Memorandum to Cabinet

Mémoire au Cabinet

PROTECTING MUSIC CREATORS IN THE DIGITAL AGE

LA PROTECTION DES CRÉATEURS DE MUSIQUE À L'ÈRE DU NUMÉRIQUE

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Minister of Canadian Heritage

Minister of Innovation, Science and Economic Development

Ministre du Patrimoine canadien

Ministre de l'Innovation, des Sciences et du Développement économique

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EXECUTIVE SUMMARY

The modern music business has become a complex economic scene that is run by millions of daily micro-transactions that are nearly impossible to track. In the midst of the rapidly developing digital age, with new internet platforms which facilitate massive dissemination and reproduction of musical works, yesterday's legislative and regulatory schemes seem outdated. With billions of dollars at stake it is no surprise that music has been at the forefront of the largest copyright controversies in recent years. The enormous amount of noise that this debate has generated has dampened the music and the interests of those that create it.

In this report we aim to find those interests within the messy and complicated environment of the music industry and assess how they have been addressed until now. Our focus lies on independent musical creators, who are not employed or hired to provide specific types of works, but create their own music and depend on the ability to later commercialize and market those works.

While this group remains the primary concern of copyright, our analysis shows that there is a major gap between what copyright is meant to achieve and the economic reality of music authorship in the digital age. It seems that in an attempt to address this gap, Canadian jurisprudence and scholarship have, in recent years, endorsed a paradigm shift in copyright, moving away from the approach that sees IP laws in isolation. It appears to us that the path has been set to address copyright issues with due consideration of the ways in which they interact and intersect with other areas of the law, mainly contract law. In all truth despite this sounding like a radical change which possibly presents an unsolvable constitutional conflict, we submit that this is not the case. Canadian law is very familiar with Constitutional arrangements which allow for some fluidity and dialogue between the two levels of government in their attempts to regulate commercial activities. Creative industries which pertain to intellectual property are one leading example of such instances.

Main Recommendations

To improve the protection of the most vulnerable Canadian musical creators' we must address the two main issues that lie at the heart of the problem:

a) Power and economic imbalance between creators and corporate intermediaries; and

b) Transparency and accountability in both work and royalties tracking.

It is our recommendation that the respective authorities of the respective ministers or, where legislative amendments are required, that Parliament, take action to:

1. **Introduce a provision in the *Copyright Act* which entrenches the right to fair remuneration as an inalienable right.**

2. **Redefine the relationship between Copyright Law and contract law by:**
   - Amending the *Copyright Act* to introduce an overarching interpretative clause, which will clarify its applicability even when raised indirectly, or when it is incidental to a primary legal claim of a different order.
     - The interpretative clause should be worded in a way that clarifies the legislative intention to ensure that legal matters that invoke copyright should be informed by the *Copyright Act* and its underlying principles.
     - In examining the legality of contractual terms, regulators and courts should refer to the minimal industry standards set out by the Copyright Board, as discussed later in our recommendations.
     - Economic behaviors and contractual terms that do not meet minimal standards should be either invalidated or interpreted to the benefit of the creator.

3. **Create a transparent and standardized system of work and revenue tracking by:**
   - Establishing a Central Rights Data Bank and developing a software or an interface through which an artist can access data relating to the works he registered.
     - The Central Rights Data Bank and the royalties tracking system should be established by the Canadian Intellectual Property Office.
   - Creating a fund (the 'Artists Fund') dedicated to musical creators where distributors obtaining a license from a Canadian CMO have to relay a certain percentage of their revenues associated with the license.

    - The Artists Fund would be devoted to increase the incomes of independent artists who are seeking to improve their means of relying on a "third model" of business in which they run their own business and maintain direct contact with users.
- Regulating the framework for unclaimed royalties by creating a mandatory publication of unclaimed rights available to the public and directing unclaimed royalties to the Artists Fund after five years.

4. **Ensure the compliance of contractual agreements with minimal protections afforded by the *Copyright Act* and set the regulatory framework by:**
    - Adopting regulations and guidelines to translate minimal standards into practical contractual dispositions and consequences.
    - Creating a Monitoring Committee under the Copyright Board
        - The Monitoring Committee should have dispute resolution powers to intervene in a case where minimal standards of protection of an artist have not been respected.
        - The Monitoring Committee should regularly study the digital market environment and make recommendations to the Copyright Board as to new or modifying minimal standards.

5. **Offer proper funding and tax incentive to engage the industry with the new paradigm by:**
    - Creating tax breaks for intermediaries maintaining and surpassing minimal standards.
    - Creating a public-private partnership to fund the Central Rights Data Bank as well as the royalties tracking system.

1. ISSUE

Many, if not most, creators in Canada lack significant control over their original works, despite the great promise of Copyright Law. Furthermore, creators find themselves in especially weak and precarious position vis-à-vis corporate intermediaries, which lead to what some have called the "copyright grab". Thus, creators find themselves extremely under-compensated. However, in contrary to common beliefs, the evidence clearly shows that this is not because musical works are not valued in the free market, but despite their value. Thus, many musicians who can and should be able to make a respectable living mainly or even solely from their musical creations, barely make ends meet. The music industry, in which 3 global conglomerates control over 70% of the market, is probably the most striking and controversial branch of Copyright Law in this regard. Very large sums of money are being circulated thanks to the works produced by the creators while most of the profits never end up reaching those creators. Furthermore, due to technological developments the economics behind the music industry have become extremely complex, with endless micro transactions that are nearly impossible to trace. To top it all the copyright system in place is itself highly complex and difficult to manage, which in turn leads to many creators' rights getting lost in the process. In many cases creators are not being paid simply because their works cannot be traced back to them. By looking at the music industry as a primary test case, and especially the situation of independent musical creators, we will ask what steps can and should be taken to both simplify the economic and legal systems and improve musicians' bargaining position vis-à-vis corporate intermediaries. In doing so we will look to both legislative and regulatory reform that have the potential of providing better and more effective protections for musical creators.

2. BACKGROUND

2.1. Protecting Authors: Independent Creators v. Creators for Hire

Authors and creators of different types, using different mediums, are often bundled together in popular and legal discourse. It is thus assumed that all creators can be well protected following the same principles. It is only in the specifics of royalties' schemes and enforcement mechanisms that distinctions are made.[1] In this paper we submit that this presumption should be re-examined. Not only is music authorship distinct in several important ways from literary authorship, which is the paradigm of most copyright legislation[2], but even within the music business there are different types of authors that present different interests, needs, vulnerabilities and expectations.

The basic distinction we wish to make is between "creators for hire" and "independent creators".[3] Creators for hire are music creators that are contracted employees being commissioned to produce musical creations for someone else. Musicians contracted by recording or production companies to preform or record tunes for a specific purpose are a good example of this type of authorship. Independent creators on the other hand, are musicians that create their own music, without necessarily being paid in the process. As such they depend on their ability to later commercialize their musical creation, whether directly to the public or through intermediaries. Thus, independent musicians are very similar to freelance authors and journalists in this regard.[4] Based on this distinction we have chosen to focus our analysis and subsequent recommendations on the most vulnerable group of musicians which is the independent creators, originally

[1] Giuseppina D'Agostino, *Copyright, Contracts, Creators- New Media, New Rules*, (Cheltenham, Edward Elgar Publishing Limited 2010) at 1-16.
[2] *Ibid.*
[3] *Ibid*. And see also: Jane C. Ginsburg, "The Author's Place in the Future of Copyright", (Working Paper No. 512, March 2015), *forthcoming* in Ruth Okediji, ed., *Copyright In An Age Of Exceptions And Limitations*, (Cambridge, Cambridge University Press 2015) at 3-6.
[4] D'Agostino, *supra* note 1 at 42-55.

envisioned as the primary beneficiaries of Copyright protections. Before continuing we should also clarify some linguistic issues. Musical artists include lyrics and melody writers, performers, producers and many others. In this analysis we focus on the independent authors of music - lyrics and melody. Of course often the musical author and performer coincide, but note always. More importantly, even when they do coincide there are still relevant creative, economic and legal distinctions between performers and authors and their respective rights, as we will show later on. Thus, throughout this paper we will refer to our main focus group as authors, creators or independent artists interchangeably while always meaning the same thing: independent music creators that produce original lyrics and/or melody.

Despite the significant ways in which digital technologies have changed the traditional modes of consumption and circulation of music and other intellectual goods, musicians remain largely dependent on corporate intermediaries in getting their creations known, marketed and, most importantly, paid for.[5] We will argue that the two different types of creators require different protections and therefore different solutions.[6] While creators for hire require employment related protections along with relatively limited control over their creations, independent creators are the classic scenario envisioned in copyright legislation. Being absolutely dependent on the ability to

[5] Rethink Music, *Fair Music: Transparency and Payment Flows in the Music Industry- Recommendations to Increase Transparency, Reduce Friction, and Promote Fairness in the Music Industry*, (Mass., BerkleeICE, 2015), available online: <https://static1.squarespace.com/static/552c0535e4b0afcbed88dc53/t/55d0da1ae4b06bd4bea8c86c/1439750682446/rethink_music_fairness_transparency_final.pdf>.
See also: Giuseppe Mazziotti, "New Licensing for Online Music Services in the European Union: From Collective to Customized Management" in "Symposium: Collective Management of Copyright: Solution of Sacrifice?", 34:4 Columbia Journal Of Law & The Arts 2011 757; Martin Kreschmer, "Artists' earnings and copyright: A review of British and German music industry data in the context of digital technologies", 10:1-3 First Monday, January 2005, available online: <http://firstmonday.org/article/view/1200/1120>.

