditeurs des livres (ANEL), for example, has refused to resume broken-off negotiations for a minimum terms agreement with Union des écrivaines et écrivains québécois (UNEQ), which was recognized by the Commission to negotiate for all writers, although recently there has been an amendment to the 1988 act that allows Association québécoise des auteurs dramatiques (AQAD) on behalf of playwrights to negotiate with producers subsequent to the commissioning producer.[163] (AQAD is also recognized under the regime of the 1987 act to negotiate with commissioning producers.) The 1988 act presents a further problem for UNEQ, which has crticized the narrowness of its definition of "literature", which falls considerably

short of covering all works of all of its members, and has lobbied without success for an amendment to cover a broader field of writing.

Unlike the earlier act, the 1988 act does not provide for the appointment of either a mediator or an arbitrator to assist the artists' association to reach a first contract with a producer or group of producers. The lack of such provisions has turned out to be a major flaw. Not surprisingly, although four artists' associations have been recognized under this second act, two of which were formed in response to it, no contracts have been negotiated.[164]

The 1988 act also requires a signed written contract between creator and producer, stipulates various matters that any individual contract between any artist and producer must address,[165] and allows substantial fines for certain deliberate violations, although compliance and enforcement are problematic. It is easy to see in these requirements the influence of European *droit d'auteur* regimes such as the German publishing law and the French Intellectual Property Code.

Quebec contracts since April 1, 1989, when the law affecting artists in the visual arts, arts and crafts and literature came into effect, must set out the following:

- the nature of the contract;
- the work or work which form the object of the contract;
- any transfer of right and any grant or licence consented to by the artist, the purposes and the term of the transfer or licence and their territorial application;
- the transferability or non-transferability to third persons of a licence granted to the promoter;
- the financial consideration due to the artist and the terms and conditions of payment; and

- the frequency with which the promoter shall report to the artist on the transactions made in respect of the work that is subject to the contract.[166]

There are additional requirements for agreements between an artist and a producer, some concerning a future work.[167] As well, a producer must keep a separate account for each contract with an artist, recording all payments received from others and, where applicable, the number of copies printed and sold; it must provide these reports at agreed times, not less frequently than once a year; and the artist is entitled to have an expert of his or her choice perform an audit of these records at the artist's own expense.[168] In the case of works of art, a gallery or auction house, for example, must keep a register of works of art that it possesses but does not own, and artists may examine this register.[169] A producer is prohibited, without the artist's consent, from giving rights obtained from the artist by contract as security or granting a security on a work subject to a contract and owned by the artist.[170] Additionally, a contract is "terminated if the promoter commits an act of bankruptcy or has a receiver order issued against him under the *Bankruptcy and Insolvency Act* (Revised Statutes of Canada, 1985, chapter B-3), if his property is taken possession of according to law or, in case of a legal person, if such legal person is liquidated."[171] Unless the artist and producer agree to give up this right, contract disputes between artist and producer may be submitted to arbitration if requested by either party.[172]

Commendable as these stipulations for individual contracts are, it seems that many producers do not comply with them. Moreover, without any mechanism to force producers to negotiate agreements, the professional relations component of this act is woefully inadequate, not having resulted in any collective agreements or even model

contracts. In short, whether well-intended or window-dressing, the provisions of the 1988 Quebec act, unlike the 1987 act, have generally done little to benefit creators in Quebec.

Federal "Status" Legislation. The federal *Status of the Artist Act*, operational in 1995, has a labour relations component similar to that of the 1987 Quebec act, allowing bargaining between associations representing creators who are self-employed professionals and federal producers for collective agreements. These "scale agreements", as they are called in the federal act, establish minimum terms for creators' services but leave the individual creator free to negotiate better terms.[173] Federal "producers" are government institutions (federal government departments and most federal agencies and crown corporations) and broadcasters under the jurisdiction of the Canadian Radio-television and Telecommunications Commission (CRTC). This federal legislation established the Canadian Artists and Producers Professional Relations Tribunal (CAPPRT), which has responsibility for the recognition or "certification" of associations representing professional creators with respect to particular sectors that CAPPRT determines as suitable for bargaining.[174] CAPPRT will certify the "artists' association" that is "most representative" of professional artists in a sector and, once certified, that association has exclusive authority to bargain for all individuals working in the sector for which it has been certified.[175]

The federal act has no provision for certification of associations of producers, but producers may form an association for the purpose of bargaining and entering into scale agreements.[176] Producers who are members of the association at the time of signing or subsequently are bound by a scale agreement.[177] Unfortunately producers are generally unwilling to bargain as groups. Of the 26 artists' associations certified by the CAPPRT,

only 14 have scale agreements, most of which have been negotiated by associations with a history of voluntary collective bargaining predating the federal act and cover professionals working in the performing arts. It is mandatory for an artists' association and the producer to "begin to bargain in good faith" if a notice to bargain is delivered by either to the other.[178] However, there is no provision in the federal act for mediation or arbitration to assist in reaching a scale agreement and no certainty that negotiations will ever result in an agreement.

It is uncertain whether the federal *Status of the Artist Act* applies to existing works, as writers' organizations TWUC and UNEQ discovered, UNEQ in its negotiations with the federal government for a scale agreement and TWUC in its certification application, which was unsuccessfully challenged in its scope by the Departments of Canadian Heritage and Public Works. Either through choice or necessity, many creators work with no contract until their work is finished, and other creators of previously published or performed works frequently re-license these to subsequent producers. It is therefore essential that these creators, like creators who are engaged prior to creating a work, be covered by the relevant scale agreement and that, if need be, the legislation be clarified.

