

Copyright Primer



Copyright Primer

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Copyright law is the legal framework that determines the earning power of creators and creator-based industries around the world. In the music industry, copyright law defines and protects those rights that are associated with the creation, production and exploitation of music. Rights holders must be assured that protection exists in the law and that recourse is available to them to receive fair and equitable remuneration for the use of their works. As such, copyright is the lifeblood of the music industry.

The area of copyright is extremely complex. Given the proliferation of methods of reproducing and making music available, all participants in the music industry must become familiar with the fundamentals of copyright and with the ongoing challenges to maintain and expand rights.

The purpose of this primer is to introduce the concept of copyright and how it works in the music industry. It is intended as an overview only. It is not intended to be an exhaustive account of the subject matter but to give the reader a basic working knowledge.

This *Copyright Primer* will first examine the origin and history of copyright worldwide and will then focus on the Canadian copyright environment including current copyright structures. This will be followed by a brief examination of future challenges to maintaining a stream of revenue in the face of changing market conditions both in Canada and worldwide.

The Origin of Copyright

While works had been created for over three thousand years it was only with the invention of the printing press that it became technically feasible to produce large numbers of copies for wide distribution. Between the creator and the public new intermediaries, printers and booksellers, were introduced.

The high cost of both paper and the presses themselves meant a large investment had to be made to make copies. This in turn led to the need to protect these editions as many publishers quickly faced financial ruin with 'pirate' publishers making cheap copies, thus undercutting the 'legitimate' market.

This led to the first campaign for 'rights' addressed to the Kings of England and France and the German Princes.

The successful result of this campaign was the establishment of 'privileges' granted by the authorities that not only protected printers' investments but also allowed control of the content by government.

These privileges had three essential characteristics of modern copyright:

- a) an exclusive right of reproduction and distribution
- b) a limited term right
- c) remedies for infringement of the right, namely fines and seizure of offending copies.

They were often enforced by special courts that had wide powers to seize and destroy property.

In 1690 the English philosopher John Locke demanded an author's copyright and conducted a sustained campaign, the result of which was the world's first copyright act, the Statute of Anne of 1709. It became the foundation for all subsequent copyright legislation in the English speaking world. The title of the Act expresses the compromise between the demands of publishers and what Parliament considered the public interest: "A Bill for the Encouragement of Learning and for Securing the Property of Copies of Books to the rightful owners thereof." It was the first clear acknowledgment of the legal rights of authors.

Similarly, in France the privilege of publication was accorded to printers and booksellers and this approach was reaffirmed by Louis XVI in 1777. However, the French Revolution abolished all such privileges and two decrees in 1791 and 1793 clearly established the priority of authors' rights as the proprietor of the work and this approach, apart from a minor amendment in 1910, stood until the French Copyright Act of 1957 was passed.

The United States, prior to the Revolution, already had a copyright regime given its stature as a colony of the UK. In fact, this system was so ingrained that by 1788, 12 of the 13 states had drafted copyright laws and the 1789 Constitution contains a clause concerning copyrights and patents. The major deviation from English law was that foreign authors were not protected. This led to the situation of widespread piracy of major English authors, a situation that continued until the passage of the 1891 Copyright Law.

The laws of copyright were essentially national until 1886 and the passage of the Berne Convention. This Convention was hammered out and agreed to at meetings in Geneva between 1884 and 1886 and was led by the four major European powers (England, France, Germany and Italy) so as to ensure that the rights of creators in one state would be effective in all others without further formalities.

The Berne Convention basically changed the way national legislation evolved because the initiative for new legislation now came from international conventions rather than from national sources. Thus the history of copyright development internationally for the next sixty years was largely that of the Berne Convention. It was also instrumental in helping to meld, to the benefit of creators, the different approaches of the French *droit d'auteur* and the English copyright systems.

In 1952 a second copyright convention, the Universal Copyright Convention, was enacted followed by the 1960 Rome Convention on Neighbouring Rights to create an international triumvirate of conventions that strengthened the issue of rights protection worldwide. Today, they act as the foundation for expanded and revised rights conventions as technology and a multiplicity of uses evolve towards the next century.

Any artist knows that artistic creation, often referred to as intellectual property, is hard work. Writing stories, articles or songs takes talent and persistence in honing your skills. But it often seems that the difficulties of creation pale in comparison to the effort involved in getting paid for such creations. As many artists, even successful ones, know, making a living as a creator has its own set of problems.

Copyright, simply speaking, is the right to copy. This is important for creators such as writers and musicians because they don't usually sell their original work but copies of that work. When artists create works, they own them. As such, copyright is a separate set of property rights. They are considered intangible rights because they relate to the ideas and imagination from which the original work is created. Creators alone have the right to copy those works for sale, although they can also sell this right to others. When you buy a compact disc or a book you're not buying the original work, you are buying a copy. A portion of the money you pay goes to the creator and/or the owner of the copyright for that work.

Copyright laws govern who has the right to make copies of works of intellectual property, which includes such things as songs, books, recordings and even computer software. If everybody had the right to make copies of a book it would be virtually impossible for the author to get paid for writing it.

What most people find difficult about intellectual property is the fact that it is not physical, it's just ideas. Society finds it difficult to put a price on ideas. Also, ideas are hard to keep track of. But ideas are valuable. Again, when you buy a CD, you're buying it because of the music. The disc itself is just a container for that music. However, because we get music in so many ways that we don't pay for directly, such as radio and television or in the background at stores, restaurants and bars, we sometimes forget that music has great value.

The function of copyright is to protect this value and to set up methods of paying for it. In the sound recording industry this means establishing the exclusive rights of recording and publishing companies for works they own as well as ensuring payment to artists, composers and authors.

Canada's Copyright Act, passed in 1924, is the law that deals with matters of copyright. The Copyright Act is based on the 1886 Berne Convention, referred to earlier, to which Canada is a signatory. The primary principle of the Berne Convention is national treatment. This principle requires countries to extend the same rights and protection to works of foreign authors as they do to their domestic authors. The 1924 Act, however, reflected a society had no knowledge of televisions, copiers, computers, recorders, VCRs, internet, MP3s, CD burners and the ever increasing options of disseminating information and data.