[6] While in Canada there is no explicit distinction in Copyright Law between independent creators and creators for hire in the US Copyright Law does draw such a distinction. Thus, under the US framework creators for hire indeed enjoy more restricted control and economic rights in their work. See Ginsburg, *supra note* 3 at 3-4.

control the dissemination of their creations in order to be fairly remunerated for their work, independent creators require more expansive protections.[7]

In dealing with the vulnerabilities and needs of independent musicians, we submit that instead of a narrow approach which looks at Copyright Law as separate and insulated from other legal areas, we should rather adopt a more holistic approach which focuses on the intersections between copyright and other legal areas. In doing so we must account for the ways in which copyright principles and aspirations can and should inform other legislative and regulatory areas. While both musicians for hire and independent musicians suffer from weak bargaining power when dealing with the large labels and producers in the music industry, their respective weak positions do not present the same challenges. The most important distinction between the two is in terms of ownership over their works:

> "The latter group of creators are "employees for hire", salaried authors who create works in pursuit of their employment, or freelancers who are commissioned to create certain kinds of works, and who sign a contract specifying that the work will be for hire. An author who is not an employee for hire starts out with rights that she may transfer by contract…"[8]

Hence, while the creator for hire arguably never enjoyed full exclusive rights to her work to start with, the independent creator is seen as the sole owner of her work.[9] More importantly, while the creator for hire's compensation is inherently built in to the employment relationship and tied to the work she does, the independent creator's sole bargaining chip is her copyright economic rights. And indeed we have witnessed how the music industry, along with other creative industries has evolved into an economy centered on the trade of rights and not products or

[7] D'Agostino, *supra* note 1, at 42-55.
[8] Ginsburg, *supra* note 3, at 3-4.
[9] See for example the "work for hire" provisions in art. 13(3) of the *Copyright Act*, R.S.C., 1985, C-42. It is important to note here, as Ginsburg explains in detail, that unlike Continental Europe and Canada the US contains only few restrictions and limitations regarding what rights the author can actually transfer- see *ibid* at 4-5.

works.[10] Essentially, the independent creator does not primarily give her time and energy to the corporate intermediary with whom she contracts, but instead sells them her economic rights.[11]

These fundamental differences between the two types of creators obviously entail very distinct positions vis-à-vis corporate intermediaries. In the former the creator knowingly enters into an employment relationship in which she has no or very little expectation to control the products of her work. What concerns the creator for hire most is safeguarding her interests as an employee. Thus, protection of this kind of creator is first and foremost achieved through labor and contract law. On the other hand, the latter creator is not considered an employee at any stage but as a holder of property rights negotiating with a stronger economic actor on the terms of transferring those rights in whole or in part for the benefit of both parties. While protecting this creator also calls our attention to contractual matters it nevertheless requires something radically different from the regular employment context. Likewise, the independent creator rightfully expects to retain greater control over her work, including how it will be disseminated and commercialized.

When seen in light of this distinction the evidence becomes overwhelmingly clear. Independent creators are indeed the most vulnerable and exploited sub-group of creators. This is further highlighted in the music business where most creators are in fact independent and not employees.

2.2. Author/Creator Vulnerability: Bargaining Power and Control over Works

2.2.1. What interests are protected by Copyright?

In recent years more and more IP scholars have turned their attention to the study of the historical development of Copyright Law.[12] As noted by several authors the study of the historical

[10] Lynette Owen, *Selling Rights*, fifth ed. (NY, Routledge 2006).
[11] It should be noted here that unlike the US in Canada moral rights cannot be transferred but only the economic rights attached to copyright, see Ginsburg, *supra* note 9.

evolution of music copyright, especially due to the central role music authorship plays in today's IP controversies, may prove extremely pertinent in order to better understand what is at stake. Likewise it may prove useful in terms of identifying the driving forces behind policy and legislative changes in this area of the law.[13] As we discuss in depth later on in our analysis, the historical context and evolution of copyright is especially relevant in Canada due to the unique history of Canadian copyright which draws from both the Anglo Common Law tradition and the Continental Civil Law tradition.[14]

As shown by Michael Carroll in his elaborate historical review of music copyright, music was a late and reluctant addition to Copyright Law[15]. When first introduced in the UK in 1710, the Statute of Anne, also known as the first Copyright Law, addressed only literary works. Seventy years later, in the *Bach v. Longman* case, the Court of King's Bench expanded the Statute through judicial interpretation to cover musical works. Interestingly though, Carroll shows that the musicians themselves were quite reluctant in seeking Royal protection under the Statute of Anne and turned to it only after other legal avenues had failed to provide them with the legal protections they were seeking.[16]

Today, on the other hand, there is no doubt that musical works fall well within the ambit of copyright. Originally the producers and disseminators of music in the 18th century, when Bach first brought his action against Logman, were adamantly arguing against the expansion of copyright protection to musical authors and creators. They claimed that the Statute applied only to literary works. And yet, since then (and even immediately after *Bach*), they have become the

[12] Michael W. Carroll, "The Struggle For Music Copyright", 57 Fla. L. Rev.907 2005, at 909-912.
[13] *Ibid* at 909-919.
[14] *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336, 2002 SCC 34, especially at 116-121. See also: Pierre-Emmanuel Moyse, "La nature du droit d'auteur: droit de propriété ou monopole?", 43 McGill L. J. 507 1997-1998.
[15] Carroll, *supra* note 12 at 935-945.
[16] *Ibid*.

most vocal advocates of expansive and stronger copyright protections for musical creations[17]. For example, the large music conglomerates have been successful in lobbying legislators to extend copyright terms for popular works, thus delaying their transition into the public domain. Likewise, the music conglomerates have led the charge along with the Hollywood's film industry against digital file sharing of music and video files, which they call "internet piracy".

2.2.2. Music copyright in Canada

Despite the initial reluctance to apply copyright protections to musical creations, today it is undisputed that musical creations form an integral part of Copyright Law. Furthermore, Canadian law explicitly recognizes the unique character of musical authorship and has set up several specific mechanisms designed to protect musicians' rights in their works.

Under the *Copyright Act*, Canadian creators acquire a 'bundle" of economic rights upon making an "original work". The author has the sole right to do or authorize another to:

- Produce, reproduce, preform or publish the work
- Convert or incorporate a substantial part of the work in another work
- Make a sound recording of the work
- Communicate the work to the public by telecommunications
- Present the work in public
- Rent a sound recording of the musical work

Generally speaking, the authors' rights are subject only to specific exceptions such as fair dealing and fair use. In recent years four new fair dealing exceptions were introduced in Canada in order

[17] *Ibid*, at 946-948.

to adapt the doctrine of fair dealing to the internet age and other new technologies.[18] Furthermore, due to the new internet platforms that facilitate easy file sharing, the concept of "users' rights" has been given an increasingly more central place in Canadian law.[19] However, the framing of copyright as a balancing act between creators' rights and users' rights has also been criticized for overlooking other relevant relationships and interests that are at stake, namely between publishers and creators.[20]

Under the *Copyright Act* authors also possess moral rights in their works, which provides for limited protection against distortion, mutilation, or other modifications to the work that might be prejudicial to the author's reputation.[21] Unlike economic rights, moral rights cannot be assigned to a third party. This distinction is especially critical for our purposes since the conditions for transferring all or some of the creator's economic rights to third parties lies at the heart of the problem. The legal and economic conditions for these rights transfers are the source of both creators' weak bargaining position vis-à-vis corporate intermediaries and the loss of control over their works, as we will discuss later. Nevertheless, it remains debatable to what extent moral rights are actually enforced and effective in Canada.[22] For instance, a significant hurdle for

[18] See ss. 29.21-29.24 of the *Copyright Act* R.S.C., 1985, C-42.

[19] See: Michael Geist, *In The Public Interest- The Future of Canadian Copyright Law*, (Toronto, Irwin Law 2005); Zohar Efroni, *Acces-Right: The Future of Digital Copyright Law*, 2011, Oxford University Press, New York; Lawrence Lessig, *Free Culture: How Big Media Uses Technology And The Law To Lock Down Culture and Control Creativity*, (NY, The Penguin Press 2004), also available online: <http://www.free-culture.cc/freeculture.pdf>. See also Teresa Scassa, "Users' Rights in the Balance: Recent Developments in Copyright Law at the Supreme Court of Canada", 22 Canadian Intellectual Property Review 133 2005.

[20] Scassa ("Users' Rights in the Balance"), *ibid*. See also: Teressa Scassa, "Interests in the Balance", in *In the Public Interest – The Future of Canadian Copyright Law* (ed. Michael Geist, Toronto, Irwin Law 2005) pp. 41-65. See also Teressa Scassa, "Book Review: Giuseppina D'Agostino, Copyright, Contracts, Creators: New Media, New Rules, (Cheltenham, UK: Edward Lublishing Ltd., 2010) 320pp.", 9.1 Canadian Journal of Law & Technology 93 2011.

[21] SS. 14.1 *Copyright Act*, R.S.C., 1985, C-42.

[22] *Ibid*.

succeeding in a claim alleging an infringement of moral rights is the requirement to prove damage to reputation.[23]

In any case, both economic and moral rights are not perpetual. In the case of sound recordings or performances the term in Canada is 70 years from publication or a maximum of 100 years if publication occurs after fixation. Yet, as mentioned above, despite the existence of both moral and economic rights, creators often find themselves exploited, unprotected, underpaid, and to top it all, lose control over their works, at times even before they have been released into the markets. Some have associated the worsening of creators' situations and the weakening of their copyright protections to the internet and new technologies which allow users to easily and undetectably copy and disseminate musical works without authorization. Others, on the other hand, see great potential in the new digital technologies and claim that intelligent and responsible use of these platforms allows musical creators to improve their bargaining positions when dealing with corporate intermediaries or even bypass them all together and communicate directly with users.[24]

In the midst of these developments it seems that Copyright Law has been taken hostage by both sides of the copyright debate. Along with ideas of undisturbed internet access and unrestricted circulation of knowledge online a new intellectual and political movement has risen. This movement advocates for expansive "users' rights" and relaxing if not complete elimination of copyright, which some of them refer to as "copywrong".[25] On the other side of the debate, strong economic powers in the music industry, along with the film industry, have actually argued that

[23] Unless the claim has to do with a physical change in an original artistic work, such as a painting or sculpture. Thus, if for example a recording company chooses to use the musical work of a musician whom has transferred his economic rights to it, in a way that the musician does not agree with his claim under moral rights would likely fail unless he can prove that the use effectively causes damage to his reputation.

[24] Rethink Music, *supra* note 4.

[25] See Lessig and Geist, *supra* note 19. See also: Peter Baldwin, *The Copyright Wars- Three Centuries Of Trans-Atlantic Battle*, (NJ, Princeton University Press 2014); Samantha Chilli, "Copywrong: A Glance at Media Conglomerates, Copyright Legislation, and Their Impact on the Music Industry", *Nota Bene: Canadian Undergraduate Journal of Musicology:* Vol. 4: Iss. 2, Article 6.

due to digital technologies and the loss of control over musical works, this is precisely the time to expand and reinforce copyright protections.[26] This extremely powerful lobby of global conglomerates has been persistently pushing for harsher "anti-piracy" laws. In the thick of these controversies the creators find themselves between a rock and a hard place, once again. If they side with the corporate intermediaries they alienate themselves from their audience, the 'users', while at the same time strengthening their dependency on the intermediaries which in turn further weakens their bargaining power. On the other hand, if they side with the "copywrong" movement they risk losing the little advantage and bargaining power they still have through copyright in an extremely demanding and competitive industry.

