Collective societies, artists' associations, and other desperate measures to prevent the tidal wave:

The role of collective bargaining mechanisms in modern Canadian copyright contracts

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Abstract

In the area of copyright, contracts are the necessary means of making copyrighted works economically valuable. Canadian artists have historically found themselves in economically and contractually unfavourable positions. Collective bargaining mechanisms, such as copyright collectives and artists' associations, are underpinned by justifications that are aimed at assisting the correction of some of the contractual imbalances that artists face. Ultimately, however, despite the theoretical advantages that collective bargaining mechanisms might hold for artists in copyright contracting, these mechanisms have been unable to substantially increase the welfare of Canadian artists. If collective bargaining mechanisms are to become useful for Canadian artists in this aspect, they must be changed or amended so that they can play a meaningful role for artists—and must be able to account for future trends in copyrighting.

Resumé

Dans le domaine du droit d'auteur, les contrats sont les moyens nécessaires pour donner aux œuvres protégées une valeur économique. Les artistes canadiens se sont historiquement trouvés dans des positions économiques et contractuelles défavorables. Les mécanismes de négociation collective, tels que les sociétés de gestion des droits d'auteur et les associations d'artistes, reposent sur des justifications visant à corriger certains des déséquilibres contractuels auxquels les artistes sont confrontés. Cependant, malgré les avantages théoriques que les mécanismes de négociation collective pourraient offrir aux artistes dans les contrats de droit d'auteur, ces mécanismes n'ont pas réussi à augmenter de manière substantielle le bien-être des artistes canadiens. Pour que ces mécanismes de négociation collective deviennent utiles pour les artistes canadiens à cet égard, ils doivent être modifiés ou amendés afin qu'ils puissent jouer un rôle significatif pour les artistes—et doivent être capables de tenir compte des futures tendances en matière de droit d'auteur.

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Abbreviations

ACTRA	Alliance of Canadian Cinema, Television and Radio Artists
AI	Artificial intelligence
CARFC	Canadian Artists' Representation / Le Front des artists canadiens
SAA	*Status of the Artist Act*
SCC	Supreme Court of Canada
SOCAN	Society of Composers, Authors and Music Publishers of Canada

INTRODUCTION

1) The Emerging Importance of Collective Bargaining Mechanisms in Copyright Contracts

Canadian copyright law is inextricably bound up with myriad other concepts and other areas of law. This is particularly true of contract law, which has always been of vital importance for copyright law. In many ways, copyright law in general can be considered in contractual terms: "Copyright is essentially a contract between the author and the public with the government acting as the agent of the public. The consideration received by authors is defined by duration and breadth of exclusivity. The consideration for the public is the creation of a 'work' that will be available on a limited basis for the life of the author plus [a number of years] and then available without limit after that.".[1] Similarly, as is expounded upon in more detail in the body of this research, copyright without contract law is much less powerful: it is only through contracts that artists of a copyrighted work are able to control who uses, distributes, and disseminates their work and under what conditions that happens. Therefore, contracts play a vital role in determining the role of the artist in Canadian society at large: if the types of contracts that are possible or prevalent in the space of copyright are detrimental for Canadian artists, it has the potential to undermine the role of artists in Canada altogether.

The current climate for copyright law contracts in Canada is in great flux. Jurisprudence from the last two decades indicates a shift away from considering the rights of artists in copyright contexts, and a shift towards the rights of users of a copyrighted work.[2] There is an ever-escalating tension between the fields of copyright law and constitutional law—in terms of both jurisdictional issues and issues stemming from the *Canadian Charter of Rights and Freedoms*. Technological developments (which have always been relevant in the area of copyright: it has been noted that "the institution of copyright is the child of technology"[3]) continue to drastically change the landscape within which copyrightable works are created,

