

ARTISTS' LEGAL RIGHTS MEMORANDUM

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Re: Artists' Legal Rights (Copyright) – Support Memo for brochure and presentation to Modern Fuel

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PART I: COPYRIGHT PROTECTION IN CANADA

Part A: Basic Rights

Copyright is a form of intellectual property that grants creators exclusive rights to produce, reproduce, publish, or perform their work. In Canada, copyright protection is automatic upon the creation of an original work in a fixed form.¹ This includes artistic (e.g. paintings, sculptures), literary (e.g. novels, poems, software), musical (e.g. songs, compositions), and dramatic works (e.g. plays, screenplays, all of which are safeguarded under Canadian copyright law as soon as they are created. In Canada, copyright is governed by a federal statute called the *Copyright Act* (“the Act”). The Act outlines the framework under which copyright is granted and regulated in the country. Section 3(1) specifically defines copyright in relation to a work as the exclusive right to produce or reproduce the work, or any substantial part of it, in any material form.² Ultimately, the Act aims to serve the public interest by fostering the creation and dissemination of artistic and intellectual works while ensuring creators receive fair recognition and compensation for their efforts. All original works are protected under the Act, regardless of their merit or commercial value, provided the conditions outlined in the legislation are met.

While a creation may last forever, copyright does not. In Canada, copyright lasts for the life of the creator, plus 70 years after the end of the calendar year in which they passed; however, this duration can vary depending on factors such as the type of work, manner of publication and the date of creation. During this period, the copyright owner has complete control over the work including the right to reproduce, distribute, and publicly display it. When the term of copyright protection ends or expires, the work enters the public domain. At this point, the work becomes freely accessible to the public, granting everyone with equal rights to reproduce or republish the work without seeking permission from the original copyright holder.

Part B: Fair Dealing

It is important to note that the Act includes a key exception to its otherwise stringent protections. Fair dealing, in section 29 of the Act, allows users to use copyright-protected works without seeking permission or paying royalties.³ Copyrighted work can be used for research, private study, education, satire, parody, criticism, review and news reporting. Under these usages, no copyright infringement will be found; however, this right is not unrestricted and ensures that the use of the material is reasonable and not excessive.

¹ Paul Bain, “Copyright Protection in Canada for Artists” (Toronto: Dickinson Wright, 2016), online: <<https://www.dickinson-wright.com/news-alerts/copyright-protection-in-canada-for-artists>>.

² *Copyright Act*, RSC 1985, c C-42, s 3(1).

³ *Ibid* at s 29.

In the 2004 case *CCH Canadian Ltd. v. The Law Society of Upper Canada*, what is considered “fair” was specified. Users need to consider six principles when engaging with fair dealing including:

- the purpose of the dealing
- the character of the dealing
- the amount of the dealing
- alternatives to the dealing
- the nature of the work
- the effect of the dealing on the original work.⁴

Attribution (citing your source) is required for a successful defence of fair dealing in some instances of alleged copyright infringement, particularly when the dealing is for the purpose of criticism, review, or news reporting.

While the Act provides creators with strong protections as soon as a work is created, they can gain even further legal advantages by formally registering their work with the Canadian Intellectual Property Office (CIPO).

⁴ *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 at para 4.

PART II: COPYRIGHT REGISTRATION IN CANADA

Part A: Registration

In Canada, copyright protection is automatically granted to creators upon the creation of an eligible work; however, this protection is subject to certain conditions. The creator must be a citizen or resident of Canada or a country that is party to a relevant copyright treaty.⁵ To apply for copyright registration, certain qualifications must be met:

- the work must be original, meaning the work is an expression of an idea
- the work is fixed in a material form.

To apply for registration, an application must be completed and sent to the Canadian Intellectual Property Office along with the appropriate fee.⁶ The application must include the author(s) and the owner of the copyright in the work, a declaration that you are the author the owner, and assignee, or a licensee whom an interest has been granted. You will also have to submit the associated category under which you are applying for copyright, the title of the work, the name of the creator, date/place of first publication (if applicable) and any additional information prescribed by regulation. The copyright office does not accept copies of your work, nor will they verify ownership or examine the work. However, creators may need to separately send copies of their work to the Library and Archives Canada on publication. It is crucial that any information submitted about copyright ownership be complete, correct and accurate.

If your application meets filing requirements a registration certificate will be issued to you. Current performance targets are that registrations are issued within 7 business days for electronic applications or 1 month for paper applications.⁷

Part B: Advantages and Disadvantages

Advantages

Registration does not create any legal rights, but it can be useful to establish evidence of authorship and ownership. The copyright certificate serves as presumptive evidence of ownership in the event of infringement. This certificate also serves as public notice of authorship and ownership, providing evidence that the work is protected under the Act. If a legal dispute arises, the certificate creates a rebuttable presumption of ownership in the work, so long as it was registered before the proceeding has commenced.

⁵ *Copyright Act*, *supra* note 2 at s 5(1)(a).

⁶ “Complete list of fees for copyrights,” (Quebec: Government of Canada, 2024, online: <<https://ised-isde.canada.ca/site/canadian-intellectual-property-office/en/complete-list-fees-copyrights>>).

⁷ <https://ised-isde.canada.ca/site/canadian-intellectual-property-office/en/corporate-information/performance-targets#cr>

Disadvantages

There are some drawbacks to registration. First, there is a fee for each item submitted which can become costly. The government filing fee for a registration in Canada is generally \$63 for online submissions; however, additional fees may be incurred based on the specifics of the work at hand, including legal fees if you retain counsel to assist with the application. Furthermore, CIPO does not oversee or enforce copyright, placing the responsibility on the creator to monitor for infringement and safeguard their rights.