Thus, once again creators and their actual needs and interests get lost in the debate. One vocal side, "copywrong", is arguing that copyright in any case only serves corporate interests, while the other (intermediaries) hijacks creators' voices by claiming to have their best interests at heart in an attempt to gain public support. Therefore, in approaching the matter of protecting creators we firmly believe that we must first locate with greater precision the creators and their interests within the background noise. Thus, we proceed by first distinguishing between the different economic models in the music industry and the respective roles all relevant actors play under each model. More importantly, we will identify the positions, vulnerabilities, needs and interests of creators and performers under each economic model.

[26] Ginsburg, *supra* note 1; Mazziotti, *supra* note 5; Marian Hebb and Warren Sheffer, *Towards A Fair Deal-Contracts and Canadian Creators' Rights*, (Creators' Rights Alliance 2006), available online: <http://www.creatorscopyright.ca/documents/contracts-study.pdf>.

3. CONSIDERATIONS

3.1. Setting the Modern Music Economic Scene

3.1.1. From the Independent Creator to the User

Each and every artist in the music industry starts as an entrepreneur, receiving his first payment in exchange for a performance or a recording. Few will end up making a stable living out of their creations.[27] Those who will succeed owe it to a large extent to intermediaries and distributors: by result of their efforts, the artist's work reaches a public that is willing to pay, either directly through payments or indirectly through publicity, to own or access their favorite tunes, making it possible for the creator's "business" to grow. In fact, over the last decades, faster release cycles, proliferating online services, and creative licensing structures has made finances and revenues more complex to understand and manage.[28] Facing the managerial aspects of the business with (often) scarce knowledge of a complex market, many artists will turn to intermediaries (managers, publishers, labels) and distributors.[29] By subcontracting the aspects that have little to do with the creative process that defines them, independent creators can focus on their art. Arguably, they will also have a better chance to increase their revenues by reaching out to more experienced and resourceful hands. However, by doing so, they waive some of their legal and economic rights and lose control over the business aspects of their efforts. And while most artists tirelessly pursue their passion in the face of long odds, corporate stakeholders are driven less by

[27] Rethink Music, *supra* note 4 at 5; Cole Sternberg, "Where Have All The Royalties Gone?: Emerging Technologies And The Lack Of Equitable Mechanical Royalties", 22 Cardozo Arts & Ent. L.J. 863 2004-2005; Martin Kreschmer, *supra* note 5.

[28] Rethink Music, *Ibid* at 3. See also: 'Streaming music payments: how much do artists really receive?- Stats from Zoë Keating show how musician's 0.4 cents per Spotify stream compare to payments from iTunes Match, Amazon Cloud Drive and Xbox Music', by Stuart Dredge, The Guardian (August 19 2013), available online: <http://www.theguardian.com/technology/2013/aug/19/zoe-keating-spotify-streaming-royalties> ; 'The Royalty Scam', by Billy Brag, NY Times (March 22 2008), available online: <http://www.nytimes.com/2008/03/22/opinion/22bragg.html?_r=0>.

[29] Rethink Music, supra note 4 at 5.

passion and more by profits.[30] They are private businesses and have to meet their own stakeholders' expectations. The stark difference in business skills and control over revenue data is a first and substantial hurdle to overcome in the future: most artists lack the power and knowledge over the distribution of their own works.

The modern music industry, the one that takes place over the Internet, has connected more artists to more users than ever before. It entails millions of micro-transactions, generating revenues - albeit in fractions of pennies - from songs and albums.[31] Nevertheless, more money flows to handlers than to creators.[32] Technology could arguably have empowered artists to gain control over their business by facilitating online activities such as selling merchandise, booking their shows, connecting directly with fans and overseeing digital real-time data and statistics on relevant information royalties they are owed. Instead, it has created a whole new level of complexity. It has buried first-hand statistics and information about supply and demand in algorithms impossible to crack.[33] Arguably, what could have been part of the solution has in fact made things worse.

The Internet has also had another important impact on the effectiveness of copyright by shifting consumers' habits from owning music to accessing it through music streaming models based on advertising and subscriptions.[34] This could be beneficial in the long run. In the streaming model, the subscription fees are being distributed by plays, instead of paying upfront to purchase music. Even where the streaming service provider pays the CMO an upfront lump sum for the music, the CMO later distributes the royalties it collected amongst its members according to numbers of

[30] *Ibid.*
[31] *Ibid* at 3.
[32] 'The music business: The dry stream of musicians' royalties', by The Economist (September 3 2015), available online: <http://www.economist.com/blogs/prospero/2015/09/music-business>.
[33] Rethink Music, *supra* note 4 at 7.
[34] *Ibid* at 3.

plays. Thus, in theory, the music that one enjoys the most will receive the highest share of his fees. The entire system is based on the number of times a piece has been played by a particular user. It is, perhaps, fairer than the traditional music royalty schemes that existed before[35]. Indeed, never was an artist able to tell how many times one of his songs was played. New technology has the ability to create a degree of transparency that was never achievable before. Where data is readily available and micropayments can be tracked, it has the potential of empowering artists with greater knowledge and control over their revenue streams which in turn will provide them the leverage they deserve when negotiating with intermediaries. Finally, artists can know precisely what they are worth, where their fans come from and what they enjoy. However, for now, this kind of transparency has largely been absent from the online copyright model.

Instead, the frameworks and processes resulting from new technologies seem uneven and opaque.[36] This observation doesn't only apply to transactions over the Internet. The industry itself has failed to provide a comprehensive global database to facilitate the licensing and control of artistic works. The consequence is a great degree of confusion over where moneys should go which in turn results in payments not making it to their rightful owners. This will be discussed further in the *Collective Management Organizations* (CMOs) section of this paper.

3.1.2. And Everything in Between

As mentioned earlier, in reality most musicians depend on a long line of intermediaries in order to effectively disseminate their works and get compensated for them. Nevertheless, copyright debates tend to be polarized between the artists and the consumers while overlooking the

[35] *Ibid* at 6.
[36] *Ibid* at 3.

stakeholders in between. We argue that it is by addressing these stakeholders that we can enhance the protection of creators.

i. Direct-to-fan platforms

In the modern music industry, artists will often start by distributing their music themselves, most likely through online music stores or platforms which promote independent artists. One such example is *Bandcamp*, where users can play music for free on the website and are provided with the option to purchase the album or a specific track. A variety of options allows artists to customize all aspects of their business relations with the user, from prices to giveaways or create artists email lists. Such platforms provide smaller and independent artists with a free and flexible online presence for their music, while making it easier for them to sell their music and merchandise. Uploading music to *Bandcamp* is free, but the company takes a 15% cut of sales made from their website (in addition to payment processing fees), which drops to 10% after an artist's sales surpass $5000.[37]

Similar services are being launched to attract independent labels, such as *Bandcamp for Labels*, where participating companies pay for the services according to the number of artists they want to represent on the platform. Distribution platforms for independent artists and labels all have one thing in common that is important for the future of the protection for creators: total artist control through an app that provides real-time statistics, information about the visitors and unified accounting. When we visited its website on November 22nd 2015, *Bandcamp* claimed that fans had paid artists over 130 million USD through its services, including 3.8 million in the previous 30 days alone.[38]

[37] 'Pricing', Bandcamp (November 26 2015): <https://bandcamp.com/pricing>.
[38] 'Bandcamp for Artists', Bandcamp (November 26 2015): <https://bandcamp.com/artists>.

Although those direct-to-fan platforms also mean direct-to-artists money, they still appear to be focused on selling downloads while the trend is to use streaming services. In 2014, US streaming music revenues increased about 29 %,[39] accounting for more than one-quarter of total industry revenues. This was at the expense of digital downloads for which revenues decreased about 3 %.[40] This trend is reflected in Québec and Canada as well.[41] It is also important to consider that despite the value that artists bring to such platforms by posting music for free and generating membership, they rarely see a penny when the owners decide to sell or merge with a major player in the industry.[42] Thus, creators whom have contributed their works voluntarily remain left out when finally their works gain significant market value. Lastly, those platforms are also deemed to be useful only to those who decide, despite a growth in popularity, that they prefer to stay independent from labels and other intermediaries, whose business models are irreconcilable with direct-to-fans services.

ii. Corporate Intermediaries (labels, publishers, managers)

Artists turn to intermediaries for assistance as their business grows. Labels, publishers and managers have the resources to make the best of the fast pace industry, creative brands market, online services and licensing structures that have transformed the music industry in the last decades. As discussed, although the Internet could have empowered artists to manage some aspects of their business, bargaining power has remained firmly tilted towards intermediaries for various reasons, including the difficulty for an outsider to understand the complex market of the modern music industry, the difficulty for independent artists to get noticed among all other

[39] Cefrio, "Le divertissement en ligne: des utilisateurs de plus en plus nombreux- Écouter de la musique sur Internet", (Cefrio, October 2015), available online : <http://www.cefrio.qc.ca/netendances/le-divertissement-en-ligne-des-utilisateurs-de-plus-en-plus-nombreux/ecouter-de-la-musique-sur-internet/> [Cefrio].
[40] *Ibid.*
[41] *Ibid.*
[42] See for instance what happened with Bebo.com: The Royalty Scam, *supra* note 28.

creators and the reluctance of many artists and the industry as a whole to engage in alternative forms of copyrights exploitation.[43]

Although the role of intermediaries is prominent in the modern music era, the industry as not yet required them to provide complete, readable, standardized, up-to-date data about music sales and licenses.[44] This simple step, which lies in the hands of CMOs and distributors, could remediate major problems with royalties' redistribution and assist artists to better understand the industry and become vigilant about the financial reward for the exploitation of their talents. As of now, Internet companies are monetizing music, as opposed to the old music business, like labels, publishers, artists and composers. Nevertheless, labels are obtaining large equity stakes in streaming services. Since the companies' value is tied to a greater membership, labels are less interested in the per-stream payout as compared to keeping subscription fees low, which hurts the per-stream payout. Additionally, labels receive greater shares of licensing revenues than artists, the disproportion being qualified as 'blatantly unfair' by SOCAN members.[45] Even where CMOs, labels, publishers, and managers are required to provide data to back their payments distributions, the opacity of such data as provided to artists makes it impossible to understand the payments and accountings received.

One reason for this lack of transparency albeit the technological possibilities to generate detailed data could be that it benefits intermediaries. "There is no incentive for anyone to build a system that is fully accountable," said Larry Kenswil, former head of Universal Music's eLabs division, when he participated in the Rethink Music Initiative, a project of the Berklee Institute of Creative

[43] Kreschmer, *supra* note 5.
[44] Rethink Music, *supra* note 4 at 8.
[45] SOCAN, 'Vote 2015: Board Elections', Writer Candidate Profile of Safwan Javed, available online: <https://www.socan.ca/jsp/en/about/board_candidates/wb2015_JavedSafwan.jsp>. It should nevertheless be noted here that this is only in relation to reproduction rights and not royalties for telecommunications which are set out by the Copyright Board and which we discuss in subsequent sections of this paper.