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[1] Jeffrey L Harrison, "Copyright as Contract" (2015) 22:2 J Intell Prop L 279 at 281.
[2] See e.g. the Supreme Court of Canada's decision in: *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 [*CCH*].
[3] Caterina Sganga, *Propertizing European Copyright: History, Challenges and Opportunities* (Cheltenham, UK: Edward Elgar Publishing Limited, 2008) at 51, citing: Mark Rose, "Technology and Copyright in 1737: The Engraver's Act" (2005) 21 Journal of the Information Society 63 at 63.

distributed, and disseminated. Not only do technological developments change how copyrightable works operate, but they also have the potential to skew contracting in the space of copyright further in favour of users of a copyrighted work, rather than artists of that work.[4]

Since the 1990s, collective bargaining mechanisms have been implemented largely as a response to the concerns of artists regarding the role that they play in Canadian society: while Canadian policy has, by and large, lauded this role, the practical and economic realities that artists have historically faced fail to reflect this. Since their introduction to the area of Canadian copyright law—through the *Copyright Act* and the *Status of the Artist Act*—the focus on collective bargaining mechanisms has only increased and remains today a purported, but uneasy, source of contractual power for artists.

This research explores the current role of collective bargaining mechanisms, and provides an analysis of the efficacy of these mechanisms in light of the modern environment for contracting in Canadian copyright. This research considers the role of collective bargaining mechanisms primarily from the perspective of the artist. In Part I, this research is contextualized within the broader current Canadian approach to contracting in copyright in general. In Part II, the current framework for collective bargaining mechanisms in Canada is outlined in detail. Part III is concerned with exploring the theoretical and purported benefits of implementing collective bargaining mechanisms in this area, as well as exploring the practical effect that these mechanisms may have had for improving the status of artists in Canada. In Part IV, the main limitations of collective bargaining mechanisms are outlined, as well as possible solutions for these limitations. Finally, Part V offers an international perspective on collective bargaining in this area, and identifies key areas for the future of collective bargaining mechanisms.

2) A Definitional Note

For simplicity, this research broadly uses the word "artist" to refer to those who create copyrighted works. Use of the word "artist" is intended to be quite general, and to encompass people who are the primary creators of a copyrightable work. This can be contrasted with words

[4] See e.g. Giuseppina D'Agostino, "Copyright, Contracts, Creators: New Media, New Rules" (Cheltenham, UK: Edward Elgar, 2010).

or phrases that are often used in scholarship and in relevant literature. For instance, the expression "copyright holder" or "owner" of a given copyright is often used. However, the holder or owner of a given copyright of a given work often differs from the person who originally created this work: "Authors and copyright owners exercise rights that can conflict with each other. The very statement of the rights can lead to a puzzling assessment of the overall scope of the economic rights that are granted to them.".[5] For simplicity, this research primarily approaches copyright contracts from the artist's perspective. This is not to minimize the scope of possible contractual relationships that might exist in the field of copyright, but rather to focus this research on the contractual position of artists in particular. For instance, it cannot be ignored in the field of copyright that an artist of a given work might not also be the holder of the copyright in the work that they have created—or possibly even that the artist had never held copyright in the work that they have created, as might be the case for artists who create a work in the context of their employment.[6]

Notably, "artist" has been defined in Canada in relevant legislation. For instance, "artist" is defined in the federal *Status of the Artist Act* to refer to "independent contractors determined to be professionals" and who fall within an exhaustive list of artistic categories (such as authors, composers, performers, singers, etc…).[7] Use of the word "artist" in this research is intended to capture a broad range of people—including not only artists who are currently recognized by statute or jurisprudence, but also potentially types of artists who ought to be recognized, or artists who might be recognized in the future.

Similarly, this research takes a general perspective on the nature of contracts that are involved in copyright contracting—this is not to minimize the types of contracts that might be involved, or the types of specific rights that might be involved, but to provide an overview of the state of contracting for artists in Canada. Likewise, the status of artists in Canada might differ across industries, provinces, and contexts, and artists in different situations might face unique challenges. However, this research is aimed at providing an overarching view of collective

[5] Ysolde Gendreau, "Walking the copyright tightrope" in Paul Torremans, ed, *Research Handbook on Copyright Law, Second* Edition (Cheltenham, UK: Edward Elgar Publishing Limited, 2017) 1 at 5.
[6] *Copyright Act*, RSC 1985, c C-42 at s 13(3).
[7] *Status of the Artist Act*, SC 1992, c 33 at ss 5, 6(2)(b).

bargaining mechanisms as they apply broadly to the field of copyright contracts and therefore takes a general approach to the status of Canadian artists.