PART III: AUTHORSHIP VS OWNERSHIP

There is an inherent distinction between authorship and ownership in copyright law. Authorship means the original author of the work. This can include the original painter of a work, an author, composer, or other such artist.⁸ At the point of creation, the authors are the first owners of the copyright; however, there are exceptions to this. For instance, if a work is made in the course of employment, the copyright of that work may often be owned, legally, by the employer.⁹

Canadian copyright law gives authors moral rights. Moral rights protect the integrity and intent behind the work.¹⁰ These rights allow the author to name themselves as the creator of the work publicly and object to any distortion or modification of the work that could harm their reputation or the intention behind the work. Moral rights are unique in that, if an author decides to assign copyright ownership to another individual or entity, they cannot transfer their moral rights, but they can waive those rights.

Additionally, Canadian copyright law provides economic rights. These allow authors to derive financial reward from their work. This means authors have the exclusive right to make reproductions of their work and to authorize others to do so. Control over the use and distribution of the work remains with the author; however, once the author signs away ownership, there are certain rights, like economic rights, that will now belong to the owner. Copyright owners are entitled to specific rights over such works, but these rights are balanced by limitations such as exceptions and time constraints, maintaining a fair balance between creators' interests and the broader public good.

⁸ “What you should know about copyright” (3 May 2024), online (website): <<https://ised-isde.canada.ca/site/canadian-intellectual-property-office/en/what-you-should-know-about-copyright>

⁹ *Ibid.*

¹⁰ *Ibid.*

PART IV: ASSIGNMENT VS LICENSING

There are typically two ways for an owner of copyright to transfer rights to another person or entity: assignment and licensing. Assignments are transfers of ownership from Party A to Party B. Licenses make it so that Party A retains the IP, and licenses those rights to Party B. Only assignments and exclusive licenses are required to be in writing.

The Act offers artists a robust legal framework to protect their creations through licensing, allowing them to grant rights for the use of their works while retaining ownership. Licensing is an essential tool to manage how works are used, to prevent unauthorized exploitation, and to secure appropriate compensation. By granting specific rights—such as the right to reproduce, display, or adapt their work—artists can facilitate legitimate uses while maintaining control over their intellectual property.

While only exclusive licenses are required to be in writing (s.13(4), s.13(7)), it is typically recommended that a licensing agreement be entered into which defines the scope of use, payment terms, and exclusivity of the licence. The scope of use may be used to place limits on the geographic territory, duration, and intended purpose.¹¹ For example, artists may wish to limit the use of their works to a specific medium or market sector. These limitations help ensure that their works are used only in ways that align with their creative and financial objectives.

As mentioned, licensing agreements must also address payment terms and the exclusivity of the licence. Exclusive licences, as confirmed by section 13(7) of the Act, grant the licensee a significant legal interest in the copyright, giving them sole rights to use the work for the agreed purpose.¹² This means no other party, including the artist, may use the work within the scope of the exclusive licence. In contrast, non-exclusive licences allow the artist to grant similar rights to multiple parties, offering greater flexibility in the commercial exploitation of the work. By carefully determining whether to grant an exclusive or non-exclusive licence, artists can tailor the agreement to their specific needs and goals. The exclusivity of a license can have different implications for artists entering into commission or publication agreements.

Clear, well-drafted licensing agreements are essential to prevent misuse or disputes. Agreements should precisely outline what is and is not permitted under the licence, leaving no ambiguity about the artist's expectations. Failure to specify these terms can lead to unintended uses of the work or difficulties in enforcing the artist's rights.

¹¹ Tyson Gratton, Ryan Black & David Spratley. "Scope, fees, IP, relief: Mastering the elements of good licensing", (21 April 2021), online: *DLA Piper* <<https://www.dlapiper.com/en/insights/publications/2021/03/mastering-the-elements-of-good-licensing>>.

¹² *Copyright Act*, *supra* note 11.

Artists may need licences and permits from the federal, provincial and municipal levels of government. Artists can use BizPaL to find licences and regulations that may affect their business.¹³

PART V: SOCIAL MEDIA AND ONLINE PLATFORMS

While artists undoubtedly benefit from greater exposure through the Internet, it also makes it easier for their work to be shared without proper attribution and increases the risk of copyright infringement. Once content is uploaded, users have limited control over how it is used on the platform and potentially by third parties who obtain sublicences through the platform (such as advertisers).

Part A: Terms of Service

Ownership Clauses

Agreeing to a social media service or online platform's Terms of Service has important legal implications, especially regarding content licences. Ownership Clauses often grant platforms some rights to user-generated content; this means that when artists share their work on social media and other online platforms, they grant the platform a licence. In the case of Instagram, for example, the licences that an artist grants are a "non-exclusive, royalty-free, transferable, sublicensable, worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content."¹⁴ This means:

- The artist can still use the content in other places and license it to other platforms or people.
- Instagram doesn't have to pay the artist royalties for using their content.
- Instagram can transfer this licence to another company if necessary (for example, if Instagram is acquired by another company).
- Instagram can grant rights to third parties (like advertisers or other affiliates) to use the content.
- The licence applies globally, not limited to any specific region.
- Instagram has broad rights to your content, including changing it, making copies, performing it (like in a video), and creating new versions (derivatives) based on it

¹³ Bizpal, "Permit and Licence Information (last accessed 26 November 2014) online (website): <<https://bizpal.ca/>> [<https://bizpal.ca/>].

¹⁴ Instagram, "Terms of Use" (last visited 26 November 2024), online (website): <https://help.instagram.com/581066165581870/?helpref=hc_fnav>

[http://web.archive.org/web/20241126154242/https://help.instagram.com/581066165581870/?helpref=hc_fnav].

Instagram¹⁵, Facebook¹⁶, X¹⁷, Pinterest¹⁸ and Tumblr¹⁹, do not claim ownership over any content posted to their site and note that artists retain ownership of the intellectual property rights in the content that they create and share.

Content Removal Policies

Social media sites and online platforms have content removal policies that outline the reasons for deleting posts or suspending accounts. These policies often include measures to protect intellectual property rights. For example, Instagram removes content that goes against its content policy, including posts infringing on copyright.²⁰ The platform uses a combination of technology and user reports to flag and remove such content. They then can remove the content through automated technology or a review team. Entire accounts may be disabled for any violation of their Community Guidelines.