Entrepreneurship. He further added that "Major labels and publishers benefit from the currently complex and inaccurate system, and streaming services have no incentive to invest in transparent reporting and accounting systems, which are expensive".[46]

iii. Distributors

In the digital market, music creators' works are available in a variety of platforms, from physical copies to online retailing and streaming services. The last two are most relevant to this analysis. Online, the consumer can purchase a license to his copy of a song, which is then permanently downloaded to a digital device, through a service like *iTune Music Store*. Instead, he can chose to opt for paid interactive or on-demand models, such as *Spotify Premium*, which allows a consumer to choose music to listen to and creates a copy on his device that will remain accessible as long as the consumer is paying his subscriber fees. Others will prefer advertising-supported models, where the user can choose what music they want to listen to in exchange for viewing or listening to ads on *Spotify's free* or *YouTube*. Those streaming services are somewhat like radio, offering music for free to listeners who accept advertising in exchange. Advertising or subscription-based models like *Pandora* provide music based on genre or programmed recommendations following the listener's preferences, although the user does not control which songs will be played. As described earlier in this analysis, the streaming services are overwhelmingly setting the trends around the world and this tendency is reflected in Canada as well: online sales are rapidly decreasing to the hands of online streaming services. Streaming potential is arguably enormous, yet it remains hard to assess its impacts and prospects since in many cases these streaming

[46] Rethink Music, *supra* note 4 at 10. Even where large CMOs, like SOCAN, publish annual reports detailing the sums they have collected and distributed, it remains nearly impossible for the individual creator to figure out from those opaque reports what she was entitled to compared to what she actually received.

models are still being defined. For one thing, the emergence of streaming services has resulted in a decrease in piracy and illegal downloads of music.[47]

The urgency to create fairer rules for the compensation of authors through streaming services is well illustrated by the example set out by musician Zoë Keating, who published the numbers from her online revenues in a public Google Doc. It is worth noting that unlike most musicians, the reason she even had access to this data to start with is because she works with a small label that provides its artists with such information, unlike most intermediaries. The first figures published detailed her earnings between October 2011 and March 2012. It revealed that nearly 97% of Keating's income came from sales of her music on *iTunes*, *Amazon* and her own *Bandcamp* website. During that six-month period, Keating earned just under $47k from *iTunes*, $25k from *Bandcamp* and nearly $11.2k from *Amazon*, but less than $300 from *Spotify*. Keating then went on to compare, her earnings form the various streaming services for the first half of 2013. She found that albeit Spotify was by far where she had added up the most streams of tracks, it was also the least lucrative payment source, with only 0.4 cents per stream. Meaning that despite being accessed by far most through *Spofity* it was also her least profitable source of income. Clearly downloading and streaming are not comparable business models. When a user downloads a work he actually possesses a copy of it, which is of course not the case with streaming which only provides access to the work. Thus, arguably, we should not expect to see equivalent rates in both cases. Nevertheless, the enormous gap between the market value and rapid growth of streaming and the relatively low margins of revenue it produces is remarkable. In an industry that will likely depend, to a large extent, on streaming services this gap is definitely a source of concern.

[47] "How does the music industry make money?", by Jules Gray, The New Economy (December 17 2013), available online: <http://www.theneweconomy.com/business/how-does-the-music-industry-make-money>; Sternberg, *supra* note 27.

Furthermore, arguably, the figures revealed by Keating are worse in Canada, especially since the so-called "Tariff 8" decision, by which the Copyright Board established the lowest per-play rates in the world for audio streaming services.[48] While the Canadian market is clearly different from the US and European markets both in size and nature, the comparison to other jurisdictions is still useful. This does not necessarily mean that Canada should follow the rates set out in other countries, but at the same time the discrepancies between Canadian rates and foreign rates, and more importantly between the enormous potential of streaming and its current payouts suggests that at the very least the current method for calculating appropriate rates should be re-evaluated. However, another important argument that can be made against raising streaming rates is that providers like *Spotify* already pay out 75% of its revenues in royalties. Arguably they cannot afford to pay more and remain profitable. While this may be true, the evidence suggests that even if rates stay the same the more important question is where do the royalties actually go and how are they being distributed within the industry. In an era where Internet companies and Internet service providers are monetizing music, old music bosses, such as record companies, publishers and artists themselves, are losing out. Graham Henderson, the President of Music Canada which represents the three major record companies in Canada, stated in his testimony in front of the Standing Committee on Canadian Heritage in March 2014 that: "There has been an enormous shift in wealth away from creators into technologically driven intermediaries [Ed: online distributors] who are amassing fortunes on a scale that at times beggars the imagination. […] Power and wealth are now concentrated in intermediaries, technology firms that control access to the distribution system."[49]

[48] Re:Sound No. Tariff 8 – Non-interactive and semi-interactive webcasts, Decision of the Copyright Board, 2009-2012, May 16, 2014 [Re:Sound].

[49] House of Commons, Standing Committee on Canadian Heritage, Evidence, 2nd Session, 41st Parliament, 13 May 2014, 1210 (Mr. Graham Henderson, President, Music Canada) [Standing Committee].

This reality of extreme control over the access to music flows and revenues highlights the need for more transparency in the data on which the royalties' scheme depends. Transparency means not merely providing the stakeholders down the chain with numbers of streaming occurrences, but giving access to the formulas used to provide the numbers and offering more than partial and raw collected data. The origin of the streaming demands, for instance, is in and of itself valuable information to the artists and the intermediaries. This information exists. As Daniel Ek, CEO and founder of *Spotify*, puts it himself: "If that money is not flowing to the creative community in a timely and transparent way, that's a big problem. We will do anything we can to work with the industry to increase transparency, improve speed of payments, and give artists the opportunity to promote themselves and connect with fans…" [50]

iv. Collective Management Organizations (CMOs)

In Canada, the collective management of performing rights and certain neighboring rights is regulated by section 67*ff* of the *Copyright Act*. Under this umbrella fall numerous copyright collectives. SOCAN, for instance, represents songwriters, lyrics authors, music composers, and music publishers, i.e. the ones who create and publish the creations. Other copyright collectives will administer the right of performers and record companies to equitable remuneration by licensing the use of recorded music for public performance and broadcast.

No matter who they represent, collective societies administer the rights of several copyright owners at a time. They can grant permission to use their works and set the conditions for that use. Opting into CMOs entails various benefits for the authors and other rights holders.[51] First, the

[50] "Streaming Roundup: A Summary Of Who Said What", by Howard Druckman, SOCAN (November 18 2014), available online: <http://www.socanblog.ca/en/2014/11/>.
[51] Daniel J. Gervais, *Collective Management Of Copyright And Neighbouring Rights In Canada: An International Perspective*, [Report Prepared for The Department of Canadian Heritage], (August 2001), available online: <http://aix1.uottawa.ca/~dgervais/publications/collective_management.pdf> at 7.

power of collective bargaining re-establishes, in theory, the balance in the very uneven relations between an individual creator and a large corporation. The negotiation process over royalties may then allow rights holders, as a group, to obtain more for the use of each individual work. Second, the CMOs provide the rights holders with greater control over certain uses of their works where their use would otherwise be impossible to assess due to the large number of users around the world. The streaming services are a good example of such circumstances. Negotiating the rates with all the large multinational user groups and tracing back the use of works would require a full time position just for those purposes. Finally, collective societies make it easier for users to have access to works protected by copyright in a legally correct manner.

However, while making the process easier for a rights-holder to get compensation for his works, collective management organizations may inadequately respond to certain artists. Most collective schemes value all the works that they protect on the same economic footing.[52] This may result in unfair retribution to those who create works that may have a higher value in the eyes of users. The rates per stream tend to mitigate that by providing a royalty based on the number of times a specific work has been listened to. In other words, CMOs apply the same collection rate for all works. Meaning that popular and unpopular works cost the same and it is only in the distribution rules that artists receive more according to the same rate, per play. Nevertheless, it might be that certain artists, or certain tracks could potentially generate more money per stream based on their popularity. Thus, an artist could have negotiated a higher price per stream if not obligated to the CMO's collection flat rate. Collective societies prevent them from doing just that, unless they opt out of the regime. Furthermore, although based on a voluntarily licensing or assignment of rights, CMOs impose collective management of the rights to remuneration. Thus, the newcomer has to

[52] *Ibid*.

give up substantial control over his work and fair remuneration right in order to get more control over royalties. However, by entering the collective management repertories, the new artist will get a chance to be exposed to a greater public through the use of a large corporation or streaming services that would not have known about his work otherwise. On the other hand, CMOs have been criticized for being greedy in their demands for per-stream rates from streaming services. It was said that they were partly responsible for the slow development of streaming services in Canada. As Tim Westergren, CEO of *Pandora*, put it back in 2011:

> "I think it's very important that Canadian listeners understand that Pandora is eager to launch in Canada, but the rates that have been proposed by the Canadian music rights societies are simply uneconomic. […] The inertia and obstructionism of rights societies is harming the interests of the constituents they purport to represent. As a long time working musician myself, I find it outrageous. How can these groups argue that preventing Pandora from launching in Canada benefits anyone?"[53]

Another black hole, which lies in the hands of CMOs, is the destiny of the royalties owned by unidentified or untraceable copyright owners. This is yet another consequence of the industry's lack of a comprehensive rights database. Currently, the Copyright Board has the power to issue licenses for the use of works when the copyright owner cannot be located and where the person who wishes to obtain such a license shows that she has made reasonable efforts to locate the copyright owner.[54] The rightful owner may reclaim his royalties through the collective societies. According to the legislation, the owner has five years to do so.[55] But what CMOs do with the unclaimed money is a mystery that we could not resolve. SOCAN, for instance, has made great efforts in the past years to sift through unidentified works of foreign societies in order to identify

[53] "Pandora founder decries Canadian barriers to entry", by Jameson Berkow, Financial Post (February 28 2011), available online: <http://business.financialpost.com/fp-tech-desk/pandora-founder-decries-canadian-barriers-to-entry>.
[54] S.77 *Copyright Act*, R.S.C., 1985, C-42.
[55] *Ibid.*

SOCAN member-interests.[56] It has also put in place an online unidentified performances list, so that members who haven't filed a list of works performed in a given show can find it and provide the details in order to receive their royalties.[57] But the question remains as to what SOCAN does with the unclaimed royalties at the end of the day. In the US, it is the major labels that benefit from the unclaimed royalties.[58] Thus, intermediaries profit from the opacity in the revenue flow, and have no incentive to make an effort in order to track who is legally entitled to the royalty.