The first major revision to the Copyright Law was in 1988, some 64 years after the Copyright Act was passed. Amendments at that time included abolition of the compulsory licensing for sound recordings, introduction of the exhibition right for visual artists, introduction of retransmission rights for television broadcast over cable, extension of traditional protection to choreographic works and computer software programs and the ability to establish collectives without contravention of certain provisions of the Competition Act.

In January 1989, following the signing of the Canada–U.S. Free Trade Agreement, the Copyright Act was further amended to require cable and satellite companies to pay for the retransmission of works included in distant broadcast signals. The amendments also expanded the concept of public communication from broadcasting to all forms of telecommunications.

In 1993, the passage of Bill C-88 further amended the Act. The main objectives of this legislation were to redefine 'musical work' to clarify that the Act covered both graphic and acoustic representations of music, and to ensure that transmitters – whether broadcasters, specialty pay services, or cable systems– were liable for royalties. The Bill also made program originators and distributors responsible for royalty payments.

There were certain amendments to the Copyright Act as a result of the North American Free-Trade Agreement (NAFTA) which came into force January 1, 1994. The amendments, though not as comprehensive as those that were to follow in 1997, did improve the standard of protection for all copyright works, irrespective of their national origin. Some of the amendments introduced were of specific interest to the music industry.

Rental rights in recordings was introduced to provide a rental right for the owners of sound recordings (CDs, tapes, discs, etc.); however, certain kinds of rentals that would otherwise be controlled by the owner of the copyright of the recording (e.g. public libraries) were exempt. This right provided for producers of

recordings (i.e. record companies) and not for composers, lyricists, songwriters, publishers and performers.

Canada's implementation of this legislation also amended the Copyright Act to create effective remedies against the importation of pirated copyright works.

While amendments restated the term of protection under the Berne Convention (life of the author plus 50 years), they also stated that the term be extended to the end of the calendar year of the 50-plus period. This extension also applies to the term of several works including records, films and videos.

Amendments in the World Trade Organization Agreement Implementation Act, which came into force on January 1, 1996, extended the protection of the Copyright Act to all WTO countries and gave performers protection against bootleg audio recordings and unauthorized live transmissions of their performances.

The most far-reaching amendments to the Canadian Copyright Act, after the 1988 Phase I revisions, were realized with the passage of Bill C-32 in April, 1997.

There are several rights which the Government of Canada introduced with these Phase II amendments. One of these is the performing right in a recording (otherwise known as the neighbouring right because it 'neighbours' existing copyright) whereby performers (artists) and producers (record labels) receive royalties for the public performance of their recordings by radio, television and cable systems.

Radio stations form the largest single group using recorded music with the greatest commercial interest in access to sound recordings. The onus for payment of neighbouring rights royalties lies with the radio broadcasting industry and commercial establishments that use sound recordings. Royalties are collected by the Neighbouring Rights Collective of Canada (NRCC) to be distributed to its five member collectives, representing performers and producers.

The 1997 amendments introduced a new right, the private copying right. Manufacturers and importers on the sale or disposition in Canada of blank audio recording media pay remuneration in the form of private copying levies. These payments are distributed to the music industry in compensation for sales lost due to the copying of their sound recordings. Proceeds of private copying levies are collected by the Canadian Private Copying Collective/Société canadienne de perception de la copie privée (CPCC/SCPCP) and are distributed to eligible composers, publishers, performers and producers of sound recordings through their member collectives.

Another significant reform addressed by Bill C-32 was the extension of the rental right, first introduced as a result of the North American

Free-Trade Agreement in 1994, to include composers, lyricists, songwriters, publishers and performers of musical works which was previously only provided for owners of copyright in sound recordings.

The Importance of Copyright

Copyright, in its modern form, is a relatively recent legal concept and questions are sometimes asked concerning the justification for establishing this right.

There are several justifications but the most often stated arguments are those of natural justice and economics.

As the creators of works, authors should be able to decide how their work is utilized and also be able to receive remuneration for their labours. Royalties are effectively wages for intellectual work performed.

In today's world, a considerable investment is necessary to produce a finished creative work such as a record or a film and then an additional substantial investment is necessary to ensure effective marketing and distribution of the work.

Copyright law ensures that there will be payment for this work. Clearly without such expectation of payment, little or no creative work would be undertaken.

Copyright is a property right but the property originates in the mind of the person or persons before it is reduced to material form. As such it is more aptly known as intellectual property. Unlike 'real' property it can be used in many different ways by a variety of users simultaneously and the right granted under copyright is effectively that of 'dominion' over the work.

While the creator or author of an original work is the first owner of the copyright, there are three notable exceptions to this rule:

- 1) any work created during the course of employment, the first owner of the copyright is the employer
- 2) in the case of photographs, the first owner of the copyright is the owner of the original negatives
- 3) with commissioned works, the first owner of the copyright is the commissioner of the work

Ownership is indicated with the internationally used and accepted symbol of © beside the name of the author and the date the work was produced and available for use in the marketplace.

Copyright can be bought and sold like other property rights. They become part of an author's estate and may be given by will like other assets. Authors may also assign their copyright to third parties. This is related to an outright gift, where ownership of the copyright is given wholly to a third party. Authors may waive their copyright, which means although they retain the ownership of the copyright, they do not exercise their right to control the use of the work nor seek compensation for that use.

Copyright is exclusive; meaning that rights owners can prevent others from making use of their work without authorization. It is not; however, a monopoly as is often suggested. Anyone can write a song or a book and copyright only subsists in original works and not in copies of originals as is the case of property rights of 'real' objects such as an antique chair and copies made of it.

Another component of copyright is that it is one of limited duration, unlike general property rights. When the period of protection expires the creative work passes into the public domain and can be used freely by all. The reason for these variations from the rights of 'real' property owners is clear: the system of granting copyright has to strike a balance between two public interests, that of the copyright owner and the reasonable demands of society in general.