Other suggestions have been made for changes to the federal act, including establishing a single bargaining authority for all federal government departments and providing mediation and arbitration at the request of either party at least for first agreements.[179] Consultants, engaged by the Department of Canadian Heritage to a carry out a required review of the provisions and operation of the act,[180] reported in 2002 that the legislation was strongly endorsed by almost all of those they consulted but, pointing

out that this would be consistent with the Canada Labour Code and the Quebec 1987 status of the artist act, recommended an amendment to include a provision for ensuring first contract negotiation and arbitration.[181]

The federal act, like the 1987 Quebec act, is a significant attempt by government to address the dismal socio-economic condition of most self-employed creators in Canada by providing a legal framework for collective bargaining, although mainly in sectors where voluntary agreements already had been established, and by removing the threat of action being taken by authorities under the *Competition Act*. However, more artistic production comes under provincial jurisdiction than federal jurisdiction. Creators deal mostly with producers who are not federal producers, and in other instances their organizations have not been able to negotiate minimum terms agreements with the federal producers they do deal with. Consequently, the federal *Status of the Artist Act* has been of little help to most creators except to provide a model that individual provinces might adapt.

Provincial "Status" Legislation. Some provinces have looked at the possibility of status of the artist legislation but, besides Quebec, only Saskatchewan has legislation under this rubric, unfortunately an act without a labour relations component. For that reason Saskatchewan's 2002 act, replete with motherhood statements on the importance of artists' creativity and their valuable contribution to society, is considered by most creators' organizations to be a travesty of "status of the artist" legislation.[182] The Saskatchewan legislation is currently under review, but if a recommendation of a 2003 ministerial advisory committee on the Status of the Artist is followed, it may do little more than to provide dispute resolution support for *voluntary* collective bargaining.[183] A

second ministerial advisory committee appointed in 2006 again only envisaged voluntary, membership-based rather than sector-based collective bargaining with access to enforceable collective bargaining possible in future.[184]

In September 1992 the Ministry of Culture and Communications in Ontario published a Summary of Consultations with the cultural sector which recognized, among other things, that existing collective bargaining in the arts depended on voluntary recognition of artists' representative organizations and that, with respect to labour rights and social benefits, the existing legislative framework for labour relations might be inappropriate because it does not consider the unique characteristics of the arts sector. More than a decade later, status of the artist legislation is again under consideration in Ontario because of renewed pressure from creators and creators' organizations. In a submission to the Minister's Advisory Council for Arts and Culture in May 2006, the Ontario Federation of Labour (OFL) urged the provincial government to recognize the important contribution that artists make towards the cultural, social, economic and political richness of Ontario and the need for a legislative framework to govern relations between artists and producers, while pointing out that provincial legislation should not dismantle or interfere with national agreements that already cover many Ontario cultural workers:

> ….Cultural workers need the right to organize and be represented by a union or association. They should be covered by collective agreements which are enforceable by legislation…. [185]

The advantages of mandatory collective bargaining to creators cannot be overstated. With such agreements in place, creators' associations can generally represent and serve their members effectively, not only through the negotiation of higher payment

for their services and better working conditions but also through administration of pension funds, insurance and other social benefits.

RECOMMENDED ACTION: TOWARDS A FAIR DEAL

In the Introduction and Part I of this paper we discussed the justifications for copyright and illustrated the types of copyright contracting practices in the marketplace that undermine the benefits authors are supposed to derive from copyright legislation. In Part II, we looked at European legal provisions which underscore the primacy of authors' rights, and in Part III we examined certain domestic legal mechanisms that are to some extent available to some Canadian creators, such as recourse to legal doctrines found in Anglo-Canadian case law, participation in collective societies, and status of the artist legislation.

There may be no single best way to improve the situation of creators in Canada, but there is at least one obvious way and a number of other avenues that should be explored. As well as a mandatory labour relations regime for creators outside the jurisdiction of the labour boards established by the federal *Status of the Artist Act* and Quebec's 1987 act, a variety of measures should be implemented. Certainly the need to address the economic needs of creators is irrefutable, particularly in light of the fact that self-employment of creators has been rising at one of the highest rates among OECD countries.[186] Canada has made an important beginning with its status of the artist legislation providing for labour relations regimes despite the need to address the difficulties affecting its effectiveness where it already exists and the need to extend it to creators working in activities under provincial jurisdictions outside Quebec.[187]

In addition to status of the artist legislation with a framework for mandatory labour relations, the legal provisions protecting creators in European jurisdictions provide many referential sources for Canadian legislators to consider. In this regard we are encouraged by the observation of Moyse quoted in Part I to think that there may be legislative changes to improve the position of creators, because "the Canadian Parliament is more inclined than any other legislature to stay attuned to external developments in order to mould its own rules."[188] The European concern with assisting authors when they are negotiating with contractual partners who generally have superior bargaining strength is encapsulated by Von Lewinski in the following comment:

> In order to reduce the negative effects for authors of the typical imbalance residing in such contractual agreements, European legislators often have introduced protective, mandatory legal provisions that limit the freedom of contract and, at the same time, strengthen the author's position. Other means of strengthening the author's position vis-à-vis that of a publisher, producer or other exploiting business include a broad array of statutory remuneration rights to be administered by collecting societies; such rights that are subject to collective administration are usually more beneficial to authors than full exclusive rights which have to be licensed under conditions that are too often dictated by the more powerful party.[189]

These ideas should not be alien or novel in Canada, given the influence and impact of *droit d'auteur* in Canadian copyright law and Canada's long history of adherence to *droit d'auteur* principles in international copyright law.