A difficulty with creating a global rights database is that it must be voluntary, according to the *Berne Convention*. In brief, countries cannot require registration of international works in order to gain protection. A solution to the problem may be to implement new regulations under which unclaimed money must go to the government or an independent creators fund instead of the CMOs, or, perhaps, the intermediaries' pockets. That solution would be similar to the one adopted by the banking industry, where unclaimed moneys must be transferred to the Bank of Canada or Revenu Québec. This solution would also provide an incentive for the intermediaries to track the copyrights owners. And in any case, such a mechanism would ensure that if despite all efforts the right holder cannot be located or identified then the money will go back to creators and possibly fund specific mechanisms set up to protect their interests.

v. Copyright Board of Canada

There has been a great controversy around the role of the Copyright Board after the "Tariff 8" decision[59], which set the fair value for digital streaming services to pay the rights holders at a surprisingly low rate. In fact, those rates were less than 10 % of the rates already negotiated by

[56] *SOCAN Annual Report 2012*, SOCAN, available online: <http://www.socan.ca/files/pdf/SOCANAnnualReport2012.pdf> at 46.
[57] *SOCAN Annual Report 2014*, SOCAN, available online: <http://www.socanannualreport.ca/>.
[58] Rethink Music, *supra* note 4 at 27.
[59] Re:Sound No. Tariff 8, *supra* note 48.

the CMO *Re:Sound* in its direct agreement with the streaming services, and less than 10 % of the rates paid by those services in the US.[60] The long delays it takes the Board to render its rulings and decisions are also believed to be responsible for the slow growth of streaming services in Canada.[61]

The Copyright Board is empowered to establish, either mandatorily or at the request of an interested party, the royalties to be paid for the use of copyrighted works, when the administration of such copyright is entrusted to a collective-administration society. The Board also has the right to supervise agreements between users and licensing bodies and issues licenses when the copyright owner cannot be located. According to Graham Henderson, the President of Music Canada, Parliament should unleash rights owners and digital services to do deals directly at fair market value rather than having to wait for long periods of time for the Board and the Courts at appellate levels to determine the appropriate value.[62] This would provide certainty for new digital services to be launched in Canada and would enable stakeholders to reach deals at proper market value rates - "to ensure that being a Canadian musical artist can provide a sustainable livelihood rather than at best being a hobby."[63]

Given the proper tools, personnel and funding, the Copyright Board could become something more analogous to a business development office[64] by aiming to be at the forefront of technological progress and enhance Canada's artists place in a global market.

[60] "5 Things You Need To Know About The Copyright Board of Canada's Ruling On Digital Streaming Services", CIMA (date uploaded unknown), available online: <http://cimamusic.ca/advocacy/issues-affecting-the-independent-music-industry/i-stand-for-music/5-things-you-need-to-know-about-the-copyright-board-of-canadas-ruling-on-digital-streaming-services/>.
[61] *Ibid*; Standing Committee, *supra* note 49 (Mr. Graham Henderson, President, Music Canada).
[62] Standing Committee, *ibid* (Mr. Graham Henderson, President, Music Canada).
[63] *Ibid.*
[64] *Ibid*.

3.2. The new horizon of "Right to Access" – Are we witnessing the birth of a new property right in IP law?

Another tremendous change came with the rise of the digital music industry. Consumers have moved from an ownership model to an access model. Music-as-a-product that one can own has been redefined. Music now exists as a service. This shift is a clear trend: online sales declined and the consumers are now moving to online streaming services where they can have unlimited access to the repertories on any device at any time.[65] Using and accessing are two entirely different business models. When a consumer buys and downloads music, he is giving an advance payment for future unlimited use. The user will generate the same amount of revenue regardless of how many times he will play a song. This is the right to use, as defined in the *Copyright Act*. The subscription streaming services are, on the other hand, based on access, where the consumer pays to access a service. Streaming services are driven by a pay-as-you-listen model, which results in micro-payments to the rights holders calculated based on the number of times a particular song was listened to over a set period of time. Although each performance generates far less royalties than the online sale of a particular track, there is the potential to gain more on the long run, unlike the 'use' model.

The concept of a right to access intellectual property isn't new. For example, in the early 90s, British lawyer Simon Olswang formulated the concept of the "Accessright", which he described as a *meta* right that would allow the artists to control their work in response to the blurring distinctions between the various exclusive rights and acts of infringement.

> "The envisioned right should have provided the necessary property platform upon which contractual arrangements could develop to allow access and use, to the extent these activities were authorized by the right-holder. The "Accessright" should have further afforded the rights-holder with a wide and flexible range of

[65] Cefrio, *supra* note 39.

> options for fashioning access and use permissions. At the same time, Olswang noted that "Accessright" should be "limited to permit fair dealing and to maintain the balance between authors and users."[66]

Even though the problem was identified in the early stages of the digital era, as of now, the consumer right to access an artist's work has received very little consideration in Canadian case law, let alone in the legislation. The emergence of the anticipated right to access thus occurred where no regulation addresses it directly. In light of the music industry moving more and more towards access business models it is arguably of special importance to further research and design relevant policies and legislation if deemed necessary in this regard.

3.3. Defining and Reframing Authors' Economic Interests and Legal Rights in the 'Digital Age'

In Canadian copyright jurisprudence we find clear statements highlighting the importance and centrality of fair compensation for creators in the overall copyright scheme. Furthermore, the courts have also reaffirmed that one of the primary objectives of the Copyright Board is to ensure that creators are fairly compensated:

> "To this end, Parliament established the Copyright Board to administer the scheme by approving royalties and invested it with the powers necessary for it to discharge its regulatory responsibilities in a complex area. Rapid and profound technological developments are reshaping the market and require sophisticated regulatory responses in order to ensure that all who contribute value to the recording of a musical work are fairly compensated…"[67]

[66] Efroni, *supra* note 19 at xx, citing *Accessright: An Evolutionary Path for Copyright Into the Digital Era*, 17 Eur. Intel. Prop. Rev. 215 (1995) at 215-217.

[67] *Neighbouring Rights Collective of Canada v. Society of Composers, Authors and Music Publishers of Canada*, [2004] 1 FCR 303, 2003 FCA 302 at 62. See also: *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2002] 4 FCR 3, 2002 FCA 166 at 43.

Thus, it is especially important to properly locate the place of fair remuneration within the legislative scheme and correctly identify the nature and scope of economic interests of creators protected by copyright. In this regard, some authors have described copyright as being about "maintaining control- both economic and artistic – over the fate of the work."[68] However, we submit that this is an inaccurate depiction of copyright. Since its first inception in the Statute of Anne and to this day copyright ensures only partial control over works. More importantly, it has aimed to ensure that creators are fairly compensated for the commercialization of their works. Artists, authors and creators have never truly controlled the fate of their works once they were placed on the market, and, arguably, copyright was not intended to fundamentally change that. Copyright's objective is, however, to facilitate the circulation of works by ensuring that creators determine how their works will enter the market and more importantly that they are not being exploited in the process.

Defining more precisely the scope and nature of the economic interests protected is especially crucial in the "digital age" where the limited physical control creators had over their works in the past has been significantly diminished or has become entirely irrelevant. Digital technologies of dissemination and even production have turned any laptop holder into a user and intermediary at the same time. Hence, the "digital age" challenges this delicate balance between control and economic utility that defines Copyright Law. It is in this context that Canadian Copyright Law has promising potential and can offer a more nuanced and sophisticated approach. Canadian copyright is unique in its attempt to create a system where two distinct copyright approaches co-exist: the naturalist continental approach, which sees the author and control over her creation at the center, and the economic utility Anglo approach, in which the primary goal of copyright is to

[68] Ginsburg, *supra* note 3 at 19.

ensure economic maximization.[69] While these two distinct approaches to copyright have traditionally been juxtaposed against each other, the Canadian legislature has attempted to reconcile the two.[70]

Yet, the full potential of this innovative approach has not yet been achieved. To a large extent this is precisely due to the fact that the great aspirations of copyright to ensure creators fair compensation in exchange for the commercialization and significant, even if not entire, loss of control over their works, has not fully materialized. As long as the actual commercial and contractual relations in the relevant markets are not informed by this fundamental aspiration of copyright, equitable remuneration cannot be achieved. The way both philosophies co-exist in the Canadian system is precisely through striking the balance between the creators' interests and users' interests. However, creators' legitimate and, in theory, protected interests will not be respected as long as creators find themselves dramatically disadvantaged vis-à-vis intermediaries that determine how they will be compensated. Thus, the great promise of Copyright Law will remain unfulfilled if the law does not find a way to actively equalize this fundamental commercial imbalance.

From the extensive studies and evidence in this area it is clear that it is the misfit between copyright aspirations and the actual economic reality which forms the gap in terms of protecting creators. While copyright treats creative products differently from other objects of commerce, the economics of IP do not. In practice music creators are forced to waive their economic rights due to the way the market functions. Without doing so they will never get their works disseminated to wider audiences. One of the ways in which the law itself enables this imbalance is by the fact that contracts between independent creators and third parties are treated as regular commercial

[69] Towards A Fair Deal, *supra* note 26 at 12-17; Baldwin, *supra* note 25.
[70] Towards A Fair Deal, *ibid* at 14-15. See also *Théberge* and Moyse, *supra* note 14.

contracts in which both parties are presumed to be negotiating on equal footing. Yet, as the evidence shows this could not be farther from reality. In reality the music industry is characterized by an economic power imbalance in which creators' have weak bargaining power vis-à-vis corporate intermediaries which in turn leads to unfair remuneration and standardized exploitative contracts. It would then follow that any attempt to improve this area of the law requires addressing the intersection between Copyright Law and contract law. Or, in other words, in order to make good on our promise to creators we must account for the actual ways in which Copyright Law informs and impacts commercial relations in the relevant industries.

3.4. Some solutions implemented in continental Europe jurisdictions

When addressing emerging issues, such as new use rights and new modes of exploitation, in the light of unfair contractual practices, the courts in continental Europe offer useful precedents. Instead of applying neutral Copyright Law provisions, they rather apply express legislation, resulting in interpretative tools, which tend to compensate the freelancers' structural disadvantage. For instance, the 'grant rule' is particularly effective in precluding the extension of the provisions of a contract to new uses or new modes of exploitation without specific consent. According to this rule, "whenever a contract's terms do not specifically identify the uses for which rights are granted, the author is deemed to have granted no more rights than are required by the purpose of the contract."[71] As the Federal Supreme Court of Germany put it when recognizing the will of authors to retain reasonable control over their works: "This [purpose of grant] rule of interpretation expresses the notion that the copyright powers tend to remain with

[71] D'Agostino, *supra* note 1 at 167.

the author as far as possible so that he can enjoy reasonable participation in the profits from his works."[72]

In continental Europe, some countries have also given performers an inalienable right to equitable remuneration, except when assigning that right to a collective society. This aims to better protect performers, who were once ill equipped to allege any rights in their works.