This is clearly expressed in article 27 of the Declaration of Human Rights:

- 1) Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
- 2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

To balance these two objectives the rights of copyright owners are not always absolute. As stated earlier, the right is for a limited duration but also some specific uses are designated as free or some rights specify that use may be made upon payment of equitable remuneration, the so-called compulsory license provision.

Copyright flows from two main streams, the civil system (or *droit d'auteur*) and the common law system (or 'copyright'). The *droit d'auteur* system holds that rights are essentially individualistic, the right is a natural right and as such subject to minimal restrictions on the rights holders. It is viewed as a creation of an author's mind and is property as much as any physical object.

The original philosophy behind copyright was somewhat more mundane. It was simply the right to prevent the copying of physical material with the object of protecting the owner of the right against any unauthorized reproduction. It focused on the material support rather than creation.

However, while there may seem to be major philosophical differences between the two approaches, in the real world the practical applications of both systems are broadly similar and lead to the same economic results and benefits for creators.

As the world shifts towards a society based on ideas, technology and 'value added' products, the importance of effective intellectual property laws (one of which is copyright) cannot be overstated in protecting creators' rights and allowing an orderly pattern of commercial and public use of these works for the public and private good. In a rights-based, digital delivery world the importance of effective rights protection will grow exponentially and will be a key factor in the profitability of cultural industries in the future.

Overview of Copyright in the Canadian Music Industry

For those involved in the music industry, the rights and protection afforded by the Canadian Copyright Act form the basic framework upon which the business rests.

In general, copyright consists of two types of rights: economic rights and non-economic rights. Economic rights are the revenue generating rights from the following activities: production or reproduction of a work or any part of a work, performance of a work in public, publishing a work or any part thereof if unpublished, conversion to a non-dramatic work, manufacture of a mechanical contrivance (record, film, etc.) whereby a work may be performed mechanically or delivered, reproduction, adaptation or public presentation of a work, communication of a work by telecommunication, and authorization to do any of the above.

Non-economic rights refer to moral rights. Moral rights include the right of the author to claim authorship on a work, to use a pseudonym or remain anonymous, the right to use a work in association with a product, service, cause or institution and the right to prevent any distortion, mutilation or modification of a work that may compromise the integrity of the work or be prejudicial to the reputation of the author.

One of the most significant characteristics of copyright is that it is a right of property. The sole difference with other forms of property is that it is intellectual property as opposed to actual physical property. Intellectual property is intangible; consequently improper and unauthorized uses are often very difficult to control. As with any form of property, owners are entitled to control its use and to receive payment for any use of their property they may authorize.

Copyright in Canada is automatic upon creation and is an integral right that belongs to anyone who produces intellectual property. As stated previously, copyright includes the sole right to: produce, reproduce, perform or publish any translation of the work; make a sound recording of a musical work; communicate a work by telecommunication; or authorize any of these acts.

If someone does any of the above without permission, it is deemed infringing or violating copyright. Examples of infringement are piracy, playing recordings at a club without the copyright owners' permission, counterfeiting, bootlegging, downloading songs over the Internet, etc.

Most often the creator of a work is the owner. The exception to this is where a work is created in the course of employment or on commission. Also, it is possible to legally transfer copyright to someone else, for instance a music publisher.

Copyright generally exists for 50 years after the death of the creator or the death of the last surviving creator in the case of collaboration (joint work).

Economic rights permit the commercial exploitation of a work in the marketplace, as well as the means for the author to control how, when and where such a work may be used and for how much.

Just as copyright applies to all original musical compositions, it also applies to sound recordings (cassettes, CDs, singles, albums, etc.) which are termed 'mechanical contrivances' in the Copyright Act.

A sound recording is also an intellectual property. In today's world the complexities involved in record production require a great deal of intellectual and financial commitment. Once created a recording is, by the criteria laid down in the Copyright Act, an intellectual property and as such is entitled to the protection of the Act to enable owners to fully exercise their rights.

Rights in sound recordings are distinct and completely separate from the rights of the composers, lyricists and music publishers whose music is recorded. This means there is a distinctive copyright for the musical work (song) and another for the device (cassette or CD) because they are deemed two different works.

The purchase of a record, tape or compact disc does not confer on the purchaser the ownership of any rights in the sound recording itself, nor in the music which has been recorded or the performances of the artists. The record, tape or compact disc is merely a carrier, a means of delivering the product.

Until 1971 sound recordings were substantially protected under Canadian law. However, an amendment passed as a result of a struggle between the major

record producers and Canadian broadcasters severely modified the sound recording right.

Due to this amendment, record producers rights were limited to rights of ownership in matters such as counterfeiting and piracy until passage of Bill C-32 in 1997 and the introduction of neighbouring rights.

For sound recordings (cassettes, CDs, etc.), copyright lasts for 50 years after the year of production of the master tape.

Music videos are also contrivances. Video tapes are not copyright protected as cinematograph films because they are not produced by the same process. However, if a video is transferred to film afterwards or is filmed and then transferred to video, videos are protected as cinematograph films. Generally music videos are protected as dramatic works.

Also, a music video, which is a multimedia work, may also acquire separate copyright protection. The music is copyright as a musical work and the script of the video can be protected as a literary work.

When a video is being made it requires two main licences: a licence that permits the music to be recorded and synchronized with the visual images and a licence from the owner of the master recording that embodies the music.

In order to duplicate and/or exhibit music videos it is necessary to obtain a licence from the Audio-Visual Licensing Agency (AVLA). Licence fees are passed through to the rights owners who are members of this collective.

To summarize the above, every time music is reproduced (or copied), whether it be in sheet music form, recordings, used in commercials, etc., income is generated.

The following gives an overview of how copyright earnings are derived, who the players are and how the process works.

How Money Is Earned from Copyrights

Owners of copyright confer their rights to produce or reproduce a creative work to others usually through legal agreements. There are many types of agreements but copyright assignments and licensing are the main ways that income is derived from musical copyright.