Canada has already implemented two instances of remuneration rights, one with respect to performance in public of a published sound recording or its telecommunication to the public for the "equitable remuneration" of performers as well as producers of sound recordings, and the other with respect to copying for private use for the remuneration of authors (composers and lyricists), performers and also producers of sound recordings of musical works that is funded by a levy on blank audiotapes and other

audio recording media. A statutory retransmission regime also exists although few creators benefit from it.

With respect to legal provisions limiting freedom of contract, Canada's *Copyright Act* could be amended to:

- Require mention of each specific right granted by licence or assignment;
- Require the exercise of any right to be specific as to extent, purpose, place and duration;
- Allow authors to revert rights that are never or no longer used;
- Provide an accounting to the creator and revert rights in instances where a producer fails to provide an accounting;
- Require any rights of equitable remuneration to be inalienable, and to be unwaivable, not only unassignable;
- Presume the author's first ownership of copyright even where a work is created in the course of employment or on commission, unless expressly agreed otherwise;
- Prohibit the granting of rights that cover exploitation by means not known or reasonably foreseeable;
- Prohibit assignment of rights without the creator's consent; and
- Require any waiver of moral rights to be delineated explicitly in writing.

All of these provisions are justifiable either as a means of clarifying issues of ownership or control or as a means of correcting "market failure", where the contract reached by the contracting parties is not mutually beneficial and one party is forced to accept patently unfair terms. Adopting them or similar provisions as well as adopting new rights, such as *droit de suite* with respect to artistic works and moral rights for all performers, and extending rental rights to all authors and performers, would be an initiative in keeping with harmonizing Canada's law with like-minded jurisdictions, a

goal commended by the Supreme Court of Canada in light of the on-going globalization of cultural industries,[190] but something that has yet to be done by Canadian courts specifically in favour of creators.

In rendering its decision in *CCH* v. *Law Society of Upper Canada*, the Supreme Court of Canada took measures to harmonize the interests of users under Canadian copyright law with user interests under American copyright law. It did this by aligning the factors to be considered when determining whether dealing is 'fair' under a fair dealing exception with the statutory factors to be considered in a fair use determination under U.S. law. We wonder if it would have come to the same conclusion if Canadian creators' rights had been harmonized in other respects with their European counterparts or if at least more heed was paid to the difference in interests between rightsholders who are natural persons and large corporate rightsholders.

Neither the differences in the legal regimes of the European jurisdictions discussed nor the constitutional issues associated with the Canadian federal government's authority to legislate in respect of "Copyrights"[191] vis-à-vis provincial jurisdiction over "Property and Civil Rights in the Province"[192] should present immutable barriers for Canada's policymakers to consider and employ provisions similar to the ones we have discussed. Of course, for such provisions to qualify constitutionally they would need to be implemented in a way such that in "pith and substance" they remain part of, and sufficiently integrated in, what is already a constitutionally valid legislative scheme[193] - in this instance, the *Copyright Act,* which is designed to provide creators with rights in respect of their original works, subject to certain statutory exceptions. A consideration of the context in which the *Copyright Act* was enacted and the reasons that creators are

vested with rights at all should provide ample justification for such amendments and, as Beaulieu and Lorinc remind us, there is neither determinism nor inevitability in copyright reform; only policy choices.[194]

Any proposal for copyright reform should take into consideration its effect on contractual relationships between creators and their producers or distributors, including practices with respect to moral rights waivers and levels of compensation on a cultural sector-by-sector basis and, in the visual arts sector, practices concerning the exhibition right in publicly-funded government and non-government institutions. In addition to recommendations with respect to providing education and information on the exhibition right for artistic works to both public exhibitors and artists, the consultants engaged by Canadian Heritage to study the exhibition right recommended that the department "should consider developing a funding condition on their grant application forms that would require respect for the ER as a prerequisite to support."[195] Requirements for royalty payments already exist with respect to some federal and provincial grants to book publishers and similar provisions could ensure that the contracts between artists and public galleries would contain a provision with payment for the exhibition right. Consideration should be given to extending the principle to government aid to producers in other sectors as well; for example, existing aid to magazines could be tied to levels of payment for the writers and illustrators they engage.

We are discouraged by the glacial pace of copyright reform in Canada and the failure to implement even those revisions that few oppose. Creators caught in crossfire between users and large corporate producers are, in our view, well advised to look to solutions outside as well as inside the *Copyright Act*. We refer to government grants,

taxation policy, employment insurance, guaranteed income for senior creators and insolvency legislation, as well as status of the artist legislation that will bring those producers who have not already accepted scale agreements to the bargaining table and strengthen the bargaining rights of creators where such agreements already exist.

As Dietz has said, and we have quoted in Part II above, simply granting more and more rights to a creator under copyright law is "far from a sufficient answer" where what is given by the legislators "is often taken from him at a ridiculous consideration" by his contractual partner. With this in mind, Canadian policymakers should also look to improve upon existing status of the artist legislation so that creators and producers actually have to negotiate and, under some circumstances, to submit their differences to arbitration. Canada's status of the artist legislation may be unique, but some elements of it are shared with the new German law that looks to negotiated industry agreements to establish common standards of fairness. However, the following comment by Von Lewinski in a comparison of the rights of audiovisual performers in the United States and Europe is also instructive:

> The protection of performers in the United States is mainly based on individual contracts and collective bargaining agreements where conditions are laid down which may, to some extent, even secure a higher level of protection than what is secured in European countries. The key to such success is certainly the strength of the US guilds which do not find any comparable counterpart in Europe. Performers in Europe are protected on the basis of economic rights – both exclusive rights and statutory remuneration rights – and moral rights. Due to a lack of sufficiently strong performers' unions in Europe, their bargaining position is usually quite weak; the law envisages improving this situation by protective provisions of contract law and by the extension of tasks for collecting societies.[196]