Most platforms provide tools for reporting copyright infringement, allowing artists to flag unauthorized uses of their work. When filing such reports, artists should be prepared to provide documentation proving their ownership. Some platforms may even require the artist's original work to be posted on their site as evidence of ownership. By leveraging these tools and adhering to platform-specific terms of service, artists can safeguard their intellectual property and ensure that unauthorized or infringing posts are removed.

Part B: Notice and Notice Regime

The Notice and Notice regime, established under the Act through the *Copyright Modernization Act*, is primarily an Internet Service Provider (ISP)-based system designed to notify alleged

¹⁵ *Ibid.*

¹⁶ Facebook, "Terms of Service" (last visited 26 November 2024), online (website):

<<https://www.facebook.com/terms.php/>>.

¹⁷ X, "Terms of Service" (last accessed 26 November 2024) online (website):

<<https://x.com/en/tos#:~:text=You%20retain%20your%20rights%20to,let%20others%20do%20the%20same.>> at section 3.

¹⁸ Pinterest, "Content Claiming Portal" (last accessed 26 November 2024) online (website):

<<https://policy.pinterest.com/en-gb/pinterest-content-claiming-portal-terms-of-service>>

[<https://web.archive.org/web/20240124105342/https://policy.pinterest.com/en-gb/pinterest-content-claiming-portal-terms-of-service>] at para 2.

¹⁹ Tumblr, "Terms of Service" online (website): < <https://www.tumblr.com/policy/en/terms-of-service>>

[<https://web.archive.org/web/20250117010250/https://www.tumblr.com/policy/en/terms-of-service>] at section 6.

²⁰ Instagram, "What happens if somebody breaches the Community Guidelines?" (last accessed November 26, 2024) online (website): <<https://about.instagram.com/blog/announcements/instagram-community-guidelines-faqs#:~:text=What%20happens%20if%20somebody%20breaches,more%20about%20our%20Community%20Guidelines>> [<http://web.archive.org/web/20241128051308/https://about.instagram.com/blog/announcements/instagram-community-guidelines-faqs>].

infringers of copyright violations.²¹ While it serves as a deterrent, it has limitations in enforcing content removal on social media platforms. Canadian artists often rely on the specific content removal policies of these platforms or turn to other legal mechanisms to address infringement.

Under this system, Internet intermediaries, such as ISPs, are required to forward notices from copyright owners to subscribers whose accounts have been linked to alleged copyright-infringing activities.

Key Features

Notification System

Copyright holders can send a notice of infringement to the ISP of the alleged infringer, typically after detecting unauthorized sharing or downloading of their work. The ISP is then obligated to forward the notice to the subscriber associated with the IP address in question.

No Mandatory Takedown

The Notice and Notice regime does not compel ISPs or platforms to remove infringing content. Instead, it acts as a warning system to inform alleged infringers about their actions and deter future violations without requiring immediate content removal.

Application on Social Media Platforms

Limited Direct Application

The Notice and Notice regime is primarily targeted at ISPs and has limited applicability to social media platforms. For example, if an artist's work is used without permission on platforms like Instagram, the regime cannot compel Instagram to take down the content; however, it can notify Canadian ISPs if infringement is facilitated by Canadian users sharing or accessing the content.

Sending a Direct Notice

Although the regime does not mandate takedowns, artists can file copyright infringement notices directly with social media platforms. These platforms may act on the complaint based on their content removal policies. In such cases, artists can still pursue content removal, but the decision ultimately rests with the platform.

Part C: Reproduction and Attribution Toolbox

Artists can leverage a range of tools to protect their work from unauthorized reproduction and ensure they receive proper credit. By utilizing these tools, artists can not only combat the misuse

²¹ Government of Canada, "Notices to Canadian Internet subscribers" (16 November 2021), online (website): <<https://ised-isde.canada.ca/site/office-consumer-affairs/en/connected-consumer/notices-canadian-internet-subscribers>>

[<http://web.archive.org/web/20241126155012/https://ised-isde.canada.ca/site/office-consumer-affairs/en/connected-consumer/notices-canadian-internet-subscribers>].

of their work but also maintain control over how their art is attributed and shared online; however, it's important to note that, despite these tools, platforms and other users may still find ways to circumvent proper attribution or unauthorized use by leveraging their technologies.

See the **Further Resources** section for specific tools related to the Reproduction and Attribution Toolbox.

Metadata

Artists can embed metadata in their works to include copyright details, ensuring their ownership information is securely stored within the file and can be traced if the work is used without permission.

Licences

By using licences, artists can clearly define how their work can be used, granting specific rights to others while retaining control over unauthorized use, and providing a legal framework for enforcement.

Watermarking

Artists can use watermarking to place their signature or copyright notice on their images or videos, making unauthorized use more difficult by visibly marking the work as owned.

Blockchain Technology

Blockchain platforms allow artists to register their work on the blockchain, providing a secure and immutable record of ownership and enabling them to track usage and protect their intellectual property rights.

Reverse Image Search Technology

Artists can use reverse image search tools to locate where their images appear online, helping to identify unauthorized uses and take action to enforce their rights.

Digital Executor

Artists can appoint a digital executor to manage their digital assets after they pass, ensuring their online presence, copyright claims, and digital works are handled according to their wishes, protecting their intellectual property even after death.

When selling their work online, artists must navigate a range of legal considerations. These include understanding copyright law, creating contracts, and complying with business regulations.

Part D: Contracts

Written Agreements

It is essential for artists to have clear, written contracts with buyers. This ensures mutual understanding of the terms of sale, including payment, delivery, and any rights granted to the buyer. Contracts should specify:

- whether the buyer is purchasing the artwork itself or obtaining a licence to use it,
- the rights granted to the buyer (e.g., exclusive or non-exclusive rights),
- payment terms and schedules (e.g., deposit and final payment),
- any restrictions on the use of the artwork, such as reproduction, commercial use, or modification.