Finally, this research employs the term "collective bargaining mechanism" to refer to any type of activity that might involve or facilitate collective bargaining for artists. This is intended to be broader than words such as "collective society" (which has a specific definition as per the *Copyright Act*[8]), or "artists' association" (which has a specific definition as per the *Status of the Artist Act*[9]). Similar to the use of the word "artist", use of the term "collective bargaining mechanism" is intended to encompass a broad range of activities, procedures, or systems—both those that currently exist under Canadian law and those that ought to exist or may find legislative recognition in the future.

I. THE CANADIAN CONTEXT

1) Historical and Cultural Contexts

In the 1986 documentary "Poet: Irving Layton Observed", famed Canadian poet Irving Layton addresses the question of whether a distinctive style characterizes Canadian poetry. In his vehement response that there is a uniquely Canadian style of poetry, Layton comments:

> The fact remains that Canada has produced an extremely sophisticated poetry, especially the poetry that I call the poetry of the "double hook":…beauty and terror. A Canadian child becomes conscious that somehow nature—the world out there—exhibits these two things: beauty and terror. And then of course you are conscious of the winter—the great beauty of the winter—the wonderful white radiance, but still the danger…there is always that element of menace. The feeling is that we can be swallowed up at any time by a tidal wave of history or of nature—a flood of some kind—and we wouldn't even be missed.[10]

Indeed, Canadian narratives of art and culture have historically been preoccupied with forging an artistic culture that is uniquely "Canadian" and seems to have been underpinned by

[8] *Copyright Act*, *supra* note 6 at s (2).
[9] *Status of the Artist Act*, *supra* note 7 at s 5.
[10] Donald Winkler, "Poet: Irving Layton Observed" (1986) at 00h:17m:47s, online (documentary): <nfb.ca/film/poet_irving_layton_observed/>.

this very feeling that Layton describes—the feeling that Canadian culture can be swallowed up at any time by a tidal wave of history or of nature, and that it would not be missed at all.

This so-called "element of menace" is something that has pervaded policy and laws regarding Canadian cultural products and outputs from Canada's inception as a nation-state: "[N]ation-builders identified and mobilized cultural devices in hopes of imprinting a sense of nationhood during periods of insecurity…[Historical moments of nation-builders using culture to imprint a sense of nation-hood] expose changing conceptions of nation, culture, state involvement, and an ongoing post-colonial process of not one but a series of radically different nationhoods, each held fast in the minds and imaginations of its advocates only to give way to a new model tenuously tailored to the realities of maintaining a national project in a changing world.".[11] As early as 1832, Canadian legislation related to culture was informed by a sense of self-preservation, of breaking free from the dampening cultural policy of colonial powers, and of asserting a "Canadian" culture.[12] Similarly, as Canada entered confederation in 1867 and became more independent from European colonial oversight in the 18th and early 19th centuries, Canadian cultural policies and laws were shaped by a desire of policymakers to create the new "Canadian" identity (as they saw it)—to establish a uniquely Canadian culture.[13]

Similarly, in subsequent years, Canadian cultural policy was largely aimed at ensuring that Canadian culture remained independent and distinct from American culture, or what has been referred to as American "cultural imperialism": "[In Canada], cultural free trade raises the spectre of standing unprotected against the forces of American cultural annexation".[14] For instance, this concern can be seen in "historical" or "early" cultural mediums, such as broadcasting and radio: "While the Canadian state took form…the federal government began to enlarge its activities and put forward its centralizing project: the promotion of *one* Canadian identity by opposition to the more and more influential American popular culture.".[15] Indeed, the