In Canada, as in Europe, contract negotiations by collective societies are also part of the solution to imbalance between creators and producers. In the words of Dietz:

> …we all know the deficiencies of the contractual regime in the field of rights management by individual contracts, in particular also in view of many unclarified questions in case of transborder use and conflict of laws. Whether and how far authors and performers (and other neighbouring rights owners) can share in income from exploitation of works or performances or other protected matter, is often a question of bargaining power or often its lack. When such administration of rights (be it legal remuneration rights) is entrusted to collecting societies, there is at least a probability, backed by traditional distribution rules or, partly, also by legal provisions, that authors and performers get an adequate share.[197]

This would appear to be borne out by the experience of the Nordic countries where creators have a long tradition of acting collectively and undoubtedly enjoy better conditions than their colleagues in most other countries. This is attributable in large part, though not entirely, to the negotiation of standard contracts between creators' organizations and publishers' organizations.[198] Jan Gehlin, a Swedish judge and author, has written about the position of creators in Sweden:

> …the last decades have witnessed a profound change in the artist's situation, thanks to artists' trade union-type efforts and self help. And in this change Swedish authors have played a leading role. Where the authors themselves are concerned, one could even almost speak of a revolution. Acting methodically and purposively, they have demanded that society as a whole, and especially their own contracting opposite numbers, shall regard their organization as a trade union, with the same rights to negotiate, sign collective agreements and take industrial action as any other trade union representing wage-earners.[199]

It is also noteworthy that the new German Law to strengthen the contractual position of authors and performers uses, as a measure of fairness of remuneration, the standards negotiated between associations of creators and associations of users of works or individual users. We note too, in a number of countries, that equitable remuneration is negotiated between such associations in connection with a levy.

So it seems that negotiation between creators' organizations and producers' organizations is a common thread that links Canadian status of the artist legislation with

the new German law, with collective bargaining in the Nordic countries and elsewhere, and even with negotiation-based levies in some countries. The result in most instances other than levies will be scale or minimum terms agreements. Legislation does not need to provide complete solutions to address the power imbalance between creators and producers and cannot be expected to do so, but it is our view that the law should at least open the door for negotiation between creators and producers and, where necessary, for mediation and compulsory arbitration. It is also our view that this will not happen in Canada for most creators' organizations without effective status of the artist legislation that will force producers to the bargaining table or keep them there, and that advocating such legislation must be a priority for creators and their organizations.

While the cultural industries are responsible for a significant portion of our economy and to a large degree for our cultural identity, the evidence is clear that it is difficult, often impossible, for creators to earn a decent living in Canada through their art alone. Creators are key to a vibrant and flourishing culture, and if their economic situation is a real concern to our society, then alternatives such as we have discussed in this paper must be explored and implemented. We submit that the contribution of Canadian creators merits our collective efforts to ensure them, in the words of Paul Siren and Gratien Gélinas in the foreword to their 1986 task force report on the *The Status of the Artist*, an "equitable and just place in our society".

The authors wish to thank Maryse Beaulieu for her report "Comparative Study: Contractual Practices and Copyright (July 25, 2005) which was prepared as part of this project, and Fernande Ouellet for her 2005 report on current contract issues for artists in Europe.

[1]A.Dietz, "Amendment of German Copyright Law in Order to Strengthen the Contractual Position of Authors and Performers" (2002) 33 IIC 828 at 841-842.
[2] R.S.C. 1985, c. C-42.
[3]Hill Strategies Research Inc., "A Statistical Profile of Artists in Canada Based on the 2001 Census," Statistical insights on the arts, v.3, n.1 (September 2004) at 2-3. In which, artists are referred to as those Canadians 15 or older reporting employment or self-employment earnings in any of the following nine occupation groups: actors; artisans and craftspersons; conductors, composers and arrangers; dancers; musicians and singers; other performers; painters, sculptors and other visual artists; producers, directors, choreographers and related occupations; and writers. Hill Strategies Research Inc. notes that the earnings statistics it reports include wages, salaries and net self-employment earnings, but exclude government transfers, investment income and pension income. Moreover it notes that the earnings statistics include amounts received from all employment in 2000, not just the position at which the respondent worked the most hours.
[4] *Ibid*. at 15.
[5] *Ibid*. at 5.
[6] *Ibid.* at 15.
7 *Quill and Quire* survey, September 1999.
[8] Information provided by the American Federation of Musicians, Canada.
[9] *The Status of the Artist in Ontario, Summary of Consultations,* (Ontario Ministry of Culture and Communication, 1992) at 3.
[10] *Ibid*.
[11] *Canadian Professional Writers Survey, a profile of the freelance writing sector in Canada*, May 2006, Quantum Communications.
[12] *Ibid*. at 30.
[13] *Pour Mieux Vivre*, (Quebec: Ministry of Culture and Communications, 2004) at 10-11. It should be noted that since 1995, Quebec creators other than performers have had an advantage over creators elsewhere in Canada because of a tax deduction for income from copyright up to $30,000, and recently a similar benefit has been extended to performers and income averaging introduced for creators with higher incomes.
[14] *Ibid*. at 3.
[15] G. D'Agostino, "FREELANCE AUTHORS FOR FREE: Globalization of Publishing, Convergence of Copyright Contracts and Divergence of Judicial Reasoning", <http://www.copyright.bbk.ac.uk/contents/publications/workshops/theme2/agostino.pdf> at 2. We note with interest emerging models of digital distribution of works which would appear to provide authors with the lion's share of revenue generated thereby. See for example, Boing Boing's new 'Digital Emporium' <http://www.boingboing.net/2006/09/18/introducing_the_boin.html >.
[16] Maryse Beaulieu and John Lorinc, "CCC-DA*MI*© Research Project on The Working Conditions of Creators in Quebec and Canada" (February 2005), <http://www.creatorscopyright.ca/documents/lorinc-beaulieu.html> at 24 – 49 [Beaulieu and Lorinc].
[17] *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act*, (Ottawa: Industry Canada, 2002) at 2 [*Supporting Culture and Innovation*].
[18] *Théberge* v. *Galerie d'Art duPetit Champlain inc.*, 2002 SCC 34 at para. 31 [*Théberge*].
[19] *Ibid*.
[20] *CCH Canadian Ltd.* v. *Law Society of Upper Canada*, 2004 SCC 13. CJ McLachlin stating at para 12: "The exceptions to copyright infringement, perhaps more properly understood as users' rights, are set out in ss. 29 and 30 of the Act."
[21] Teresa Scassa, "Interests in the Balance" in Michael Geist ed. *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) at 52-53.
[22] For a discussion of the difficulties in capturing the number of "artists" in Canada see supra note 3 at 3.
[23] P. Bernt Hugenholtz, "THE GREAT COPYRIGHT ROBBERY: Rights allocation in a digital environment" (Paper prepared for A Free Information Ecology in a Digital Environment Conference, NYU School of Law**,** March 31 – April 2, 2000), <http://www.ivir.nl/publications/hugenholtz/PBH-Ecology.doc>.