An assignment occurs when part or all of the copyrights are transferred to another party. The assignment may be for the whole term of the copyright, or for

a certain part of it either generally or subject to territorial limitations. In the latter case, rights are either given up for a certain period, or completely.

An important assignment is made by the composer, lyricist or songwriter to the music publisher. The music publisher becomes the owner of all the other copyrights inherent in the music, except the performing right.

The assignment of performing rights in a musical work to a performing rights society is another key assignment. Here the creator (composer, lyricist, songwriter) and the music publisher through separate membership agreements with the performing rights society, assign their performing rights.

The second most significant income-generating route for copyright owners is through licensing. A licence gives someone else permission to use a work for certain purposes and under certain conditions, but the copyright remains with the owner(s). No rights are given up.

Assignments and licences are termed grants of interest and are the very essence of the business of music. An example of licensing would be a music publisher who licenses certain copyright uses that generate income.

The music publisher owns and controls all copyrights based on the assignment of rights granted under a publishing agreement with the creator. The role of the music publisher is to administrate, promote, exploit and protect these rights in the marketplace. As the relationship between the music publisher and the creator plays such an important part in the exploitation of creative works, it is important to give an overview of the role of a music publisher.

Music Publishing

The music publishing industry is an increasingly complex affair. New technology in the broadcast and duplication areas is a major challenge to today's publisher, and makes the job of exploiting songs that much more difficult.

Until the 20th century a publisher's main function was administrating printed music in all its forms.

However, as 20th century technology extended the use of music, so the responsibilities of publishers similarly widened to include the licensing of music on records, radio, television, films, concerts and, more recently, tapes, compact discs, satellite and cable distribution, karaoke, video games, computer software, CD-Roms and other forms of multimedia, etc.

Also, along the way, the creative business practices of publishers evolved as well. It started at the turn of the century with just the marketing of sheet music

and the selling (or 'plugging') of songs to music hall artists to stimulate sales. This evolved into the 'pitching' of songs to artists to record and the 'plugging' of recorded songs to radio, TV and other users, and subsequently to the signing of writers/artists who then obtained a recording contract. Today's scenario sees publishers involved in all aspects of the administrative, creative and business functions of copyright exploitation including, more often than not, signing of 'development' agreements for writers who may also be artists.

As previously stated, under copyright legislation in Canada and throughout the world, it is unlawful to reproduce or perform a work without the permission of the owner of the copyright in the work. The creator is usually the first owner of the copyright, but almost always enters into a music publishing agreement to assign all rights to the music publisher. However, it has become increasingly common for the creator to have his or her own publishing company that acts as a co-publisher with the administering publisher.

Under the old style of music publishing agreements, a creator would assign all rights in a song for the full term of copyright to a music publisher, and in return the publisher would administer and exploit rights granted and pay the creator 50% of the revenue derived from this exploitation. The 50% share typically payable to the creator is called the "writer's share" and the 50% retained by the publisher is called the "publisher's share."

However, contracts of this type are no longer the norm as a vast majority of contracts today are either a co-publishing agreement or for a percentage higher than 50%. In either scenario the net result is that the creator often receives up to 75¢ of every dollar earned.

Currently, publishing contracts are often signed for a period shorter than the full term of copyright. This is almost always the case when acquiring the publishing rights of works (songs) or catalogues of songs of well-established writers. A songwriter with negotiating leverage can often demand not only the "writer's share" but also a percentage or "cut-in" of the publisher's share. Another common arrangement is a creator with his or her own publishing company controlling the work. This publishing company then assigns the contract to a major publisher. This is often referred to as a co-publishing agreement although the reference is somewhat misleading since the major publisher alone administers and controls the exploitation of the song.

It is very common in today's marketplace for an artist or group to write their own material. Therefore if a recording contract is signed strong efforts are made to sign rights to the songs at the same time. The main reasons for this are economic and artistic.

In economic terms, additional earnings from performing rights can boost publishing earnings from record sales. As well, those copyrights are still available

to be exploited and 'covered' by other artists. In artistic terms, it is often felt that controlling both the recording and publishing constitutes a more marketable package.

There are instances where it is better for the creators if recording and publishing agreements are signed with the same company thus enabling the maximum promotional and marketing benefits to be realized and increasing the chance of success.

To maximize the earnings potential of copyrights when a domestic publisher looks to exploit a song catalogue internationally, the publisher generally turns to established publishers in foreign territories. Their agreement is known as a sub-publishing contract.

The advantages of sub-publishing are obvious: the foreign publisher ideally has the necessary contacts to expose works in that territory and the administrative skills to collect subsequent royalties. Securing covers is part of the job, but having a sub-publisher ensures proper registration, licensing and documentation of a catalogue. Also, a sub-publisher can, through membership in local mechanical and performing rights societies, collect and distribute income generated by an original recording much more quickly than if those societies were to farm it out to the original publisher's performing rights society.

The two key earnings sources for music publishers are mechanical royalties – royalties from sales of records, tapes and compact discs, and performance royalties – royalties earned from the public performance of songs.

As mentioned above, the publisher usually becomes the owner of the work and has the right to administer every right granted under the Copyright Act.

No use of a copyright work can be made without payment to the owner of that work but in practice there are six major sources of revenue: **mechanical royalties** – obtained from the sale of compact discs, tapes and records; **performance royalties** – paid whenever the work is performed in public; **synchronization rights** – amounts negotiated with film and TV producers for the right to 'synchronize' the music with the soundtrack of a movie or TV program; **merchandising; advertising rights** – paid where the user is an advertising agency or merchandising company that wants to use the work as part of an ongoing campaign; **sheet music sales** – obtained from the sale of the printed music; **private copying rights** – remuneration for sales lost to private copying (home taping).

Royalties and Tariffs

The income that is derived from the exploitation of copyrights is received in the form of royalties paid by music users. Tariffs are set fees that users must pay for access to certain copyright material.