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[11] Ryan Edwardson, "Canadian Content: Culture and the Quest for Nationhood" (Toronto: University of Toronto Press Incorporated, 2008) at 5-6.
[12] Pierre-Emmanuel Moyse, "Colonial copyright redux: 1709 *v.* 1832" in Lionel Bently, Uma Suthersanen & Paul Torremans, eds, *Global Copyright: Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace* (Cheltenham, UK: Edward Elgar Publishing Limited, 2010) 144.
[13] Edwardson, *supra* note 11 at 5-9.
[14] Kevin V Mulcahy, "Cultural Imperialism and Cultural Sovereignty: U.S.-Canadian Cultural Relations" (2000) 30:2 American Review of Canadian Studies 181 at 182.
[15] Michel Filion, "Broadcasting and cultural identity: the Canadian experience" (1996) 18:3 Media, Culture & Society 447 at 449.

Canadian *Broadcasting Act* explicitly outlines the goals of Canada's broadcasting system as being to "serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada" and "encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, value and artistic creativity…".[16]

While the roots of Canadian cultural policy can be traced back to more traditionally popular types of media, the concern for fostering and encouraging uniquely Canadian content, media, and art is still very much at the forefront of policy and lawmaking today, and this concern can be seen in more modern or emerging mediums and industries. For instance, while the radio industry has been an active site of regulation to protect Canadian culture since the 1960s, as satellite radio was licensed in Canada in 2005 and swiftly followed by notable mergers in the industry and changes to the way that people accessed radio content (such as using mobile listening devices), Canadian policymakers had to adapt the way in which Canadian content was given priority in radio.[17]

Similarly, Canadian cultural policy has recently begun to adapt to recent changes in Canadian media and cultural industries—such as an increase in online content distribution, a shift away from conventional means of broadcasting, and an increased presence of foreign digital platforms.[18] While the recent shift of "Canadian cultural policy in response to massive digitization" has been described as a shift to promoting (as opposed to protecting) Canadian culture, the sentiment that Canadian art and culture ought to be bolstered by and encouraged by policies and laws remains strong.[19] This can also be seen in recent discussions regarding the intellectual property chapter of the North American Free Trade Agreement (NAFTA): there are

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[16] *Broadcasting Act*, SC 1991, c 11 at ss (3)(d)(i) and (ii).
[17] Brian Fauteux, "Satellite footprint to cultural lifelines: Sirius XM and the circulation of Canada content" (2016) 22:3 International Journal of Cultural Policy 313.
[18] Charles H Davis & Emilia Zboralska, "Cultural Policy in the Time of Digital Disruption: The Case of Creative Canada" in Luis A Albornoz & Mª Trinidad Garcia Leiva, eds, *Audio-Visual Industries and Diversity: Economics and Policies in the Digital Era* (New York: Routledge, 2019) 152; For a discussion on the complexities that are caused by increasing digitization and the presence of foreign content providers—such as Netflix—in Canadian cultural markets, see Emilia Zboralska & Charles H Davis, "Transnational over-the-top video distribution as a business and policy disruptor: The case of Netflix in Canada" (2017) 4:1 Journal of Media Innovations 4.
[19] Davis & Zboralska, *supra* note 18 at 160.

concerns that Canadian cultural policy and related intellectual property aims will be undermined if Canada is overaccommodating to American policy preferences.[20]

Therefore, promoting Canadian content seems to very much be at the forefront of law and policy considerations in the realm of copyright today. It has been noted that: "Contracts lie at the heart of the regulatory system governing the creation and dissemination of cultural products…" and "[c]opyright itself is not an incentive mechanism, but (assuming that it is enforced) it does allow an incentive mechanism, namely contracts, to operate.".[21] Therefore, Canadian artists will be more incentivized to create copyrightable works if they are able to enter into contracts that have favourable terms for themselves. A vital aspect of ensuring that Canadian content is not swallowed up by a tidal wave of history or of nature is ensuring that Canadian artists of copyrightable materials are contractually empowered.