Agreements with Online Platforms

When selling on online platforms (e.g., Etsy, Shopify, etc.), artists must also comply with the platform's terms of service. These terms often outline the platform's rights over listings and sales, as well as any commissions or fees they may charge.

Part E: Common Business Regulations

Tax

Sales Tax

Artists may need to collect the Goods and Services Tax (GST) or the Harmonized Sales Tax (HST) on sales of their works, depending on their income level and the province in which they operate. Artists must register for a GST/HST number if their taxable revenue exceeds the threshold set by the Canada Revenue Agency (CRA).²²

Income Tax

Artists must report earnings from sales on their annual tax return. If operating as a business, the artist may also be able to deduct business-related expenses (e.g., materials, studio rent, marketing) from their taxable income.²³

Other Common Regulations

Consumer Product Safety

²² Government of Canada, "Arts and artists guide" (last modified 9 August 2024) online (website): <<https://sbs-spe.feddevontario.canada.ca/en/arts-and-artists-guide>> [<http://web.archive.org/web/20241126162222/https://sbs-spe.feddevontario.canada.ca/en/arts-and-artists-guide>].

²³ CARFAC, "What are my tax obligations as a self-employed individual?" (last accessed 26 November 2024) online (website): <<https://www.carfac.ca/tools/artist-taxation/what-are-my-tax-obligations-as-a-self-employed-individual/>> [<http://web.archive.org/web/20241126163321/https://www.carfac.ca/tools/artist-taxation/what-are-my-tax-obligations-as-a-self-employed-individual/>].

If you manufacture, import, distribute or sell products in Canada, you are responsible for ensuring that they are safe.²⁴

Labelling

If you sell packaged goods that have been imported or produced domestically, you need to be aware of any labelling requirements that will apply to your products before selling them in Canada.²⁵ The Competition Bureau provides information on the labelling requirements.²⁶

²⁴ Government of Canada, “Arts and artists guide,” *supra* note 25.

²⁵ *Ibid.*

²⁶ Government of Canada, “Labelling” “last modified 20 January 2022) online (website:) <<https://competition-bureau.canada.ca/labelling>> [<http://web.archive.org/web/20241126163448/https://competition-bureau.canada.ca/labelling>].

PART VI: LEGAL RIGHTS OF A PURCHASER

Physical Ownership

When an artwork is sold, the buyer gains ownership of the physical object. However, unless explicitly stated, the buyer does not acquire the copyright or the rights to reproduce the artwork.

Re-sale and Distribution Rights

If the artist retains copyright, they may specify in the sale agreement whether the buyer has the right to resell or distribute reproductions of the work. The buyer may also be restricted from altering or reproducing the work in any form without the artist's permission – this may be specified in the sales contract.

Exhibition Rights

If the artwork is sold, the purchaser may have the right to display it in private spaces. However, any public display (e.g., in a gallery or for commercial purposes) may require additional permissions from the artist if they retain the copyright. The exhibition right in the Act applies to public exhibitions of artistic works created after June 7, 1988. It entitles visual artists to receive payment when their work is exhibited in a public exhibition, for a purpose other than sale or hire.

International Sales

If selling internationally, artists need to consider the copyright laws of other countries, as they may differ from Canadian laws. International treaties like the Berne Convention help protect an artist's rights across member countries.

PART VII: REPRODUCTION RIGHTS

Part A: Scope of the Rights

As previously mentioned, the Act provides an author of an original work with the exclusive right to reproduce that work. An author's economic rights also allow them the sole right to authorize another to reproduce the work which can occur through licensing. There is an exemption to this right built into section 30.1 of the Act. It allows libraries, archives, and museums to make reproductions for their respective collections, for research, and for private study.²⁷

Part B: Musical Works

Types of Reproduction Rights and Associated Licences

Mechanical Rights

These rights govern the physical or digital reproduction (e.g., a record, tape, CD, streaming) of a musical work.²⁸ When an artist's work is reproduced in such a way, if they are also the copyright owner, they are entitled to receive royalties. Reproduction Rights Organizations ("RROs") can act on behalf of the copyright owners of musical works to assist in royalty collection. Canada has three RROs: SOCAN, CMRRA, and Re:Sound. The mechanical licences that these RROs can assist copyright owners grant the licensee permission to attach a musical work to some physical or digital form, as well as the right to then duplicate and distribute this reproduction.²⁹

Synchronization Rights

These rights govern the reproduction of a musical work in an audiovisual production (e.g., film, TV, video game, commercial).³⁰ Such rights may be managed through synchronization licences, but these are not administered by RROs. Rather, these rights must be negotiated directly between the copyright owner and the reproducer.³¹ Additionally, while a sync licence may allow use of a musical work, a master-use licence, which is separate, allows for a specific recording of a musical work to be used. The two licences must work together in order to fully licence the work.³²

Sync licences should include a licence term, licence territory or market, and the scope and purpose of use for the musical work in question. In order to protect a musical work, it may be helpful to work non-exclusively with licensees. In other words, drafting non-exclusive license agreements will allow you to negotiate with multiple licensees.³³

²⁷ *Copyright Act*, *supra* note 2 at s 30.1.

²⁸ musiccreator.ca, "Know Your Rights: Reproduction Rights" (March 3, 2023), online (website): <<https://musiccreator.ca/know-your-rights-reproduction-rights/#:~:text=In%20addition%20to%20performing%20rights,synchronization%20rights%20and%20mechanical%20rights>>.

²⁹ Canadian League of Composers, "Sync & Mechanical Licensing Guidelines" (2022), online (website): <<https://www.composition.org/resources/model-synchronization-licensing-agreement/>> ("CLC").

³⁰ musiccreator.ca, *supra* note 26.

³¹ CLC, *supra* note 27.

³² musiccreator.ca, *supra* note 26.

³³ CLC, *supra* note 27.