The Society of Authors, Composers and Music Publishers of Canada (SOCAN), in administering performing rights, proposes tariffs which govern each category of music user (radio, television, cable). A radio station, for example, would negotiate with the society to use all the society's repertoire for a specific period in any way it chose for an agreed fee set by the Copyright Board, and agree to provide the society with a sample selection of programming to enable the society to make royalty payments to owners on an effective basis.

In fact, every time music is played on radio, television, in concert or clubs, public performance royalties are due to the music publishers and creators. Royalties are not due for a private performance, such as playing music at home. However, for a dance or concert, since these are considered public performances, royalties are payable. In many instances, the venue will have already arranged for the payment of royalties.

Every time a recording is sold, mechanical royalties are payable to the music publishers and in turn to the creators of that music. In the case of a sound recording, additional monies are also due to the recording artists, record producers, AF of M, etc. but for the purposes of this guide we will discuss only the monies due to copyright owners.

The following is a brief summary of royalties collected.

Mechanical royalties arise when a song is 'fixed mechanically.' In layman's terms, this means whenever it is used on a compact disc, tape or record. A licence for use is obtained by the record company and royalties for product sold are paid to the copyright owner quarterly in arrears.

Performance royalties become due whenever a song is performed in public. While many years ago this meant an actual performer, today the vast majority of earnings come from use of material already recorded and used either on radio, television or in public places such as discos, night clubs, etc.

Since 1990, copyright owners of works aired on television and radio stations are compensated when those works are retransmitted outside the area served by the broadcaster.

In 1993, the Copyright Act was amended to change the definition of musical work and the concept of performance of a work. This change clarified the nature of the

use of music by cable operators when they transmit non-broadcast programming by satellite to cable services such as MuchMusic, etc.

Synchronization rights arise when a musical work is synchronized with video in films, television shows, audio visual productions, web site and computer programs. Unlike the uses already explained, synchronization licences are typically negotiated between the user and music publisher on a one-time basis.

The same approach is used in negotiating **advertising and merchandising rights**, such as the use of a song in a radio or TV commercial or use of the song as part of a merchandising campaign in various media. The amount is negotiated on a one-time basis and for an agreed amount and period of time.

Sheet music sales were originally the sole source of income for music publishers. While it is still a good source of revenue from successful songs, the economics of this sector of the business today dictate that the rights are assigned to one of half a dozen companies who specialize in this field and have the economic and sales clout plus the necessary production facilities to maximize these sales. These companies do all the planning, design, merchandising and selling of both single songs and folios of music for all music publishers and in return pay a royalty on every copy sold to the original publisher.

Private copying levies are collected from manufacturers and importers of blank audio recording media sold or disposed of in Canada. The levies are intended to compensate copyright owners for lost sales due to private (home) copying. The Copyright Board of Canada conducts hearings to determine the quantum of levies to be collected.

As uses such as video games, karaoke, downloading (MP3s) and streaming technology grow rapidly, the range of licensing activities of a publisher is expanding rapidly. These are already proving to be substantial revenue sources in some instances. There is little doubt that these and other uses spawned by digitalization and technology will make a substantial contribution to the bottom line earnings of copyright owners and publishers in the future.

Tariffs and royalties account for a large volume of business transactions. To facilitate the administration of copyrights through the vast international copyright system, collectives, also known as licensing bodies, have been established.

An Overview of Collective Administration of Copyrights

Because of the number of copyright users, owners and the many transactions among them, collectives are in many cases the most efficient and effective way to license, collect and distribute royalties earned from music uses. In fact, the

collective administration of copyright is a key business practice upon which the industry functions.

A collective is an organization that represents a number of different copyright owners in respect of a particular form of use and collects and distributes royalties from copyright users, often on the basis of a blanket licence.

The federal body charged with regulating the copyright system is the Copyright Board of Canada.

Collectives are active in the acquisition of rights through membership, assignment and registration. In addition, collectives offer licences, collect royalties, distribute royalties and perform other roles such as education, lobbying and research.

Collectives grant permission to users of works owned by members and determine the conditions under which those works may be used. Collectives operate in additional capacities such as launching a civil suit on behalf of a member in the case of copyright infringement.

In the music industry, there is a wide range of collectives covering such areas as television and radio broadcasts, sound recordings, performances, video recordings, private copying and photocopying.

The Operation of Collectives in the Music Industry

Performing Rights Collective

The performing right is the primary source of income for music creators.

It would be impossible for every individual Canadian composer or lyricist to keep track of the millions of music users and public performances of their works across Canada and internationally.

Similarly, it would be impossible and extremely costly for music users to obtain the permission of each of the hundreds of thousands of copyright owners from Canada and abroad each time they wished to perform or authorize the performance of music.

In Canada, SOCAN is the nation's only performing rights organization. SOCAN serves as a clearing house that licenses music users and ensures fair and equitable compensation to music creators.

Whenever a copyright is performed in public in a live performance setting or on radio or television or in every possible public use of music (clubs, airlines,

cinemas, elevators, etc.) performing rights royalties are generated. No one may perform, reproduce, sell or otherwise use the work without permission from the creator and/or legal owner.

Under Canadian copyright law, performing rights belong to anyone who creates music and/or lyrics. A performing right gives copyright owners the sole right to perform in public or broadcast their work, or to authorize others to do so in return for royalty payments. Members assign their performing rights to SOCAN upon joining the society.

In return, the performing rights organization keeps track of who is performing the song, charges users a licensing fee and pays the owner their share of performance royalties.

SOCAN is a not-for-profit, member administered collective run on behalf of copyright owners. It has a board of directors consisting of writer-members (composers, lyricists and songwriters) and publisher-members who are elected by the voting membership.

SOCAN ensures that their members are fully compensated when their music is broadcast or performed in public. It licenses the users of music who pay copyright royalties in accordance with tariffs set by the Copyright Board and then distribute these royalties to SOCAN members in Canada and to thousands of copyright owners around the world.