[24] Jane C. Ginsburg, "The Concept of Authorship in Comparative Copyright Law" (January 10, 2003) at 4. Columbia Law School, Pub. Law Research Paper No. 03-51. Available at SSRN: http://ssrn.com/abstract=368481 or DOI: 10.2139/ssrn.368481.
[25]In this regard see Maryse Beaulieu, "Comparative Study: Contractual Practices and Copyright, July 25, 2005 (unpublished).
[26]*Supra* note 24 at 3.
[27] This will be rectified for audio performers when Canada implements the WIPO Performances and Phonograms Treaty, concluded in 1996 and signed by Canada in 1997.
[28] In both the European Union and the United States the basic term of copyright is now life of the author plus 70 years measuring from the end of the year of death, through respective passage of Council Directive 93/98/EEC harmonizing the term of protection of copyright and certain related rights in 1993 and the Sonny Bono Copyright Term Extension in the United States in 1998.
[29] W.Cornish, "The Author as Risk-Sharer", 15th Annual Horace S.Manges Lecture, Columbia Law School: March 2002, <http://www.oiprc.ox.ac.uk/EJWP0304.pdf> [Cornish].
[30]However, scholar Jane Ginsburg has made a noteworthy argument that both traditions were marked at an early stage by both a recognition of personal rights springing from the act of creation as well as the utilitarian motivation of advancing public instruction. See J. Ginsburg, "A Tale of Two Copyrights" in B. Sherman and A. Strowel, eds., *Of Authors and Origins: Essays on Copyright Law* (New York: Oxford University Press, 1994) at 134 – 135.
[31] See for example *Feist Publications Inc*. v. *Rural Telephone Service Co*., 499 U.S. 340 (1991) at para 19. For a contrary characterization, see *Eldred v. Ashcroft*, 537 U. S. 186 (2003) at 21-22.
[32] D. Vaver, "The Copyright Mixture in a Mixed Legal System: Fit for Human Consumption?" vol 5.2 Electronic Journal of Comparative Law, (May 2001), <http://www.ejcl.org/52/art52-3.html>.
[33] In particular a portion of the *Second Treatise of Government*, chap.V, "Of Property": "Though the earth, and all inferior creatures, be common to all men, yet every man has a *property* in his own *person:* this no body has any right to but himself. The *labour* of his body, and the *work* of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his *labour* with, and joined to it something that is his own, and thereby makes it his *property*. It being by him removed from the common state nature hath placed it in, it hath by this *labour* something annexed to it, that excludes the common right of other men: for this *labour* being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others.
[34] P.Gaudrat, "Legislation versus Technology: is the need for Copyright Legislation diminishing?" (Paper prepared for Management and Legitimate Use of Intellectual Property Conference, July 10, 2000) at 45.
[35] D. Gervais & E. Judge, *Intellectual Property: The Law in Canada* (Toronto: Thomson Canada Limited, 2005) at 10 - 11.
[36]*Théberge* supra note 18 at para 116, Gonthier for the minority citing P. Moyse, "La nature du droit d'auteur: droit de propriété ou monopole?" (1998) 43 McGill L.J. 507 at 562.
[37] Interestingly, the Supreme Court of Canada took this position notwithstanding the fact that it would be another couple of decades before Parliament codified moral rights in the *Copyright Act*.
[38] Royal Commission on Patents, Copyright, Trademarks and Industrial Design: *Report on Copyright* (Ottawa: Queen's Printer and Controller of Stationery, 1957).
[39] *Ibid*. at 9.
[40] *Ibid*.
[41] *Berne Convention for the Protection of Literary and Artistic Works,* 9 September 1886, 828 U.N.T.S. 221, as last revised 24 July 1971, <http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html>.
[42] *Ibid*.
[43] *Ibid*.
[44] P.Drahos, "The Universality of Intellectual Property Rights: Origins and Development", <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/drahos.pdf>.
[45] *Supra* note 32.
[46] < http://www.unhchr.ch/html/menu3/b/a_cescr.htm>.