It is also crucial for a creator to draft a fee payment structure that is most beneficial to them. For instance, a single upfront fee may be the most beneficial; however, if, for instance, it would make more sense to include back-end payments, the due dates for these payments should be set in stone before the sync licence is given.³⁴

Performance Rights

These rights govern the use of a musical work when performed publicly (e.g., a theatre performance, streaming, radio broadcasts, during a business event). RROs can administer performance licences as well.³⁵

Managing Reproduction Rights: RROs

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

SOCAN can facilitate a creator's reproduction rights through the issuance of licences and collection of royalties. While SOCAN membership is free, a creator must opt in or sign up in order to have SOCAN administer their reproduction rights. The sign-up form specifies SOCAN's commission rates. There are also fees associated with the length of the work involved in a licence as well as specific, licence-dependent fees. These fees have been set in tandem with the Copyright Board and cover a wide variety of licence types.³⁶

Canadian Musical Reproduction Rights Agency (CMRRA)

CMRRA also works on behalf of creators to facilitate licensing and royalty collection, specifically with reference to mechanical rights. While they do not provide sync licences, they can assist with audiovisual post-synchronization licensing which allows the reproduction of musical work attached to audiovisual content that already exists.³⁷

Re:Sound

Re:Sound also works on behalf of creators to facilitate licensing and royalty collection, specifically with reference to performance rights. Like SOCAN, Re:Sound has a specific fee schedule that is licence-specific.³⁸ For instance, the fee for Use of Recorded Music to Accompany Fitness Activities may differ from that of Background Music in Establishments, which depends on the physical size of the establishment.³⁹

³⁴ *Ibid.*

³⁵ CMRRA, "What's the difference between the reproduction and performing rights?" (2024), online (website): <https://www.cmrra.ca/wp_super_faq/whats-the-difference-between-mechanical-and-performing-rights/>.

³⁶ SOCAN, "SOCAN Reproduction Rights: It's Easy and It Pays Off" (2024), online (website): <<https://www.socan.com/what-are-socan-reproduction-rights/>>.

³⁷ CMRRA, "Our Services" (2024), online (website): <<https://www.cmrra.ca/music-publishers/our-services/>>.

³⁸ Re:Sound, "What We Do" (2024), online (website): <<https://www.resound.ca/what-we-do/>>.

³⁹ Mike Reid and Gavyn Backus, "Music Licensing" (March 2024) 44:3 TLJ at 2.

PART VIII: LEGAL AGREEMENTS

Part A: Collaboration and Joint Ownership Agreements

For artists collaborating on creative works, joint ownership agreements are essential to protect their individual and collective rights and specify who the owners of the work product are. While the Act does not explicitly regulate joint ownership, it provides a foundation for assigning ownership rights. These agreements establish clear terms regarding the management, use, and distribution of the jointly created work, helping to prevent disputes and ensuring fairness.⁴⁰

A well-crafted joint ownership agreement should cover several critical elements: usage, sales and transfers, revenue-sharing, and decision-making protocols. First, it must address the rights to use the work.⁴¹ Collaborators need to decide whether all parties must agree before one can license or sublicense the work. This ensures transparency and mutual consent in decisions affecting the work’s commercial and public use. The agreement should also define whether rights to the work can be sold or transferred and under what conditions.⁴² For example, if one artist wishes to assign their share of the copyright, the agreement should outline the process for obtaining consent from the other collaborators to avoid unilateral decisions that could impact the group’s interests.

Revenue-sharing is another key component for dividing generated income.⁴³ The agreement should specify how profits from the work—such as earnings from licensing or sales—will be divided among the collaborators. This prevents misunderstandings and provides a clear framework for financial accountability. Decision-making protocols are equally important, as they ensure that all parties understand how key decisions, such as licensing agreements, adaptations, or public exhibitions, will be made.⁴⁴ Clear procedures reduce the risk of conflicts and streamline the process of managing the work.

Exclusivity is another consideration that should be addressed in the agreement as collaborators may wish to determine whether any contributor has exclusive rights to specific elements of the work, such as designs, concepts, or sketches.⁴⁵

The absence of explicit provisions in the Act for joint ownership arrangements underscores the importance of such agreements. The law remains silent on operational aspects like revenue-

⁴⁰ Sanderson Entertainment Law. “Top 5 Legal Considerations Every Emerging Visual Artist Must Know”, (last visited 25 November 2024), online: <<https://www.dlapiper.com/en/insights/publications/2021/03/mastering-the-elements-of-good-licensing>>.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

sharing and decision-making among co-owners. Artists must proactively address these gaps through tailored agreements that reflect their specific needs and goals.

Part B: Commission Agreements

Commission agreements are legal contracts that outline the terms of compensation between an artist and the commissioner in exchange for the creation of new works to which the commissioner will have certain rights. They provide a legal basis for artistic freedom within set boundaries agreed upon by each party. Production of the work should not begin until all contract terms are negotiated, agreed to and the contract is signed.⁴⁶ If either party requests any changes be made, they must be negotiated and agreed to, then recorded in a signed addendum to the original contract.⁴⁷

There are parts of a commission agreement which are essential to the contract, and can be used to legally protect any rights that the artist wishes to retain in relation to the work:

Parties

Identifies the commissioning party and the artist as the contributor of the work.

Term

Identifies the term of the agreement when the parties seek to enter into an agreement that is either:

- for a specified term, which may or may not be subject to renewal; or
- “evergreen”, in that the agreement will continue in effect until either party decides they would like to terminate it.⁴⁸

The term of the agreement does not need to be included in the contract if the agreement is only intended to cover one or more specific works commissioned at the time of the agreement.

Works

This section identifies expectations for the work that is to be completed by the artist for the commissioner, either for specified works or for a defined term. For works that are specifically commissioned at the time of the agreement, parties should set and record specific criteria such as

⁴⁶ “Public Art Commissions” (6 July 2019), p 6, online: <<https://www.carfacalberta.com/wp-content/uploads/2019/07/6-Best-Practices-Public-Art-Commissions-Mar-14.pdf>> [Public Art].