SOCAN administers performing rights in hundreds of thousands of musical works created by its members and the members of foreign affiliated performing right societies through its affiliation with over 40 foreign societies representing the music of over 100 countries.

SOCAN licenses virtually all of the world's repertoire of musical works while its foreign affiliated societies represent SOCAN's repertoire in their territories of operation. SOCAN operates under the principle of national treatment because it extends the same protection to foreign copyright owners that it accords to its own copyright owners.

SOCAN issues blanket licences for the performance of the musical works that are within its repertoire. Users thereby have access to any or all musical works that are commercially available in Canada and around the world without further inquiry as to ownership, cost for intended use, type or context of use, etc.

The body of musical works licensed by SOCAN is continually expanding as new works enter the marketplace in Canada and around the world and are exploited commercially on a daily basis.

Retransmission Collectives

Canadian retransmission collectives resulted from a statutory enactment allowing copyright owners to receive royalties from cable television systems for retransmission signals. Retransmission tariffs are regulated by the Copyright Board under the Copyright Act. Currently there are eight retransmission collecting bodies representing various copyright owners including SOCAN.

For the purposes of collecting retransmission royalties, SOCAN collects and distributes royalties to copyright owners of music that is integrated in the programming carried in retransmitted radio and television signals.

Mechanical Rights Collectives and Agencies

Once a recording has been made available for sale, songs on that recording can be recorded by other artists as long as they obtain a mechanical licence from the music publisher(s). This licence states that the artist will pay the publisher mechanical royalties for the right to record a song(s) and will also account for all records sold and returned.

In fact, the reproduction of copyrighted music, whether on a record, tape, CD or other manufactured 'contrivance' or for use in a film, television program, commercial or other program, can only be made with the permission of the copyright owners or controllers involved.

In Canada, the Canadian Musical Reproduction Rights Agency (CMRRA) and the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) are in the business of granting reproduction licences on behalf of their members. The CMRRA has publisher members while SODRAC's members are composers, authors and publishers.

Reproduction rights organizations represent their members for the purpose of granting mechanical licences. In return for this permission, music users agree to pay mechanical royalties. Rates for mechanical licences are set by negotiation between the record industry and the music publishers and a single, standard rate applies to most reproductions.

Mechanical royalties due from the use of their music on records, tapes and CDs are one of the key sources of revenue for songwriters and music publishers.

Similarly the inclusion of copyrighted music in film, television or commercials requires the copyright owner's permission. This is granted in the form of a synchronization licence, derived from the synchronization of music with visual or other elements. Each 'sync' licence is individually negotiated between the user and the copyright owner, either directly or through a reproduction rights organization.

Reproduction licences must be applied for and agreed upon prior to the manufacture of a sound recording or, in the case of synchronization, in advance of the exhibition of the film, etc.

Locating an owner for copyrighted works can be a time-consuming task as there are hundreds of thousands of titles controlled by multi-national publishers or by many individual songwriters with small catalogues. The reproduction rights organizations were formed to centralize and standardize the process of licensing and collecting royalties.

Until 1988, Canada's copyright legislation provided for a fixed price for each copy manufactured. In a major amendment to the Copyright Act which took place that same year, this statutory rate was eliminated and rates are now set, as mentioned previously, by industry negotiation. As of January 1, 2001, the mechanical rate in Canada is \$.074 per song per copy sold or otherwise distributed, where the playing time is five minutes or less with each additional minute (or part thereof) earning another \$.0148 cents to the rate. In 2002, the mechanical rate will be \$.077 plus \$.0154 for each additional minute.

There may be some instances where the ownership of a copyright is divided between more than one owner. It is a legal requirement to obtain licences from all owners before proceeding with reproduction of a work. There may be some cases where neither the CMRRA nor SODRAC represent the copyright owners. While these organizations help track down copyright owners, it is the responsibility of the music user to locate the missing copyright owners.

The manufacture or importation of sound recordings, which reproduce copyrighted songs without obtaining a mechanical licence for each song, will result in a copyright infringement. Canadian copyright law provides for civil penalties and criminal prosecution with a maximum fine of \$1,000,000 for copyright infringement. If a CD, cassette or LP contains unlicensed music, it can be removed from the marketplace by means of an injunction.

Audio-Video Licensing Agency

The Audio-Video Licensing Agency is a non-exclusive agent that administers licensing in Canada for the owners and exclusive holders of copyright in audio and music video recordings. AVLA licenses the exhibition and duplication of music videos as well as the reproduction of audio recordings for commercial use.

Anyone who copies sound recordings or music videos and anyone who performs or broadcasts music videos needs a licence from AVLA or authorization from the owner or holder of the copyright. The unlicensed copying of sound recordings or music videos and/or the unlicensed exhibition of music videos is an infringement of copyright and may be subject to legal prosecution.

AVLA is the licensing agent of all the major record companies in Canada and many independent labels, artists and producers. AVLA's members own or control the copyright of over 95% of all musical audio recordings and music videos produced and/or distributed in Canada.

Video

AVLA's television licensing program administers the exhibition of music videos on network, regional and local programs as well as pay and cable television.

Video pools are licensed through AVLA to copy music videos to incorporate into analogue programs and digital programs for lease to commercial subscribers and third party venues. Also, a video road show licence is available to copy music videos onto analogue tapes for performance at various venues (clubs, dances, etc.).

AVLA licenses sound recordings and music videos for use by Canada's major airlines on the inflight entertainment programs and in boarding lounges and airport facilities. It also licenses radio stations using music videos and/or sound recordings for use in television commercials promoting the station, announcer's contests and special events.

Audio

AVLA provides a DJ licence which allows the licensee to copy songs or sound recordings onto tapes, CDRs, MiniDiscs and hard drives for the sole purpose of performance of recorded musical entertainment to the public at various functions. AVLA also licenses DJ associations.

In addition, AVLA provides a music supply service licence which allows music suppliers to copy sound recordings onto tapes, CDs and CD-Rs for commercial lease in their subscription music service.