[47] Article 27(2) "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 author. Available at: http://www.un.org/Overview/rights.html
[48] *Supra* note 46.
[49] L. Bently, *Between a Rock and a Hard Place: The Problems Facing Freelance Creators in the UK Media Market Place* (London: Institute of Employment Rights, 2002) at 11.
[50] In 1998, following amendments of the *Copyright Act* introducing some rights for performers, Canada finally signed and ratified the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, usually referred to as the *Rome Convention*, which had been drawn up in 1961 and gave minimal protection to performers of musical works as well as to phonogram producers and broadcasters.
[51] Eric J. Schwartz in P.Geller, ed., *International Copyright Law and Practice* (New York: Matthew Bender, 2005) para 7[1][b][ii], USA-123 [*International Copyright Law*].
[52]<http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm>
[53] 2004 CanLII 32254 (ON C.A.) at para 51.
[54] See generally Beaulieu and Lorinc, *supra* note 16.
[55] *Ibid.* at 38.
[56] *Heather Robertson v. The Thomson Corporation, Thomson Canada Limited, Thomson Affiliates, Information Access Company and Bell Globemedia Publishing Inc.*, 2006 SCC 43, judgment delivered on October 12, 2006.
[57] The Strategic Review Group, *Study of the Exhibition Right,* November 2000, Canadian Heritage, at iii.
[58] *Ibid*. at 25.
[59] *Ibid*. at 26.
[60] *Ibid.* at 43-44.
[61] Darlene C. Chisholm, "Profit-sharing Versus Fixed Payment Contracts: Evidence from the Motion Picture Industry", (1997)13 *The Journal of law, Economics & Organization* 169.
[62] Silke von Lewinski, "The Protection of Performers in the Audiovisual Field in Europe and the United States", *Creators' Rights in the Information Society*, ALAI, Budapest 2003, at 883.
[63] A. Dietz in *International Copyright Law*, *supra* note 51 at GER-56-57.
[64] *Ibid.* at GER-55.
[65] *Ibid*. at GER-65.
[66] A. Lucas and P. Kamina in *International Copyright Law*, *supra* note 51 at FRA-54-58.
[67] Art. L. 131-3(1), Law No. 92-597 of July 1, 1992 as cited by A. Lucas and P. Kamina, *ibid*.
[68] *Ibid.* at FRA-63.
[69] *Supra* note 63 at GER-58.
[70] *Loi relative au droit d'auteur et aux droits voisins* June 30, 1994, Art. 3(1)(3).
[71] Act No. 2121/1993 sets out the following interpretive rules concerning copyright contracts as described by I. Stamatoudi in *International Copyright Law* at para 4[2][c], GRE-23: "If the contract does not provide whether the assignment or licence is exclusive or non-exclusive, it is presumed that it is non-exclusive; If the contract does not fix the duration of rights that it transfers and nothing else derives from business usage, this duration is limited to five years; If the contract does not fix the geographic reach of rights that it transfers, this reach is limited to rights effective within the country where the contract was concluded; If the contract does not fix the means of exploitation for which it transfers rights, these means are limited to those necessary for the fulfillment of the aims of the contract. The Contract may not transfer all rights in all future works. Nor may it transfer rights with regard to means of exploitation unknown at the time of the transfer.
[72] *Ley de Propiedad Intelectual*, Art. 43 as cited by A. Bercovitz and G. Bercovitz in *International Copyright Law supra* note 51 at para 4[2][b], SPA-34.
[73] P. Bernt Hugenholtz and Lucie M.C.R. Guibault, *Study on the Conditions Applicable to Contracts relating to Intellectual Property in the European Union,* Final Report, Institute for Information Law, Amsterdam, The Netherlands, May 2002 [Hugenholtz].
[74] *Supra* note 63 at GER-58, and Dr. Alberto Musso in *International Copyright Law*, *supra* note 51 at ITA-43-44.
[75] District Court of Amsterdam, 24 September 1997 (*De Volkskrant*) in Informatierecht, AMI 1997, at 194, as cited by H.C. Jehoram in *International Copyright Law*, *supra* note 51 at NETH 35.