⁴⁷ Practical Law Canada Commercial Transactions, “Freelance Contributor Agreement” (January 2024), Thomson Reuters Practical Law Canada, online: <https://ca.practicallaw.thomsonreuters.com/SharedLink/8e386270df124882a4f34157b510cf0d?productview=PLCC&VR=3.0&RS=cblt1.0> [Freelance Contributor Agreement].

⁴⁸ *Ibid.*

type, format, method of submission, and purpose.⁴⁹ This section provides guidance as to how much creative control will be given to the artist.

Where the commissioner may commission future works within the term of the contract, this section should specify any details that will apply to all works commissioned within the term.⁵⁰

This section should also specify if the terms of the agreement will apply to all works commissioned by the commissioner during the term, regardless if the works are completed or required to be completed prior to expiration or termination of the term.

Grant of Rights

This section outlines the intentions of the parties regarding ownership and use of copyright and other IP rights of the work. It will indicate whether the commissioning party will own the copyright and any other IP rights in the work, or if the artist will maintain ownership and only license copyright and IP rights to the commissioning party. In the absence of a written grant of rights where the artist is an independent contractor, copyright ownership will remain with the artist, and the commissioner receives a licence to use work.⁵¹ For work created in the course of employment, copyright ownership will automatically be assigned to the employer. Assignment and licence grants are only enforceable for the same term as the copyright itself.^{52, 53}

If the work's copyright will only be licensed to the commissioner, the terms of the licence will need to be specified.

Exclusivity

It will need to be indicated whether the licence is exclusive or non-exclusive. An exclusive licence gives the commissioner authorization to do any act, subject to copyright, and excludes all others, including the copyright owner, from using the work for the duration of the agreement term. An exclusive licence constitutes a grant of ownership pursuant to s. 3(7) of the Act.⁵⁴ A non-exclusive licence grants certain rights to the commissioner, but does not preclude the artist from granting similar licences to other parties, as well as maintaining those rights themselves.⁵⁵

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Copyright Act, supra* note 2 at s 3(1).

⁵² Practical Law Canada Commercial Transactions, "Copyright License Agreement" (September 2024), Thomson Reuters Practical Law Canada, online: <[https://ca.practicallaw.thomsonreuters.com/Document/Ica8344ebd02811e9adfea82903531a62/View/FullText.html?transitionType=SearchItem&contextData=\(sc.Search\)&firstPage=true&OWSessionId=NA&skipAnonymous=true](https://ca.practicallaw.thomsonreuters.com/Document/Ica8344ebd02811e9adfea82903531a62/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)&firstPage=true&OWSessionId=NA&skipAnonymous=true)> [Copyright License Agreement].

⁵³ "Transfer Ownership" (7 July 2022), Canadian Intellectual Property Office, online: <<https://ised-isde.canada.ca/site/canadian-intellectual-property-office/en/copyright/transfer-ownership#assignment>> [Transfer Ownership].

⁵⁴ *Ibid* at s 3(7).

⁵⁵ Copyright License Agreement.

A non-exclusive licence gives the artist more flexibility and earning capabilities; however, the commissioner may restrict the ability of the artist to provide the works to specific parties. A sole license can also be granted, which gives the commissioner or licensee exclusive third party rights, but the artist themselves also retains the right to exercise the licensed rights.⁵⁶ To create a sole license, the artist will have to explicitly reserve them in the license grant. If the commissioner will own the copyright for the work, the artist can be granted a limited licence to use the work for specific purposes in, which are usually narrowly defined and include self-promotion, for a limited term.

This section includes both economic and moral rights. As previously mentioned, moral rights include the artist's rights to the integrity of the work and to attribution. These rights cannot be assigned, but can be waived.⁵⁷ An assignment or license of copyright does not constitute a waiving of moral rights by the artist.⁵⁸ If moral rights are to be waived, it must be specified in this section. The artist has the right to request compensation for the waiving of moral rights, which will often be included in the consideration for the agreement.

This section should also discuss the use of the artist's name and information in connection to the work and any other derivative works, separate from intellectual property rights. This includes use in promotional contexts.

An artist should never give up any more rights than are necessary for the commissioning party to achieve their desired use for the work. The ability to retain rights depends on the specific work and its nature or purpose, the compensation for the work, and what is customary practice.

Payment

This section will specify the amount, method and timeline of payment. In best practice, payment upon signing of the contract may be around half of the total fee and include consideration of the costs an artist will incur in producing the work.⁵⁹ This section can also include any specifications regarding payment of taxes.

Attribution

This section addresses how the artist will be identified and the work attributed to them, including the placement of the attribution, and if the commissioner is to receive any co-attribution. It will also allow the artist to agree to non-attribution in circumstances where it is impractical.⁶⁰

⁵⁶ *Ibid.*

⁵⁷ *Copyright Act, supra* note 2 at s 17(2).

⁵⁸ *Ibid* at s 17(3).

⁵⁹ *Public Art, supra* note 37.

⁶⁰ *Freelance Contributor Agreement*, at para 8.

Representations

Can include that the artist created the work for the commissioner's purposes as outlined within the agreement, and that the creation of the work was done in accordance with any applicable laws. Another typical representation is that the work is original and that it does not infringe on any third party rights.

The scope of the representations can be limited by the artist through the addition of a knowledge qualifier, which limits the representations to being true to the knowledge of the artist at the time of the agreement. The scope can also be limited by restricting the territory of the representation.

All other representations and warranties, other those that are explicitly stated can be disclaimed to avoid making common law and statutory representations and warranties.

Indemnification

This term may be present in the agreement. Its purpose is to assert that in the case of breach of a representation or other obligation under the agreement by the artist, the artist will indemnify the commissioner against any losses resulting from the breach.

Artist may wish to limit the indemnification obligations to material breaches, gross negligence or more culpable conduct, claims arising under Canadian law, and awards of damages resulting from final judgements only.⁶¹

Other ways to limit exposure under contract are the inclusion of limitations on total damages provisions, having your corporation sign the agreement (rather than signing personally), and to have insurance in place on your business to respond to claims.