The Neighbouring Rights Collective of Canada

The Neighbouring Rights Collective of Canada (NRCC) is one of the two new collectives that came into existence following passage of Bill C-32 in 1997. It is, in effect, a collective of collectives that came together to represent the interests of performers and makers of eligible sound recordings. It operates for the purpose of providing a 'one point' for payment of neighbouring rights royalties by users and distribution to eligible rights holders.

Following hearings at the Copyright Board, a five-year tariff structure was established running from January 1998 to December 2002 for all private radio stations in Canada. Subsequent hearings have established rates for public radio and digital pay radio services. Other tariff hearings will follow.

Monies are collected by NRCC and dispensed on a timely basis (after reduction for expenses) to the various collectives representing artists and makers who in turn have the responsibility of accounting to their members. Member collectives include AVLA (Audio-Video Licensing Agency), ARTISTI (La société de gestion collective de l'Union des artistes), SOPROQ (La société de gestion collective des droits des producteurs de phonogrammes et de vidéogrammes du Québec), APRS (The ACTRA Performer's Rights Society), and AFM (The American Federation of Musicians of the United States and Canada).

The neighbouring rights legislation is based on the principle of reciprocity whereby a country protects foreign copyright owners only to the extent that its own copyright owners are protected in return.

The Canadian Private Copying Collective

The Canadian Private Copying Collective (CPCC) came into being following the passage of Bill C-32 in order to administer the new private copying right. Formed in 1998, the CPCC is a collective representing other music industry collectives who, in turn, represent individual copyright owners whose musical works have been reproduced for private use. Members of the CPCC include CMRRA (The Canadian Mechanical Reproduction Rights Agency), SOCAN (The Society of Composers, Authors and Music Publishers of Canada), SODRAC (Society for Reproduction Rights of Authors, Composers and Publishers in Canada), and the Neighbouring Rights Collective of Canada (NRCC).

Making a copy of a sound recording for personal use is called 'private copying' or home taping. After the passage of Bill C-32, private copying (home taping) is no longer an infringement of copyright. However, copies made for private use cannot be sold, rented or distributed. Additionally, these copies cannot be used for a performance in public.

The Canadian Copyright Board, an independent quasi-judicial tribunal, sets the tariff of levies as well as the related terms and conditions for the private use of copyrighted works. The Copyright Board has designated the CPCC as the collecting body to whom levies are paid.

Under copyright law, importers and manufacturers of blank audio recording media are required to pay levies on blank audio recording media sold or otherwise disposed of in Canada. The levies are to compensate copyright owners for lost sales due to private copying. Audio recording media importers

and manufacturers determine what costs are passed on to consumers, based on their own circumstances and the economics of the marketplace.

The Canadian Reprography Collective

The Canadian Reprography Collective, founded in 1988, is popularly known as CANCOPY. It acts as a clearing house for the rights it administers in relation to the reprographic (copying) use of published material. CANCOPY has reciprocal agreements with national and international collectives and therefore has access to a huge repertoire of works beyond the scope of its membership affiliates.

For those involved in the music industry, CANCOPY is most relevant when sheet music is in print form and can be copied reprographically. Increasingly, the administration of reprographic rights by CANCOPY is being added to music publishing agreements.

The Future of Copyright in Canada: New Rights, New Challenges

In today's world of ideas, strong intellectual property laws are a necessity if Canada is to maintain its standard of living in the new century. These laws are one of the key supports to a successful modern society, particularly in the trade-based and export-oriented society that will be Canada's future.

Despite two major copyright revisions in 1988 and 1997, as well as other revisions in the interim, it is an unfortunate fact that rapid and continuing changes in technology have resulted in a variety of new challenges to the Canadian music industry.

In order to ensure that the copyright system is sustained in Canada, it is necessary to deal with the following pressures on the system:

- 1) As the copyright system attempts to protect more non-traditional subject matters, there is a reaction in the form of more exemptions to traditional copyright exclusive rights, and potentially increased activity of antitrust authorities, especially in relation to computer issues.
- 2) Changing ownership patterns in user-based industries are challenging traditional concepts of the balancing of interests between creator and user and the role of various participants in the marketplace, including the government.
- 3) The potential schism in two types of protection: *droit d'auteur* (the cultural model) which was the basis of international copyright protection for the first one hundred years of the Berne Convention and the other, more utilitarian model to deal with functional or information-based works of a non-cultural nature.

4) Cable and direct-to-home satellites (new pay and specialty services, pay-per-view and video-on-demand transactional services)

5) Telephone company facilities (home computers, expansion of commercial on-line database services)

6) Potential competition between cable and telephone companies (cable entry into telephone company territory, telephone company entry into cable area, unclaimed territory between both)

7) Impact of new developments (technology, regulatory, etc.) on development and expansion of collectives

The issues and concerns that face creators and copyright owners in Canada and around the world are many, varied and pressing. This is especially true as technology continues to evolve causing holes in the system of copyright protection. These gaps can severely damage the ability of creators and copyright owners to receive fair payment for their work and, at the same time, have helped to establish in the public's mind the concept that music is free for the taking.

While both the principle and day-to-day operation of copyright law appears complex, the principle is very simple: copyright is a property right. A right is a right, and creators and copyright owners are perfectly entitled to be properly compensated for the work, which results in the creation of copyright properties.

The Canadian government has recently announced a review of certain specific issues in its ongoing revision process. However, the proposed revisions do not address the vast majority of issues that concern creators and copyright owners in light of today's challenges.

Current and future challenges range from Napster and its clones, to worldwide delivery systems, to fair and effective rate structures for the many new technologies – for example the issue of ring tones, and new and different users. New approaches are required to develop effective tracking and payment structures and to effectively combat the growing public concept that music should be free.

The music industry has no option but to actively pursue the constant review of copyright laws in Canada so that the industry can continue to grow and prosper. The industry also needs to provide Canadians with both cultural and entertainment products from a Canadian perspective in an increasingly global environment.