4. OPTIONS ANALYSIS

As our analysis has shown there are three main legal and administrative components to the protection of musical creators' economic and moral rights. The first is of course Copyright Law which is implemented to a large extent by the Copyright Board. The second being contract law regulated at the provincial level. And the third component is collective management societies which in fact hold most of Canadian musicians' rights and handle many of the dealings with corporate intermediaries. This means that any attempt to reinforce and improve creators' positions in the industry requires working on one or more of these components. Furthermore, as our analysis has indicated in improving the way any or all of these components function the two principal problems in the industry that must be addressed are bargaining power and lack of transparency. However, before examining specific suggestions for reform and improvement it is important to first assess the prospects of addressing the different components.

i. Collective Management Organizations

In an industry which has evolved from being centered on commercialization of works to an industry dominated by the circulation of economic rights instead,[73] CMOs play a major role in

[72] *Ibid*.

protecting creators from exploitation. However, CMOs have been heavily criticized by both creators, intermediaries and scholars as being both inefficient and for not representing interests of all musicians equally. On the other hand, the CMOs have argued to the contrary that their shortcomings are due to weaknesses in the statutory scheme itself and especially the fact that streaming services do not pay their fair share.

Thus, if we conclude that the appropriate path for change is by reforming the CMOs it will still have to be determined whether that means strengthening or weakening them, depending on whose perspective is preferred. However, this would be the smallest problem. Any governmental intervention in the CMOs would be extremely controversial and problematic and would likely be met by very strong opposition by both the music CMOs and other collective societies. More importantly, even if these political challenges were somehow overcome changing the CMO structure and distribution rules would only partially enhance creators' protection. As we have discussed earlier, due to the basic structure of CMOs only a specific portion of musicians actually benefit from its distribution of royalties. While the CMO collection rules apply a flat rate to all works, the royalties' distribution scheme is inherently based on the number of times a work has been played. In other words, the scheme prioritizes popular musicians and popular music while at the same time preventing creators from obtaining higher rates where they might be able to. The result is that if you are big enough as a creator you can afford to opt out of the CMO because you have enough bargaining power on your own or can afford to pay for private managing services to represent you. But if you are too small, then your interests get lost in the collective management's distribution structure which prioritizes popular creators. Thus the solution of collective management is at best only partial as it serves a limited portion of creators located somewhere in

[73] Owen, *supra* note 10.

the middle of the spectrum. Thus, beyond the fact that trying to further regulate CMOs will be extremely difficult both politically and legally, even if successful it would not advance the protection of all musical creators or even the most vulnerable.

ii. Contract Law

It is evident throughout our analysis that the primary problem lies in the commercial relations set out by contracts between creators and corporate intermediaries. The overwhelming power imbalance which defines these relations have created a business culture in which creators are forced to sign standardized contracts in which they transfer their rights for less than fair compensation. Thus, contractual standards in the industry clearly lie at the heart of the problem. However, any attempt by the Federal Government to intervene in the regulation of these contracts is likely to be met by significant political and constitutional challenges since contract and commercial law in this regard are under exclusive provincial jurisdiction. Thus, it will eventually be up to provincial legislatures to choose how to address this issue. This means that even if each province were to enact new laws and create new mechanisms to enhance the protection of creators it will be limited to their respective jurisdictions. More importantly these potential solutions, intelligent and appropriate as they may be, will not advance the creation of uniform standards across and even beyond Canada. This will most likely create even more confusion and inconsistency in this area of the law, which in turn will make it even more difficult to effectively protect Canadian creators. Finally, due to the political and constitutional challenges it seems very unlikely that addressing the problem through this avenue will be successful.

iii. Copyright Law

The last and final component of creator protection is of course Copyright Law which is regulated and enforced at the federal level. In this regard the Copyright Board plays a central role in the

implementation of the legislative scheme both in setting tariffs and more importantly in setting acceptable standards of behavior in the relevant industries. Despite the growing tensions and disagreements surrounding Copyright Law it nevertheless remains the primary statute aimed at protecting creators. As such it would only be natural to address the current problems of musical creators through this existing legislative and regulatory tool.

However, as our analysis has shown the problem lies precisely in the gap between copyright aspirations and the contractual economic reality. Contractual commercial relations between creators and corporate intermediaries are not truly informed by Copyright Law in a satisfactory way. While Copyright Law treats IP differently from other objects of commerce, the economics of IP do not. In practice, musical creators are forced to waive their economic rights due to the way the market functions. Thus, the most relevant and promising course of action would be to find a way to bridge this gap. This would entail constructing a legal and regulatory bridge between copyright and other intersecting areas of the law. This can be achieved by explicitly strengthening the ways in which Copyright Law and its underlying principles inform industry standards and behaviors without encroaching on the provinces' exclusive powers.

5. RECOMMENDATIONS

Our analysis thus far has indicated that in order to improve the protection of the most vulnerable Canadian musical creators' we must address the two main issues which lie at the heart of the problem: a) power and economic imbalance between creators and corporate intermediaries; and b) transparency and accountability in both work and royalties tracking. Thus, our recommendations focus precisely on addressing these issues. More specifically, as we have shown, the most promising course of action would be to close the gap between copyright

aspirations and the actual economic reality in the industry. We submit that doing so entails adopting an innovative approach which aims to extend Copyright Law's reach to other legal and regulatory areas. Most importantly, we believe that both in the context of creators' weak bargaining power and industry transparency Canada's unique copyright scheme contains great potential due to the way in which it weaves authorship and economic utility together. However, this may entail that Copyright Law and the Copyright Board itself need to be expanded to some extent in order to actually influence the economic behaviors and culture in the music industry.

5.1. Central Rights Data Bank

Scholars and stakeholders in the music industry have emphasized in recent years the importance of establishing a central rights data bank in Canada. As will become evident from the recommendations that follow, this is indeed a preliminary condition without which no significant improvements can be made. Without a central registration system it is impossible to see how any effective mechanism of work and royalties tracking could be implemented. At the same time it is important to note that this does not mean that if a creator chooses not to register their rights they will not be protected by Copyright Law. The option of registration should remain only optional, but strongly encouraged, in order to facilitate and enhance the protection of creators' interests. Further research is of course necessary in order to evaluate the best and most cost effective methods of establishing this kind of data bank in the simplest, and most accessible and transparent manner.

5.2. Fair remuneration

5.2.1. Fair remuneration should be recognized as an inalienable right

As our earlier sections have shown, much can be benefited by reiterating and reinforcing in

explicit legislative language the centrality of fair compensation in the copyright scheme. Thus, we believe that Canada should adopt the approach of continental European countries and introduce a provision which will clarify that the right to fair compensation is inalienable. However, unlike the European example we believe this should apply to both authors and performers. Such a provision has the potential to resolve problems such as the Tarrif 8 decision mentioned earlier and likewise constrain CMOs from negotiating prices on behalf of small creators that are below market value.

5.2.2. Tarrif 8 decision should be revisited and further research is necessary in order to determine what constitutes "fair value" for streaming in Canada

As our analysis has shown, and is especially highlighted in the controversial Tarrif 8 decision of the Copyright Board, the royalty tariffs for streaming services is a crucial issue. Not only are the Canadian tariffs extremely low compared with other countries, but as the growing tendency in the music industry is to use streaming, the business potential of these services are not fully reflected in current revenue streams. It is estimated that streaming will continue to grow and eventually constitute the central source of revenue in the industry. Currently the Copyright Board and CMOs refer to a 'fair value' rate instead of a 'fair market value' one, which explains the relatively low tariffs. Due to the technological changes in the industry this approach should be re-evaluated. This does not mean that Canada should adapt a "market value" approach with rates similar to the US. However, a more relevant method of measuring appropriate rates can and should be devised in light of the ways streaming services have changed the music industry's business models. We believe that further research is needed on this matter in order to complete a thorough comparative study of global rates and finally determine the appropriate method of calculating streaming

services tariffs in Canada. Likewise, we submit that instead of setting absolute rates the Copyright Board should rather set minimal and maximum rates and allow stakeholders to negotiate freely within that range. Furthermore, due to the rapidly changing technological developments in the industry, a permanent special committee should be set up within the Copyright Board in order to conduct annual evaluations of production and dissemination patterns and verify that tariffs are set in accordance with the actual state of the industry. The relevant stakeholders should be heard in these deliberations.

5.2.3. Addressing the contractual imbalance

As we have seen the exploitative standardized contracts which are prevalent in the industry are a major factor that must be addressed. Yet, this must not be done through federal intervention in the legislation and regulation of contract law which is part of the provinces' exclusive powers. Nevertheless, this does not mean that Copyright Law does not and should not inform contract law. Canadian jurisprudence is indeed very clear on this matter, stating that contracts which touch upon copyright issues inherently invoke the federal statute.[74] Thus, we already find that Canadian courts adjudicate a variety of legal matters by also referring to Copyright Law where necessary. This has been the case in matters involving contract law, labor law and bankruptcy among others.[75] However, judicial and regulatory reference to the federal statute is not being done in a systematic, coherent and consistent manner. One of the main reasons for this being that Copyright Law itself remains silent as to how it should be utilized where it intersects with other areas of law, especially those that are within provincial jurisdiction. For example, this is most

[74] *Théberge, supra* note 14; *Euro-Excellence Inc. v. Kraft Canada Inc.*, 2007 SCC 37, [2007] 3 S.C.R. 20; *Song Corp., Re,* 2002 CanLII 49574: <http://www.canlii.org/en/on/onsc/doc/2002/2002canlii49574/2002canlii49574.html?autocompleteStr=49574&autocompletePos=4>.
[75] *Ibid*.

reflected in the *Copyright Act* itself, in which out of over 90 articles only one, art 13, explicitly relates to the intersection between copyright and contract. This is extremely striking given that most of copyright matters actually play out in contracts and other commercial instruments.