2) Complexities Arising from the Collision of Civil Law and Common Law

Similar to how Canadian cultural policies in the 19th and 20th centuries were largely concerned with ensuring that a uniquely Canadian voice would not be drowned out by dominating European or American culture, another struggle characterized the historical development of these laws and policies: the struggle between French and British approaches to law. This can be seen in the type of outputs that were historically copyrighted in Canada. For instance: "The province's dual history shaped its search for identity, as can be discerned in the copyright registration data. In English Canada, copyright-protected books and other works on patriotic themes fostered a nationalist pride that grew over time, especially as Confederation neared. For French Canadians, the anxiety over safeguarding their history, their language, and their laws can be gleaned from the registered material.".[22] This struggle can be seen in specific industries as well. It has been noted that: "As much as the influence of the USA the Canadian

[20] See e.g. Michael Geist, "Five Ways NAFTA Talks Can Level the Innovation Playing Field", in Centre for International Governance Innovation, *NAFTA 2.0 and Intellectual Property Rights: Insights on Developing Canada's Knowledge Economy* (Waterloo, ON: Centre for International Governance Innovation, 2017) 7.
[21] Martin Kretschmer, "Copyright and Contract Law: Regulating Artist Contracts: The State of the Art and a Research Agenda" (2010) 18:1 J Intell Prop L 141 at 143-144, quoting: Richard Watt, "Regulating User Contracts: Economic Theory of Copyright Contracts" (2019) 18 J Intell Prop L 173 at 181.
[22] Myra Tawfik, *For the Encouragement of Learning: The Origins of Canadian Copyright Law* (Toronto: University of Toronto Press, 2023) at 248.

cultural and linguistic duality might have been a determining factor in the evolution of Canadian broadcasting.".[23]

While the effects of the clash between French and British approaches and cultures can be seen in Canada's creative and cultural development, the clash between the two systems is also starkly illustrated in Canada's modern-day intellectual property law regime—and particularly in Canada's copyright law framework. Notably, the clash between the two types of law present problems in this area of law because the British common law and French civil law are underpinned by very different rationale and philosophies. This clash creates tension in Canadian jurisprudence—particularly in regards to what the goal of copyright law might be, the role of the artist in copyright law, and the appropriate place for each system of law in the modern Canadian copyright framework.[24]

For instance, the origins of the English copyright regime can largely be traced back to the 1710 Statute of Anne.[25] The Statute of Anne emerged in a context where printers and booksellers were able to exercise economic control over the works that authors created—largely by "tackling piracy, minimizing free-ridership, and establishing market power.".[26] The rationale for the Statute of Anne has similarly been described as a means to promote learning and progress in society, and to act in a way to further the public good.[27] More specifically, the Statute of Anne was based on economically-linked concepts, including: the notion that people ought to have a "natural right of property in the results of [their] labor"; that they should be able to benefit economically from the work that they themselves spend time and effort into creating; that there ought to be incentives for people to continue to create and produce more intellectual products; and that "[t]he social usefulness of copyright consists in providing an economic basis for creation.".[28] The Statute of Anne's foundational concept of bestowing upon artists—and subsequent owners of a given copyright—a monopoly in the work that they create is a common thread that underpins all

[23] Filion, *supra* note 15 at 448.
[24] See e.g. Pierre-Emmanuel Moyse, "La genie du droit d'auteur" (2021) 33:1 Cahiers de propriété intellectuelle 111.
[25] Thomas B Morris Jr, "The Origins of the Statute of Anne" (1961) 12 Copyright L Symp (ASCAP) 222.
[26] Dennis W K Khong, "The Historical Law and Economics of the First Copyright Act" (2006) 2 Erasmus L & Econ Rev 35 at 38.
[27] Gillian Davies, *Copyright and the Public Interest* (PhD Thesis, Aberystwyth University, 1997) [unpublished] at iix.
[28] *Ibid* at 8-15.