[76] Article 2(2) of the Dutch Copyright Act 1912.
[77] Hugenholtz, *supra* note 72.
[78] *Ibid*. at 51.
[79] *Ibid*. at 97.
[80] *Ibid*. at 110 - 111
[81] *Ibid*. at 89, 110.
[82] *Ibid*. at 60.
[83] *Ibid*. at 72-73.
[84] *Ibid*. at 83-84.
[85] *Ibid*. at 99.
[86] Law No. 92-597 of July 1, 1992 as cited by A. Lucas and P. Kamina *supra* note 66 at FRA-75.
[87] *Supra* note 63 at GER-67.
[88] *Supra* note 25 at 17.
[89] Dr. Alberto Musso in *International Copyright Law*, *supra* note 51 at ITA-65.
[90] Article L. 131-4, *supra* note 66 at FRA-70.
[91] *Ibid*.
[92] Article L. 131-6 of the I.P. Code, *ibid*.
[93] *Ibid.* at FRA-71. See also Hugenholtz, *supra* note 73 at 71-72.
[94] *Ibid*. at FRA-75.
[95] *Ibid.* at FRA-76.
[96] *Supra* note 72 at para 4[3][a], SPA-37.
[97] *Ibid.*
[98] Hugenholtz, *supra* note 73 at 34.
[99] A. Strowel in *International Copyright Law*, *supra* note 51 at BEL-36, and Dr. J. Barta and Dr. R. Markiewicz in *International Copyright Law*, *supra* note 51 at POL-29.
[100] Hugenholtz, *supra* note 73 at 82.
[101] Law to Strengthen the Contractual Position of Authors and Performing Artists of March 22, 2002, amending the Copyright Law of September 9, 1965, as last amended by Article 16 of the Law of December 13, 2001.
[102] *Supra* note 1 at 832.
[103] K.Gutsche, "New Copyright Contract Legislation in Germany: Rules on Equitable Remuneration Provide 'Just Rewards' to Authors and Performers" [2003] E.I.P.R. 366 at 367.
[104] The following is the text of Section 11, with the italicized portion representing the new language provided by the Amendment: "Copyright shall protect the author with respect to his intellectual and personal relationship with his work, and also with respect to utilization of his work. *At the same time it serves to secure an equitable remuneration for utilization of his work*." Supra note 1 at 834.
[105] As translated by Cornish *supra* note 29.
[106] *Ibid.*
[107] *Ibid.*
[108] A. Dietz, unpublished Dec 2005 presentation to Franco-German conference, Paris.
[109] Hugenholtz, *supra* note 73 at 36.
[110] A. Dietz in *International Copyright Law*, *supra* note 51 at GER-56-57. See also Hugenholtz, *supra* note 73 at 85.
[111] Hugenholtz, *supra* note 73 at 43.
[112] *Ibid.* at125.
[113] *Ibid.* at 74.
[114] *Ibid.* at 100-101.
[115] *Ibid.* at 101.
[116] *Ibid.* at 43, 85 and 116 See also A. Dietz in *International Copyright Law*, *supra* note 51 at GER-68
[117] Hugenholtz, *supra* note 73 at 74.
[118] *Ibid.* at 100 and 125.
[119] A. Dietz in *International Copyright Law*, *supra* note 51 at GER-68.
[120] Jan Gehlin, *The Swedish Writer and His Rights*, The Swedish Institute, revised edition 1980, at 15, 45.
[121] *A Shortcut to Writers' Rights, A Brief Overview of the Norwegian System,* 2001, at 7, 33.
[122] *Ibid*. at 33.

[123] *Ibid*.
[124] "Authors right situation in Sweden, in general and specifically for journalist", undated handout from the Swedish Union of Journalists.
[125] *Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art*
[126] *Ibid.*, Preamble, recital no. 4.
[127] Carola Streul, *Droit de Suite* Management in the EU, June 2004, EVA (representing European collective societies for the visual works), at 9 [Streul].
[128] Alexander James Weatherall, *Harmonizing the Droit de Suite; a legal and economic analysis of the EC Directive and an overview of the recent literature*, Hamburg 2003, <www.bepress.com/gwp/default/vol2003/ISC1/ent22> at 11 [Weatherall].
[129] Clare McAndrew and Lorna Dallas-Conte*, Implementing Droit de Suite (artists' resale right) in England*, The Arts Council of England, undated (researched 2000-2001), <www.artscouncil.org.uk/documents/325.pdf > at 11.
[130] Streul*, supra* note 127 at 13.
[131] Weatherall, *supra* note 128 at 22.
[132] Bernt Hugenholz, "The Future of Copyright Levies in the Digital Environment", Willem Wanrooij, "Remuneration Systems for Private Copying in Europe", and Vincent Salvadé, "The Rights to Remuneration in Switzerland" in *Creators' Rights in the Information Society*, ALAI, Budapest 2003, at 295, 373 and 511.
[133] Council Directive 92/100/EEC of 19 November 1992 on rental and lending right and on certain rights related to copyright in the field of intellectual property.
[134] Silke von Lewinski, "The Protection of Authors and Artists by Contract, Introductory Notes", ALAI Congress 1997.
[135] François Dessemontet, "Authors' and Performers' Protection through Individual Contracts", General Report, ALAI Congress, 1997, at 53.
[136] *Supporting Culture and Innovation*, *supra* note 17 at 35 states that "[T]he Government of Canada is committed to bringing the *Copyright Act* in conformity with the WCT and WPPT once the issues involved are thoroughly analysed and appropriately consulted upon."
[137] *Re: Song Corp.* [2002] O.J. No. 13, Bankruptcy Court File No. 31-38843.
[138][1974] 3 All E.R. 616.
[139] 1989 C.A. 750
[140] Q.B. 1990 S-6909
[141] Ben Challis, "EXTENDING THE TERM:Should the UK recording industry have new obligations as well as new rights if the copyright term for sound recordings is extended?" <http://www.musiclawupdates.com/index_main.htm.>.
[142] Paul Siren and Gratien Gélinas, *The Status of the Artist, Report of the Task Force,* August 1986.
[143] *Tenth Anniversary Report 2003.2004*, Canadian Artists and Producers Professional Tribunal, at 14.
[144] *Loi sur le statut professionnel et les conditions d'engagement des artistes de la scene, du disque et du cinema*, L.R.Q., chapitre S-32.1.
[145] *Ibid.*, section 1.
[146] *Ibid.*, section 6.
[147] *Ibid.*, section 18.
[148] *Ibid.*, section 26.1 provides for producers to withhold and send the amount of dues to the artists' organization as agreed or fixed by the Commission.
[149] *Ibid*., section 24.
[150] *Ibid.*, section 27.
[151] See <www.craaap.gouv.gc.ca> under "Registre".
[152] *Supra* note 144, section 8.
[153] *Ibid.*, section 40.
[154] *Ibid.*, sections 29 and 31.
[155] *Ibid.*, section 33.
[156] *Ibid.*, sections 31 – 33.
[157] *Ibid.*, section 35.1 (2004, chapter 16, section 8) *An Act to amend various legislative provisions concerning professional artists*