It seems that in an attempt to address this gap, Canadian jurisprudence and scholarship have, in recent years, increasingly endorsed a paradigm shift in Intellectual Property law in general and copyright specifically. The new paradigm suggests moving away from seeing IP laws in isolation or as a distinct and specialized area of the law. Instead intellectual property issues should be addressed with due consideration of the ways in which they interact and intersect with other areas of the law.[76] Furthermore, in addressing the constitutional issues raised by this proposition, it is suggested that instead of seeing IP law as part of the federal government's exclusive powers it should rather be considered as an area of interaction between federal and provincial regulation.[77] Such a paradigm shift seems indeed warranted in order to truly affect change in the creative industries in general and music in particular. The Canadian constitutional context and framework is well acquainted already arrangements that allow for fluidity and dialogue between the two levels of government in their attempts to regulate specific commercial activities. Creative industries which pertain to intellectual property are one leading example of such instances.[78]

In line with this movement in Canadian jurisprudence and doctrine we recommend that Copyright Law be amended by adding an overarching interpretative clause which will clarify once and for

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[76] *Théberge*, *supra* note 14; *Kraft*, *supra* note 75. And see also D'Agostino, *supra* note 1 at 122-126 and Scassa ("Book Review"), *supra* note 20.

[77] See for example the constitutional doctrine of a "functional relationship" between the federal and provincial governments in the context of patent law elaborated in *Kirkbi AG and Lego Canada Inc.*, 2005 SCC 65. Seemingly a similar approach is equally applicable to copyright. See also: Jean Leclair, "L'interaction entre le droit privé fédéral et le droit civil québécois en Matière d'effets de commerce: perspective constitutionelle", 40 McGill L. J. 691 1994-1995; Craig McTaggart, "A Layered Approach to Internet Legal Analysis", 18 McGill L. J. 571 2003; Jeremy De Beer & Craig Brusnyk, "Intellectual Property and Biomedical Innovation in the Context of Canadian Federalism", 19 Health L. J. 45 2011.

[78] *Ibid.*

all its applicability even when raised indirectly or when it is incidental to a primary legal claim of a different order. More importantly, we submit that in the process of articulating this clause it would be useful to look at the ways the law has dealt with similar situations of power and economic imbalances. A primary candidate for such a comparison is of course the intersection of contract law and labor law. In that context, even though the general legal presumption is that in commercial relations both parties have negotiated on equal footing, labor and employment laws reverse the assumption in order to protect employees against exploitation. Hence, employees are assumed to be negotiating at a disadvantage which in turn means that abusive, vague or broad contractual clauses will generally be held against the employer.[79] We submit that a similar principle can and should be introduced to the intersection of copyright and contract law.

Thus, the interpretative clause should be worded in a way that clarifies the legislative intention to ensure that legal matters which invoke copyright (especially but not restricted to contract law) should be informed by the *Copyright Act* and, more importantly, its underlying principles. Among these are the fair compensation of creators. Furthermore, in examining the legality of contractual terms, regulators and courts should refer to the minimal industry standards set out by the Copyright Board, as we discuss later on in our recommendations. Economic behaviors and contractual terms that do not meet these minimal standards should, generally, be either invalidated or interpreted to the benefit of the creator.

5.3. Transparency and Accountability

5.3.1. Standardized and transparent system of work and revenue tracking

[79] *Wallace v. United Grain Growers Ltd.*, [1997] 3 SCR 701; *Shafron v. KRG Insurance Brokers (Western) Inc.*, [2009] 1 SCR 157, 2009 SCC 6; *Evans v. Teamsters Local Union No. 31*, [2008] 1 SCR 661, 2008 SCC 20; *Standard Broadcasting Corporation Ltd. c. Stewart*, [1994] RJQ 1751.

As we have seen throughout the analysis, the modern Canadian music industry lacks a comprehensive database through which all the rights holders can be tracked in an intelligible manner. As already mentioned we recommend that the Canadian Intellectual Property Office should lead the efforts in establishing a central rights data bank. In a second phase, we recommend that a software or an interface be developed through which an artist can access data that concerns the works he registered. This interface should provide options for the artist or his representative to input data and generate real-time statistics, information about the users of their works and unified accounting.

5.3.2. Obligatory streaming of distributor revenues to an artists fund

The discrepancy of revenues on which artists can rely varies greatly. Nevertheless, we know that individual artists earned an average of $7,228 per year from music-related activities in 2011.[80] It is clear from our analysis that the modern digital access business model, upon which streaming services rely, is yet another factor that exacerbates this problem. Considering that the Canadian digital music market remains relatively undeveloped and we lag behind in launching digital services,[81] we recommend creating a fund dedicated to musical creators (the "Artists Fund") similar to the model existing in the telecommunications industry.[82] The distributors obtaining a license from a Canadian CMO would have to relay a certain percentage of revenues associated with that license to the Artist Fund. The Fund would be devoted to increase the incomes of independent artists who are seeking to improve their means of relying on a "third model" of business by keeping direct contact with the users. Those independent artists could then outsource

[80] CIMA (Canadian Independent Music Association) released a study that said artists earn about $10,000 a year from music and spend 29 hours a week on it. See Canadian Independent Music Association (CIMA), 'Sound Analysis: An examination of the Canadian Independent Music Industry' (Prepared by Nordicity, February 2013), available online: <http://www.nordicity.com/media/201336fjtnrdeunp.pdf>.

[81] See Henderson's testimony before the Standing Committee, *supra* note 49.

[82] For instance see arts. 34-35 Canada, *Broadcasting Distribution Regulations*, SOR/97-555.

some of the administrative aspects inherent in their business model. This would modestly help to fill the gap between revenues of artists deciding to pursue alternative business models. It would also burst the false notion of consent on which the structure of the industry relies, namely in terms of the relationship between creators and CMOs. Some artists would rather not give up their rights or not be part of a CMO, but they don't have much of a choice if they want to enhance their chance to make a decent living out of their art. Streaming a small percentage of the industry's revenues to this independent fund will allow these artists to pursue alternative business models, including direct communication with users.

5.3.3. Unclaimed royalties

The creation of a comprehensive database, as described in earlier, should result in a more transparent tracking of royalties, and thus a decrease in unclaimed royalties. For those unclaimed royalties that will still occur, we recommend that the legislator make it mandatory for CMOs and intermediaries to publish a list of such unclaimed rights in a way that is available to the public, and thus to all artists, and not only the members of each CMO, as they do today. Such a document should list all the works for which royalties have been received by the CMO in the previous five years to mirror the *Copyrights Act* statute of limitation on those unclaimed royalties. After five years, all the unclaimed royalties should be transferred into the independent Artists Fund mentioned above.

5.3.4. Encouraging a third business model: direct contact between artists and consumers

As discussed through this analysis, the digital environment of the modern music industry can enhance the direct contact between the artist and the user, which is a way to engage the fans in

the music community and arguably generate more profits. For example, independent artists and labels successfully use this model already through the *Bandcamp* platform. Through digital technologies, accounting, marketing, communication and distribution become more transparent, more efficient and easier to manage despite the globalization of the market. Thus, making it easier for musical creators to manage their business on their own. Such models should be encouraged by incentives like the Artists Fund, discussed above. Through a shared investment by the government and the private sector an easy to use and accessible tracking and accounting digital system could be offered for creators who prefer to run their business on their own. Furthermore, by merely having such a data platform at their disposal, with the right to request CMOs and intermediaries to feed the system with information that concerns the relevant creator, they will be able to follow their works and royalty payments.

5.4. Administration of rights

5.4.1. Monitoring Committee under the Copyright Board

At the heart of this analysis is the assessment of the contractual imbalance that undermines the objectives of Copyright Law. In order to give themselves a better chance to succeed, musicians have very little choice other than contracting out of copyright protection regime by assigning or licensing their rights to CMOs or intermediaries. We suggest that, inspired by the principles of labor law, the protection afforded by the *Copyright Act* be the minimal industry standards, which ought to be respected in the contractual dealings in the industry. It goes without saying that stakeholders who wish to be good corporate citizens and respect the interests of creators should be encouraged to go beyond such minimal standards. As the regulatory body with the mandate to set royalties to be paid for the use of copyrighted works, we believe that the Copyright Board has

the credibility, the legitimacy and the expertise to oversee and ensure that the minimal standards are respected. For this purpose we propose that a Monitoring Committee be established within the Board. Specific regulations and guidelines will of course have to be set out in order to translate those minimal standards into practical contractual dispositions. The Monitoring Committee should likewise regularly study the digital market environment and assess the new challenges facing the industry. It should, with those considerations in mind, make recommendations to the Copyright Board where it believes that it is necessary to modify the minimal standards.

5.4.2. Dispute resolution powers of the Monitoring Committee

The Monitoring Committee should have dispute resolution powers to intervene where the minimal standards of protection awarded to artists have not been respected. The Monitoring Committee should have the power to fine actors for violating their obligations pursuant to the minimal standards and where necessary to represent the creator before the Copyright Board where an interested party asks for the review of the administrative decision to issue a fine. The funds obtained through these fines should be allocated to the development of the database and the interface managed and operated by the Canadian Intellectual Property Office, after the creator has been fairly compensated.

5.5. Funding and tax incentives

5.5.1. Introducing tax breaks for intermediaries maintaining and surpassing minimal standards.

On an annual basis, the Monitoring Committee should issue authorizations for intermediaries who have maintained minimal standards throughout the year for the purposes of receiving tax breaks in exchange for adopting good citizens' practices. That could be achieved through

favorable remuneration, but also through the implementation of tools improving transparency or generating useful data to the musical artists.

5.5.2. Funding: Public-Private Partnership

A Public-Private Partnership should fund the Central Rights Data Bank as well as the work and royalties tracking system, under the oversight of the Canadian Intellectual Property Office. All the private actors of the industry will be encouraged to participate in the partnership through positive incentives, namely through tax breaks and credits. For instance a tax break could be granted to the private partners in exchange for any investments they make in the partnership.

BIBLIOGRAPHY

Legislation and Regulations

- Canada, *Broadcasting Distribution Regulations*, SOR/97-555.
- Canada, Canadian Radio-Television and Telecommunications Commission, *Politique réglementaire de radiodifussion*, CRTC 2010-833.
- *Copyright Act*, R.S.C., 1985, C-42.