copyright law frameworks that base themselves on Anglo-American law—including those of Canada.[29]

In contrast, the French counterpart to the British approach was historically less concerned about more economic concepts such as incentivization and proprietorship, and more concerned about romantic or moral considerations linked to the idea of an author as an artist—with the "droit d'auteur". Though economic concerns were not entirely absent from the development of copyright law in France, while the English approach was largely concerned with the "public good", the French approach to copyright law took a more individualistic approach and was more concerned with the romantic notion of the artist.[30] For instance, historically there was an emphasis on the "…need to recognize the [author] as owner of his creation, for this was 'the most precious part of himself, that part which…immortalizes him'.".[31] This philosophical underpinning informing French approaches to copyright law contributed to the development of some unique aspects of French copyright law. For instance, the emergence of "moral rights" in copyright law as a legal right held by the artist of a work is directly related to these sorts of romantic conceptions of the artist: "…the sanctity of the author's bond with her work could emerge more easily and attributed a much stronger personalistic nature to the *propriété littéraire* compared to other traditional property rights, which ultimately led to the judicial creation of moral rights.".[32]

In the modern Canadian copyright law regime, the histories of both the British and the French systems of law have left notable legacies. The Supreme Court of Canada directly addressed how the two approaches of law have informed Canadian copyright law in the 2002 decision *Théberge v Galerie d'Art du Petit Champlain Inc* [*Théberge*].[33] In this decision, the court makes a number of comments on how artists of copyrightable works have both English-informed economic rights and French-informed moral rights:

> [12] Generally speaking, Canadian copyright law has traditionally been more concerned with economic than moral rights. Our original [Copyright Act], which came into force in 1924, substantially tracked the English Copyright Act…The

[29] Morris Jr, *supra* note 25 at *222*.
[30] Sganga, *supra* note 3 at 63-74.
[31] *Ibid* at 66.
[32] *Ibid* at 72.
[33] *Théberge v Galerie d'Art du Petit Champlain Inc*, 2002 SCC 34 [*Théberge*].

> economic rights are based on a conception of artistic and literary works essentially as articles of commerce. (Indeed, the initial Copyright Act, 1709 (U.K.), 8 Anne, c. 19, was passed to assuage the concerns of printers, not authors.)…
>
> …
>
> [15] Moral rights, by contrast, descend from the civil law tradition. They adopt a more elevated and less dollars and cents view of the relationship between an artist and his or her work. They treat the artist's oeuvre as an extension of his or her personality, possessing a dignity which is deserving of protection…
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> …
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> [62] It is not altogether helpful that in the French and English versions of the [Copyright Act], the terms 'copyright' and 'droit d'auteur' are treated as equivalent. While the notion of 'copyright' has historically been associated with economic rights in common law jurisdictions, the term 'droit d'auteur' is the venerable French term that embraces a bundle of rights which include elements of both economic rights and moral rights. As Professor Strowel observes:
>
> [TRANSLATION] The expressions 'droit d'auteur' and 'copyright' speak volumes in themselves. It has been pointed out that the distinction between the copyright tradition and the 'droit d'auteur' tradition is based on a question of terminology: where the followers of the first tradition, the British and their spiritual heirs, talk about 'copyright' to refer to a right that derives from the existence of a 'copy', an object in itself, the followers of the second tradition talk about 'authors right' (droit d'auteur) to refer to a right that stems from intellectual effort or activity brought to bear by an author, a creator. This is the fundamental difference: on the one hand, a right that is conceived of by reference to the author, the creative person, and, on the other, by reference to the copy of the work, the product of the creative activity that is protected against copying."