Relationships of the Parties

This section identifies if the artist is an independent contractor or employee of the commissioner. This distinction is important for the grant of rights, as the ownership, and therefore copyright, of works created under employment is automatically granted to the employer. As an independent contractor, the artist has control over the accomplishment of the commissioned work subject to the terms of the agreement, and will automatically hold copyright and ownership of the work. The commissioner only has the right to control the end result of the work as specified within the agreement.

Independent contractors are recognized as operating their own business, and provide services for an employer under contract.⁶² As an independent contractor, an individual or business has the

⁶¹ Freelance Contributor Agreement, at para 10.

⁶² Sam Zargami, "Independent Contractor vs. Employee" (October 2021), Queen's Law Clinics, online (website): <<https://queenslawclinics.ca/node/72>>.

ability to work with several clients which can increase the potential profits. It is crucial to include that the agreement is non-exclusive if the contractor wishes to engage in other contracts simultaneously with the agreement in question. Independent contractors have more freedom over their work, methods, and , but do not have the security afforded to employees completing work.⁶³ An independent contractor agreement should identify the expectations and scope of the services that the contractor will provide, but will acknowledge that the contractor has control over the performance of the work.⁶⁴

Governing Law

Identifies the territory and governing law that disputes regarding the agreement are subject to.

Termination

Indicates how the agreement can be ended by either party, in what situations either party has the right to end the agreement, and if there are any effects that will result from termination of the agreement.

Part C: Publication Agreements

Publication agreements are contracts between the copyright holder of a work and a party that wishes to reproduce the work and possibly publicly display reproduction(s). The copyright owner may be the artist, but it may also be a party that has previously acquired copyright from the artist. The copyright owner has the sole right to “reproduce the work or any substantial part thereof in any material form whatever... and to authorize any such acts.”⁶⁵ Any party that wishes to reproduce and publicly distribute work of which the copyright is owned by another party must obtain a licence to do so through an agreement such as this. By granting license to reproduce their work while retaining copyright, the artist can be compensated for use of their work while maintaining ownership of it.

The standard structure of a publication agreement includes:

Parties

Identifies the licensor as the copyright owner, and the licensee as the party that will be granted license to reproduce the work.

⁶³ Goulart, “Independent Contractor Relationship: Advantages and Disadvantages Table” (8 June 2024), Lexis+ Canada, online: <<https://plus.lexis.com/api/permalink/19fa8442-3dab-46d9-b2f1-e1ade7eac70a/?context=1537339>>

⁶⁴ *Ibid.*

⁶⁵ *Copyright Act, supra* note 37.

Term

Identifies if the licence will be for a limited term or perpetual in that it will continue until either party chooses to terminate it subject to the termination requirements outlined in the agreement.

Works

The work or works intended to be licensed should be clearly identified and described in this section, including the title of the work, and its subject matter. It is best practice to attach an image of the work where possible to avoid any disputes.⁶⁶

Grant of Rights

This section identifies rights to be licensed in accordance with the purpose and scope of the licence. It will identify whether the licensee will be granted an exclusive or non-exclusive licence. An exclusive licence to the work constitutes a grant of ownership interest subject to s. 13(7) of the Act,⁶⁷ and the licensor may be granted a licence back for any adaptations made.

If the licensee is granted a non-exclusive licence, this section will identify if the licensee has the right to sub-license the work and to which parties, if they have the right to alter the work or create derivative works, if they will be granted ownership of copyright in derivative works or if they will be granted to the licensor or artist, the territory that the licence applies to, the format in which they have the right to reproduce the work, and if the artist's moral rights in the work have been waived. Restricting the permitted use of work under the agreement will allow the copyright owner to maintain better control of the work.

This section will also identify the artist's right to be identified as the author of the work, if their moral rights have not been waived, and the preferred method of identification.

Licensor Obligations

This section identifies any obligations the licensor may have in relation to delivery of the work for reproduction purposes and in which form, and attests to the fact that the licensor has the right to license the work to the licensee.

Payment

This section will identify the method of payment to the licensor for use of the work by the licensee. This could be in the form of an annual or upfront licence fee, or ongoing royalty payments, or a combination of both. The amount of payment will depend on the scope of the

⁶⁶ Practical Law Canada Commercial Transactions, "Photograph/Image License Agreement (Pro-Licensee)" (January 2024), Thomson Reuters Practical Law Canada, online: <[https://ca.practicallaw.thomsonreuters.com/Document/I15bf1bf93bfd11e89bf099c0ee06c731/View/FullText.html?transitionType=SearchItem&contextData=\(sc.Search\)&firstPage=true&OWSessionId=a2f32041bdd2494b993c01d946d651dc&skipAnonymous=true](https://ca.practicallaw.thomsonreuters.com/Document/I15bf1bf93bfd11e89bf099c0ee06c731/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)&firstPage=true&OWSessionId=a2f32041bdd2494b993c01d946d651dc&skipAnonymous=true)>.

⁶⁷ *Ibid* at s 13(7).

licence, the amount of reproductions, the term of the licence, and the demand for the work within the relevant market as well as other factors. It will also address payment timing, method, tax payments and invoice requirements.

Termination

Indicates how the agreement can be ended by either party, in what situations either party has the right to end the agreement, and if there are any effects that will result from termination of the agreement.

Implications of Publication Agreements

There are both advantages and disadvantages for artists entering into publishing agreements. Solid contractual agreements are important for beneficial collaborations in the art community, and provide protection for both parties.⁶⁸ Publication agreements can limit the rights that an artist has over their work, but will provide them with compensation in return for the restriction or transfer of these rights. The publication or reproduction of an artist's work can lead to greater exposure for an artist. Licensing agreements allow artists to increase their economic benefit from a single work, however the licensee will likely earn more than you will for the contract.