Jurisprudence

- *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231.
- *Euro-Excellence Inc. v. Kraft Canada Inc.*, 2007 SCC 37, [2007] 3 S.C.R. 20.
- *Evans v. Teamsters Local Union No. 31*, [2008] 1 SCR 661, 2008 SCC 20
- *Kirkbi AG and Lego Canada Inc.*, 2005 SCC 65.
- *Neighbouring Rights Collective of Canada v. Society of Composers, Authors and Music Publishers of Canada*, [2004] 1 FCR 303, 2003 FCA 302
- *Re:Sound No. Tariff 8* – Non-interactive and semi-interactive webcasts, Decision of the Copyright Board, 2009-2012, May 16, 2014, available online: <http://www.cb-cda.gc.ca/decisions/2014/ReSound8-60-motif.pdf>
- *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R 283.
- *Shafron v. KRG Insurance Brokers (Western) Inc.*, [2009] 1 SCR 157, 2009 SCC 6
- *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2002] 4 FCR 3, 2002 FCA 166.
- *Song Corp., Re*, 2002 CanLII 49574.
- *Standard Broadcasting Corporation Ltd. c. Stewart*, [1994] RJQ 1751.
- *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336, 2002 SCC 34.
- *Wallace v. United Grain Growers Ltd.*, [1997] 3 SCR 701.

Governmental Documents

- European Parliament, Directorate-General For Internal Policies- Policies Department, Citizens' Rights And Constitutional Affairs, *Contractual Arrangements Applicable To Creators: Law And Practice Of Selected Member States* (2014), available online: <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/dv/contractualarangements_/contractualarangements_en.pdf> (last accessed: 26.11.2015).
- Gervais, Daniel J. *Collective Management Of Copyright And Neighbouring Rights In Canada: An International Perspective*, [Report Prepared for The Department of Canadian Heritage], (August 2001), available online: <http://aix1.uottawa.ca/~dgervais/publications/collective_management.pdf> (last accessed: 26.11.2015).

- House of Commons, Standing Committee On Canadian Heritage, *Review of the Canadian Music Industry* (June 2014) (Chair: Gordon Brown).
- United States Copyright Office, Register of Copyrights, *Copyright and the Music Marketplace* (February 2015).

Doctrine

- Baldwin Peter, *The Copyright Wars- Three Centuries Of Trans-Atlantic Battle*, (NJ, Princeton University Press 2014).
- Carroll, Michael W. "The Struggle For Music Copyright", 57 Fla. L. Rev.907 2005.
- Chilli, Samantha. "Copywrong: A Glance at Media Conglomerates, Copyright Legislation, and Their Impact on the Music Industry", *Nota Bene: Canadian Undergraduate Journal of Musicology:* Vol. 4: Iss. 2, Article 6.
- D'Agostino, Giuseppina. *Copyright, Contracts, Creators- New Media, New Rules*, (Cheltenham, Edward Elgar Publishing Limited 2010).
- De Beer, Jeremy & Craig Brusnyk. "Intellectual Property and Biomedical Innovation in the Context of Canadian Federalism", 19 Health L. J. 45 2011.
- Efroni, Zohar. *Acces-Right: The Future of Digital Copyright Law*, 2011, Oxford University Press, New York.
- Geist, Michael. *In The Public Interest- The Future of Canadian Copyright Law*, (Toronto, Irwin Law 2005).
- Gervais, Daniel. "The Landscape of Collective Management Schemes" in "Symposium: Collective Management of Copyright: Solution of Sacrifice?", 34:4 Columbia Journal Of Law & The Arts 2011 591.
- Ginsburg, Jane C. "The Author's Place in the Future of Copyright", (Working Paper No. 512, March 2015), Forthcoming in Ruth Okediji, ed., *Copyright In An Age Of Exceptions And Limitations*, (Cambridge, Cambridge University Press 2015).
- Horbaczewski, Henry. "No Silver Lining For The Emperor's New Clothes: *Golan* And The Traditional Contours of Copyright", 59 J. Copyright Soc'y U.S.A. 867 2011-2012.
- Kreschmer, Martin. "Artists' earnings and copyright: A review of British and German music industry data in the context of digital technologies", 10:1-3 First Monday, January 2005, available online: <http://firstmonday.org/article/view/1200/1120> (last accessed: 26.11.2015).
- Leclair, Jean. "L'interaction entre le droit privé fédéral et le droit civil québécois en Matière d'effets de commerce: perspective constitutionelle", 40 McGill L. J. 691 1994-1995.
- Lessig, Lawrence. *Free Culture: How Big Media Uses Technology And The Law To Lock Down Culture and Control Creativity*, (NY, The Penguin Press 2004), also available online: <http://www.free-culture.cc/freeculture.pdf> (last accessed: 26.11.2015).
- Mazziotti, Giuseppe. "New Licensing for Online Music Services in the European Union: From Collective to Customized Management" in "Symposium: Collective Management of Copyright: Solution of Sacrifice?", 34:4 Columbia Journal Of Law & The Arts 2011 757.
- McTaggart, Craig. "A Layered Approach to Internet Legal Analysis", 18 McGill L. J. 571 2003.

- Moyse, Pierre-Emmanuel. "La nature du droit d'auteur: droit de propriété ou monopole?", 43 McGill L. J. 507 1997-1998.
- Owen, Lynette. *Selling Rights*, fifth ed. (NY, Routledge 2006).
- Scassa, Teresa. "Users' Rights in the Balance: Recent Developments in Copyright Law at the Supreme Court of Canada", 22 Canadian Intellectual Property Review 133 2005.
- Scassa, Teressa. "Book Review: Giuseppina D'Agostino, Copyright, Contracts, Creators: New Media, New Rules, (Cheltenham, UK: Edward Lublishing Ltd., 2010) 320pp.", 9.1 Canadian Journal of Law & Technology 93 2011.
- Scassa, Teressa. "Interests in the Balance", in *In the Public Interest – The Future of Canadian Copyright Law* (ed. Michael Geist, Toronto, Irwin Law 2005) pp. 41-65.
- Sternberg, Cole. "Where Have All The Royalties Gone?: Emerging Technologies And The Lack Of Equitable Mechanical Royalties", 22 Cardozo Arts & Ent. L.J. 863 2004-2005.

Reports

- Canadian Independent Music Association (CIMA), 'Sound Analysis: An examination of the Canadian Independent Music Industry' (Prepared by Nordicity, February 2013), available online: <http://www.nordicity.com/media/201336fjtnrdeunp.pdf>.
- Cefrio, "Le divertissement en ligne: des utilisateurs de plus en plus nombreux- Écouter de la musique sur Internet", (Cefrio, October 2015), available online : <http://www.cefrio.qc.ca/netendances/le-divertissement-en-ligne-des-utilisateurs-de-plus-en-plus-nombreux/ecouter-de-la-musique-sur-internet/> (last accessed: 26.11.2015).
- Hebb, Marian and Warren Sheffer. *Towards A Fair Deal- Contracts and Canadian Creators' Rights*, (Creators' Rights Alliance 2006), available online: <http://www.creatorscopyright.ca/documents/contracts-study.pdf> (last accessed: 26.11.2015).
- Rethink Music, *Fair Music: Transparency and Payment Flows in the Music Industry- Recommendations to Increase Transparency, Reduce Friction, and Promote Fairness in the Music Industry*, (Mass., BerkleeICE, 2015), available online: <https://static1.squarespace.com/static/552c0535e4b0afcbed88dc53/t/55d0da1ae4b06bd4bea8c86c/1439750682446/rethink_music_fairness_transparency_final.pdf> (last accessed: 26.11.2015).
- Sapp, Nicolas et Cavid Chapdelaine Miller. 'La « Pentalogie »', (Montreal, CIPS-Robic 2013), available online : <http://www.robic.ca/admin/pdf/1095/427-NSA-2013.pdf> (last accessed: 26.11.2015).
- *SOCAN Annual Report 2012*, SOCAN, available online: <http://www.socan.ca/files/pdf/SOCANAnnualReport2012.pdf> (last accessed: 26.11.2015).
- *SOCAN Annual Report 2014*, SOCAN, available online: <http://www.socanannualreport.ca/> (last accessed: 26.11.2015).

Media

- '5 Things You Need To Know About The Copyright Board of Canada's Ruling On Digital Streaming Services', CIMA (date uploaded unknown), available online:

<http://cimamusic.ca/advocacy/issues-affecting-the-independent-music-industry/i-stand-for-music/5-things-you-need-to-know-about-the-copyright-board-of-canadas-ruling-on-digital-streaming-services/> (last accessed: 26.11.2015).

- 'Crooner In Rights Spat- Are copyright laws too strict?', by Louis Menand, The New Yorker (October 20 2014 Issue), available online: <http://www.newyorker.com/magazine/2014/10/20/crooner-rights-spat> (last accessed: 26.11.2015).
- 'How does the music industry make money?', by Jules Gray, The New Economy (December 17 2013), available online: < http://www.theneweconomy.com/business/how-does-the-music-industry-make-money> (last accessed: 26.11.2015).
- 'Pandora founder decries Canadian barriers to entry', by Jameson Berkow, Financial Post (February 28 2011), available online: <http://business.financialpost.com/fp-tech-desk/pandora-founder-decries-canadian-barriers-to-entry> (last accessed: 26.11.2015).
- 'Spotify now has 60m users including 15m paying subscribers', by Stuart Dredge, The Guardian (January 12 2015), available online: <http://www.theguardian.com/technology/2015/jan/12/spotify-60m-users-15m-subscribers> (last accessed: 26.11.2015).
- 'Streaming music payments: how much to artists really receive?- Stats from Zoë Keating show how musician's 0.4 cents per Spotify stream compare to payments from iTunes Match, Amazon Cloud Drive and Xbox Music', by Stuart Dredge, The Guardian (August 19 2013), available online: <http://www.theguardian.com/technology/2013/aug/19/zoe-keating-spotify-streaming-royalties> (last accessed: 26.11.2015).
- 'Streaming Roundup: A Summary Of Who Said What', by Howard Druckman, SOCAN (November 18 2014), available online: <http://www.socanblog.ca/en/2014/11/> (last accessed: 26.11.2015). 'Taylor Swift still has bad blood with Spotify over streaming music dispute', by Stuart Dredge, The Guardian (August 4 2015), available online: <http://www.theguardian.com/technology/2015/aug/04/taylor-swift-bad-blood-spotify-streaming-music> (last accessed: 26.11.2015).
- 'The future of music sales is here. So how CAN the artists make it pay?- Singer-songwriter Taylor Swift reignited the row over streaming songs online when she removed her albums from Spotify, citing too little reward for the creators', by Stuart Dredge, The Guardian (November 15 2014), available online: <http://www.theguardian.com/music/2014/nov/15/taylor-swift-music-spotify> (last accessed: 26.11.2015).
- 'The music business: The dry stream of musicians' royalties', by The Economist (September 3 2015), available online: <http://www.economist.com/blogs/prospero/2015/09/music-business> (last accessed: 26.11.2015).
- 'The Royalty Scam', by Billy Brag, NY Times (March 22 2008), available online: <http://www.nytimes.com/2008/03/22/opinion/22bragg.html?_r=0> (last accessed: 26.11.2015).