Théberge is particularly notable because it emphasizes that economic considerations and the "public interest" were just as important as other considerations, and in this way demarcated a shift in Canadian jurisprudence "away from its previous author-oriented approach and toward the idea that copyright involves a balance between two sets of interest…".[34] Subsequent decisions, such as *CCH Canadian Ltd v Law Society of Upper Canada* [*CCH*][35] have cemented the notion that the public interest—and not only the rights of the author—is an informing principle shaping

[34] Carys J Craig, "The Evolution of Originality in Canadian Copyright Law: Authorship, Reward and the Public Interest" (2005) 2:2 UOLTJ 425 at 434.
[35] *CCH*, *supra* note 2.

copyright law.[36] Similarly, in the more recent case of *Cinar Corporation v Robinson* [*Cinar*], the court notes the importance of copyright law acting to further the public interest: "[The *Copyright Act*] seeks to ensure that an author will reap the benefits of his efforts, in order to incentivize the creation of new works.".[37]

Therefore, Canada's current copyright law framework is unique and presents a complicated contractual environment for artists of copyrightable work because it is built upon the tension of two different sets of philosophies, rationale, and underpinnings that shape the rights of artists. Furthermore, this environment is complicated by the fact that the current shift in Canadian jurisprudence—as articulated in decisions such as *Théberge*, *CCH*, and *Cinar*—is a shift away from artists' rights and towards the interest of the public at large instead. Thus, as the rights of artists are being increasingly skewed to favour the public—or even the users of a copyrightable work[38]—rather than the artists themselves, the way that contract law operates for artists becomes even more important.

3) Complexities Arising from Canadian Federalism

The Canadian framework for copyright can be characterized by an overarching sense of fragmentation. The Canadian constitution, as articulated in the *Constitution Act, 1867*, explicitly grants the federal government authority over copyright.[39] Furthermore, historically, "[t]he federal government has been far more active and has had a far more pervasive impact in the cultural field over the past forty years than have the provinces.". This can be seen in a number of federally-led initiatives in the cultural sector in Canada, including the 1949 Massey Commission, the 1957 Canada Council, and the 1968 establishment of the Canadian Radio-Television and Telecommunications Commission (CRTC). [40] In these ways, the federal government—as opposed to provincial governments—maintains both an explicit power over copyright law, and

[36] Craig 2005, *supra* note 34.
[37] *Cinar Corporation v Robinson*, 2013 SCC 73 at para 23.
[38] See e.g. *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36.
[39] *Constitution Act 1867*, 30 & 31 Victoria, c 3 (UK) at s 91(23).
[40] Patrick J Monahan, "Culture and the Canadian Constitution" (1993) 31:4 Osgoode Hall L J 809 at 813.

de facto power (which has been linked to the ability of federal government to spend in this area) over national cultural initiatives.[41]

This presents complexities for Canadian artists because of how the *Constitution Act, 1867* allocates powers to provinces: while copyright is allocated to be under federal jurisdiction, many of the most important related bodies of law are under provincial jurisdiction. For instance, provincial governments have jurisdiction over "property and civil rights in the province.".[42] This broadly-phrased phrase has captured a vast array of different types of rights and laws—including those falling under contract law and those falling under labour law.[43] Therefore, the Canadian federal environment presents complexities for artists of copyrightable material because while copyright itself falls under federal jurisdiction, the primary ways of monetizing, disseminating, and controlling the rights bestowed by copyright legislation are provincially regulated.

In the modern context, this causes even more uncertainty around which level of government rightfully has jurisdiction over a given component of copyright law. For instance, "technological protection measures" and "rights management information systems" have been referred to as "paracopyright" provisions due to the unique role that they play in the copyright legal landscape.[44] In particular, these types of measures and systems present a novel problem for the division of powers in Canadian federalism: "Although paracopyright provisions are in a way connected to copyrights, they simultaneously implicate issues typically reserved for provincial legislators, such as contractual obligations, consumer protection, e-commerce, and the regulation of classic property.".[45] This creates uncertainty for contracts governing in this space, as legislation attempting to regulate these types of measures and systems may arguably be unconstitutional.