The reality is that these objectives are easy to say but will require major ongoing commitment, not just from creators, copyright owners and the music industry in general, but from politicians and bureaucrats and Canadians as a whole.

Glossary of Copyright-related Terms

Administration Agreement – A type of music publishing agreement whereby a person or company administers the collection of revenues from the exploitation of a song in return for a percentage of revenues; unlike a publisher, the administrator does not own the copyright in the song and does not actively promote the song.

Advance – Money paid before it is earned and which is recoupable out of future royalties as and when such royalties become payable.

Artists' Royalties – Amounts paid to a recording artist by a record company in return for the artist's recording services and calculated as a percentage of the wholesale or retail price or similar base price of recordings sold.

Assignment – Transfer of ownership from the original owner to another party

Berne Copyright Convention – Berne Convention for the Protection of Literary and Artistic Works is an international treaty extending copyright protection in member countries to nationals of other member countries. Canada has been a signatory to the Berne Convention since its inception in 1886, first under the responsibility of the U.K. and later as an independent nation.

CANCOPY – A reprography collective that grants licences to photocopy works and collects fees on behalf of its members.

CMRRA – The Canadian Musical Reproduction Rights Agency Limited was organized in 1975 by the Canadian Music Publishers Association to act as a centralized licensing and collecting body for mechanical reproduction rights.

Composer Royalties – A percentage (usually at least 50%) of the revenues derived from exploiting the performing rights, mechanical rights, synchronization rights and other rights in a song and paid to the composer of the song by a music publisher.

Collective – Organization that administers rights granted by the copyright system on behalf of the copyright owners who are its members. In Canada there are six music industry collectives: two for mechanical royalties (CMRRA and SODRAC), one for performing rights (SOCAN), one which licenses the exhibition and duplication of music videos (AVLA), one for neighbouring rights (NRCC) and one for private copying rights (CPCC).

Co-publishing Agreement – An agreement between two music publishers whereby they jointly own the copyright and act as publishers of a song and divide the publisher royalties between themselves.

Copyright – The rights granted under the Copyright Act to creators and copyright owners for the exclusive control of the reproduction and sale of their works. All forms of reproduction and use are covered. Examples of several commonly used rights include the following: the print right – the right to utilize works in a printed form; the mechanical right – the right to mechanically reproduce works on records or tapes; the performance right – the right to public performance of works; the synchronization right – the right to synchronize works with the sound tracks of movies, videos and television recordings.

Copyright Act – Federal legislation governing copyright in Canada.

Copyright Board of Canada – A tribunal that attempts to balance competing interests of music users, performing rights societies, copyright collectives and licensing bodies. The Board sets the fees that a performing rights society, licensing body or a copyright collective can charge for the use of music.

Copyright infringement – Violation of copyright through unauthorized copying or use of a work under copyright which denies the owner(s) from sharing in the benefits produced by that use.

Copyright notice – A marker indicating copyright with a small c in a circle (©), the name of the copyright owner and the first year of publication.

Copyright Office – The federal government office responsible for registering copyrights in Canada.

Fair dealing – A section of the Copyright Act which tries to ensure that consumers have access to copyright works in specific circumstances and under certain conditions such as use of works for the purpose of private study, research, criticism, or review.

Licence – Legal agreement granting someone permission to use a work for certain purposes or under certain conditions. A licence does not constitute a change in ownership of the copyright.

Mechanical contrivance – A device which reproduces sounds, such as cassette, CD or player.

Mechanical Royalties – Amounts paid to the copyright owner or their agent when a copyright is mechanically reproduced in an audio (sound) contrivance (e.g. album, tape, CD).

Moral rights – Rights an author retains over the integrity of a work and the right to be named as its author even after sale or transfer of the copyright.

Musical work – Work which consists of music plus lyrics or music only.

Performing rights society – An organization which administers rights to perform musical works on behalf of composers, lyricists, songwriters and music publishers. The Society of Composers, Authors and Music Publishers of Canada (SOCAN) is the only performing rights society in Canada.

Piracy – Piracy is unauthorized copying for commercial gain. In relation to sound recordings it means the manufacture of duplicates of legitimately produced recordings without the authorization of the original producer of the recording and the importation, distribution or sale to the public of such unlawful duplicates for commercial gain.

Private Copying – Private copying is a term that can be used interchangeably with home taping. It describes the non-commercial practice whereby individuals are authorized to make one private copy of a sound recording for private use.

Publisher – The person or company who owns the copyright in a song and promotes the song to artists, producers, record companies and others involved in the commercial use of music.

Publisher Royalties – A percentage of the revenues derived from exploiting the performing rights, mechanical rights, synchronization rights and other rights in a song and retained by the publisher of the song after deducting and paying the composer royalties.

Publisher Agreement – An agreement whereby a composer assigns the copyright and related rights in a song to a publisher in return for a percentage of the revenues derived from exploiting such rights.

Royalty – A sum paid to copyright owners for the sale or use of their works.

Rome Convention – The Rome Convention is an international treaty that guarantees neighbouring rights to performers and makers of sound recordings. Over 50 countries have signed the Rome Convention.

SOCAN – Canada's only performing rights society whose role is to license music users for the performance of music in Canada; to collect licence fees; and to distribute performance royalties in accordance with the rules of the Society to those composers, lyricists and music publishers whose works have been broadcast or performed in public. SOCAN is a non-profit Canadian society that acts on behalf of its members who assign their performing rights to SOCAN.

Sub-Publishing Agreement – An agreement whereby a publisher's rights in a song are licensed to another publisher for a specified number of years in a

specified territory in return for a percentage of the revenues derived from the exploitation of such rights pursuant to the agreement.

Synchronization Rights – The rights to reproduce and perform a song as part of or in 'synchronization' with a motion picture or television production.

Tariff – A standard charge for use of copyrighted works. Usually applies to fees paid by users of musical works and cable companies for the rebroadcast of programs.

Universal Copyright Convention – An international agreement extending copyright protection in member countries to nationals of other member countries. Canada is a signatory of this treaty since August, 1962.