[158] *Ibid.*, section 34.
[159] *Ibid.*, section 35.
[160] *Ibid.*, section 35.1
[161] *Loi sur le statut professional des artistes des arts visuals, des métiers d'art et de la literature et sur leurs contrats avec les diffuseurs*, L.R.Q., S-32.01.
[162] Section 3 defines a "diffuseur" in the official French version of the act, translated as "promoter" in the unofficial English translation to mean "any person, body or corporation who or which, as its main or secondary activity, operates for profit or not a circulation enterprise and enters into contracts with artists". Throughout our paper we use the term "producer" very broadly to encompass all those who enter into contracts directly with creators to produce, distribute or exhibit their works or to retain their services in productions or performances.
[163] Bill 42, An *Act to amend various legislative provisions concerning professional artists* was enacted in 2004. Section 10.1 of S-32.01 allows the Commission to recognize an association of professional artists who create dramatic works, but only with respect to the public performance of works that have already been created.
[164] Regroupement des artistes en arts visuals du Québec (RAAV) was founded in 1989 and Conseil des Métiers d'art du Québec (CMAQ) in 1988. The other two associations recognized by the Commission are UNEQ and AQAD. See CRAAAP website <www.craaap.gouv.gc.ca>
[165] *Supra* note 161, sections 31 to 34.
[166] "*Creator, an Act for you!* , a leaflet published in 1996 by the Commission de reconnaissance des associations d'artistes, reciting section 31 of the act in slightly simplified form.
[167] *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., chapter 32.01, section 34. English translation of the Editeur official du Quebec (unofficial version).
[168] *Ibid.*, sections 38 and 39.
[169] *Ibid.*, section 40.
[170] *Ibid.*, section 35.
[171] *Ibid.*, section 36.
[172] *Ibid.*, section 37.
[173] *Status of the Artist Act*, R.S.C. c. S-19.6 (1992, c.33), section 33. Section 44 provides that scale agreements may contain a compulsory check-off for dues which the producer deducts from the artist's remuneration and sends to the association, whether or not the artist is a member of the association.
[174] *Ibid.*, sections 25 and 26.
[175] *Ibid.*, sections 28 and 33.
[176] *Ibid.*, section 24.
[177] *Ibid.*, section 33.
[178] *Ibid.*, section 32.
[179] Collective bargaining under the *Status of the Artist Act*, document from February 9, 2005 meeting in Toronto with certified artists associations. Although not referred to in the *Status of the Artist Act*, through an application to the Ministry of Labour, free mediation services were provided in June 2006 in the course of negotiations between Canadian Actors Equity Asssociation and the Department of Canadian Heritage to assist them in reaching an agreement following a complaint of unfair bargaining. (Information provided by CAPPRT).
[180] *Supra* note 173, section 66.
[181] *Evaluation of the Provisions and Operations of the Status of the Artist Act*, Final Report, September 18, 2002, prepared for the Department of Canadian Heritage by Prairie Research Associates (PRA) Inc., <http://www.pch.gc.ca/progs/em-cr/eval/2002/2002_25/11_e.cfm> together with the Government's response indicating that it would do further policy work including consultations with arts community and government departments.
[182] Saskatchewan's Status of the Artist Advisory Committee in 1993 had nevertheless recommended recognition of collective bargaining rights for artists' organizations and recognition of national and regional collective agreements in the province, with adjudication by the Saskatchewan Labour Relations Board.
[183] Ministerial *Advisory Committee on the Status of the Artist Final Report,* A Report to the Minister of Culture, Youth and Recreation, Regina, October 2003, at 4.
[184] *Final Report of the Minister's Advisory Committee on Status of the Artist,* July 2006,

< www.cyr.gov.sk.ca>.
[185] Submssion to the Minister's Advisory Council for Arts and Culture, *Workers in the Arts and Culture Sector: Status, Organizing and Collective Bargaining Rights*, Ontario Federation of Labour, May 2006.
[186] Organisation for Economic Co-operation and Development, "Employment Outlook 2000 Chapter 5: The partial renaissance of self-employment" <http://www.oecd.org/dataoecd/10/44/2079593.pdf>.
[187] Saskatchewan has status of the artist legislation but without any labour relations component. *The Status of the Artist Act* being Chapter S-58.1 of the Statutes of Saskatchewan, 2002.
[188] *Théberge* supra note 18 at para 116.
[189] Silke von Lewinski, "International Copyright over the Last 50 Years – A Foreign Perspective" (2003) 50 *Journal of the Copyright Society of the USA* 581 at 602.
[190] *Théberge* supra note 18 at para 6.
[191] *Constitution Act*, *1867* (U.K.), 30 & 31 Vict., c.3. [*Constitution Act*], s. 91(23).
[192] *Constitution Act*, *ibid*., s. 92(13). See also *ibid*., s. 92(16) ("Generally all Matters of a merely local or private Nature in the Province").
[193] Reference re *Employment Insurance Act* (Can.), ss. 22 and 23, 2005 SCC 56 at para 8.
[194] Beaulieu and Lorinc, *supra* note 16 at 13.
[195] *Supra* note 57 at 35.
[196] *Supra* note 62 at 891.
[197] Dietz, "Existing Levy Systems – Germany" in *Creators Rights in the Information Society*, ALAI, Budapest 2003, at 426
[198] Trond Andreassen, "Conditions for Writers in the Nordic Countries" in *Authors Rights, Handbook of the European Writers Congress*, Munich 2000, at 79, about writers.
[199] *Supra* note 120 at 8.