Licensing contracts are usually for a limited term, so artists will have the ability to re-license the work or regain rights associated with the work once the term is over, subject to the terms of the agreement. The artist does not have to give away more rights than are necessary for the licensee to attain their goal in reproducing the work. They can maintain their moral rights to the work, which gives them some control over the integrity of the work and ensures that the work will be attributed to them if they wish. *Snow v Eaton Centre Ltd.* is a well-known case involving the infringement of an artist's moral rights. Michael Snow sold his sculpture "flight stop", which consisted of 60 sculpted geese in flight, to the Eaton Centre to be displayed in the shopping centre. The Eaton Centre attached ribbons to the geese as part of their seasonal decoration without the knowledge or consent of Snow, who argued in court that the bows distorted the naturalistic composition of his work and were prejudicial to his honor or reputation, contrary to s. 12(7) of the *Copyright Act*.⁶⁹ The court decided in favour of Snow, finding the Eaton Centre liable for violating his moral rights.

There are limits placed on the artist in cases of licenses and copyright transfer that can restrict, either partially or completely, how they can use their work in the future.⁷⁰ Complete transfer of ownership means that the artist gives up any economic rights to the work that they have, and they have no right to resulting profit from their work other than the agreed upon compensation.

⁶⁸ Sanderson Entertainment Law, "Navigating Intellectual Property Law for Canadian Visual Artists" online: <<https://www.sandersonlaw.ca/blog/intellectual-property-law-for-canadian-visual-artists>>

⁶⁹ *Snow v. The Eaton Centre Ltd.* (1982), 70 C.P.R. (2d) 105 at para 3.

⁷⁰ Transfer Ownership.

Handling Disputes Over Intellectual Property or Copyright Infringement

If an artist's work is used without their permission, and they own the copyright, they are "entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right."⁷¹ As the Canadian Intellectual Property Office registers copyright, but does not concern themselves with overseeing or enforcing it, it is up to the owner of the copyright to monitor and establish an infringement of their copyright or IP rights.⁷² This can be achieved through the use of online monitoring services or legal professionals who offer IP surveillance to ensure any infringements are detected and all relevant information is collected to assert a claim. The holder of copyright must identify the IP rights that they own, then identify all parties and locations involved in the infringing activity.⁷³ It can be helpful to learn whether there is a previous history of infringement, what the litigation process was like, and what means the infringer has to address infringement allegations. After this, the owner has to collect evidence to prove which IP rights have been infringed⁷⁴

After establishing an infringement, the owner can send a cease-and-desist letter or notice through the notice and notice regime.⁷⁵ They can also offer the infringer the option to license the copyright. Before pursuing legal action to enforce IP rights, the owner should weigh the potential costs and benefits associated with legal action.⁷⁶ While collecting evidence on the alleged infringer, the owner should research the means the infringer has to compensate them if they are found guilty of infringement, and if this would outweigh their own legal costs.⁷⁷ If an owner decides that they do not want to pursue legal action, they can also choose to resolve disputes through alternative routes of mediation or arbitration. If an infringement issue cannot be solved amicably, or the owner wishes to pursue legal action, they can seek statutory damages, without needing to prove actual loss, or punitive damages which are evaluated in court.

CARFAC works with several legal clinics across Canada that provide artists with affordable legal information, including pro-bono clinics.⁷⁸ They also offer to link members with legal services and resources which best suit specific issues. Artists' Legal Advice Services in Toronto

⁷¹ *Copyright Act, supra* at s 34(1).

⁷² "Copyright infringement" Canadian Intellectual Property Office, (19 March 2021), online (website): <<https://ised-isde.canada.ca/site/canadian-intellectual-property-office/en/copyright-infringement>>.

⁷³ "Defending intellectual property rights: Establish infringement claims" Canadian Intellectual Property Office, (19 March 2021), online (website): <<https://ised-isde.canada.ca/site/canadian-intellectual-property-office/en/defending-intellectual-property-rights/defending-intellectual-property-rights-establish-infringement-claims>>.

⁷⁴ *Ibid.*

⁷⁵ "Defending intellectual property rights: Determine your enforcement strategy" Canadian Intellectual Property Office, (19 March 2021), online (website): <<https://ised-isde.canada.ca/site/canadian-intellectual-property-office/en/defending-intellectual-property-rights/defending-intellectual-property-rights-determine-your-enforcement-strategy>>.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ "Legal Clinics For Artists" CARFAC, online (website): <<https://www.carfac.ca/tools/legal-clinics-for-artists/>>.

offers legal resources tailored to artists, and also has online databases, clinics, and educational sessions.⁷⁹

⁷⁹ “Resources” Artists’ Legal Advice Services, online (website): <<https://www.alasontario.ca/resources/>>.

PART VIX: FURTHER RESOURCES

Reproduction and Attribution Tool Box

Metadata

Metadata Quality Control (AVP): “free and open-source application that allows users to create rules on embedded metadata, scan a set of files, and report on the conformance of each file against the user-defined rules.”⁸⁰

Licences

Creative Commons: enables artists to create standardized licenses that grant the public permission to use their copyrighted works.⁸¹

Watermarking

Adobe Photoshop: artists can add watermarks to their work by overlaying text or logos with adjustable opacity, ensuring their copyright is visibly protected.⁸²

Blockchain Technology

Binded (formerly Blockai): blockchain-based copyright registration and monitoring for artists.⁸³

Reverse Image Search Technology

ImageRights International, Inc.: uses image recognition technology to track the usage of images online⁸⁴

Google Reverse Image Search: can use the search engine to identify unauthorized use of their work online by locating where their images appear across the web.⁸⁵

⁸⁰ AVP, “MDCQ” (last visited 26 November 2024), online (website):

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⁸¹ Creative Commons, “What We Do” (last visited 26 November 2024), online (website):

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⁸² Adobe, “Photoshop” (last visited 26 November 2024), online (website):

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⁸³ Binded, “About” (last visited 26 November 2024), online (website): <<https://binded.com/>>

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⁸⁴ Image Rights, “Services” (last visited 26 November 2024), online (website): <<https://www.imagerights.com/>>

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⁸⁵ Google, “Google Images” (last visited 26 November 2024), online (website): <<https://images.google.ca/>>

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PART X: TABLE OF AUTHORITIES

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