Another fragmentation in the field of copyright law in Canada has also been noted: freedom of expression—which is inextricably intertwined with copyright law—enjoys

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[41] *Ibid* at 814.
[42] *Constitution Act 1867*, *supra* note 39 at s 92(13).
[43] Library of Parliament, "The Distribution of Legislative Powers: An Overview" (Ottawa: Library of Parliament HillStudies, 3 January 2022) online: <lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201935E>.
[44] Jeremy F deBeer, "Constitutional Jurisdiction Over Paracopyright Laws" in Michael Geist, ed, *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law Inc, 2005) 89.
[45] *Ibid* at 90.

constitutional protection through the *Constitution Act, 1982*.[46] This presents further complexities for artists of copyrightable material in Canada because the underlying rationale for the constitutionally-enshrined freedom of expression and copyright law have been described as being fundamentally at odds with one another: "Section 2(b) of the Charter constitutionally guarantees freedom of expression, while the Copyright Act creates an exclusionary interest over the expression of an idea fixed in a tangible form. Put in this way, the question is not whether the Copyright Act is constitutionally questionable but, rather, how can it be anything but?".[47] In practice, this has the potential to pose dangers to Canada's system of copyright law: "When defined in opposition to the social purposes of free expression, copyright loses its coherence and hence its legitimacy. If the private property rights conferred in the name of copyright contradict the values underlying free expression, they also work against the values that underlie copyright; the copyright system then fails on its own terms.".[48]

Furthermore, in the wake of increasing digitization and the increased available of online works, there has been a recent push in Canada for the legislature and the judiciary to recognize that freedom of expression, as a constitutionally-enshrined right, ought to result in a more user-friendly and less author-focused framework.[49] For instance, this push can be seen in the area of technological protection measures, which some worry advance the interests of copyright holders at the expense of users' rights.[50] This approach has already gained significant traction in the international context, as there is a growing trend in the "digital era" for courts to interpret the right of freedom of expression in a copyright context as a means to emphasize the rights of users of a copyrightable work as opposed to the rights of artists of these works.[51]

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[46] David Fewer, "Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada" (1997) 55:2 U Toronto Fac L Rev 175.
[47] Carys J Craig, "Putting the Community in Communication: Dissolving the Conflict between Freedom of Expression and Copyright" (2006) 56:1 UTLJ 75 at 77.
[48] *Ibid* at 114.
[49] See e.g. Saleh Al-Sharieh, "Securing the Future of Copyright Users' Rights in Canada", (2018) 35 Windsor Y B Access Just 11.
[50] Danny Titolo, "Canadian copyright law and the *Charter of Rights and Freedoms*: Statutory property rights trump constitutionally guaranteed expression" (2017) 12:1 JIPLP 30.
[51] See e.g. Elena Izymenko, "The Freedom of Expression Contours of Copyright in the Digital Era: A European Perspective" (2016) 19:3 J of World IP 115.

4) A Note on Indigenous Law

While the tensions between French and British approaches to copyright law and the tensions between federal and provincial levels of governance have largely shaped Canada's current copyright regime, Indigenous sources of culture and law have been noticeably absent throughout Canada's history (and indeed, remain largely absent to this day). For instance, it has been commented that "The deeply entrenched narrative of the two founding peoples—French Catholic and English Protestant—meant that Indigenous peoples and religious or racialized minorities were ignored in copyright policies and practices, just as they were within the province's book and print culture as a whole.".[52] Similarly, Canada's historically "protectionist" approaches to its culture, and the rationale underpinning federal control over aspects of culture, have been critiqued as perpetuating a "settler colonial vision of cultural citizenship that remains skewed by ethnolinguistic hierarchies"—often to the detriment of those who find themselves a cultural minority in Canada.[53] The effect that this has on Indigenous artists is profound and marked. For instance, a study conducted in 2010 found that "…an estimated $52 million is spent on Inuit art annually, yet the Inuit artists receive no compensation from the thriving market for their work.".[54] This is just one example of a broader problem: in general, Indigenous artists and Indigenous art are the victims of exploitation.[55]

The historical tendency to ignore Indigenous cultures, traditions, and laws when regulating in the field of copyright has legacies that persist until today. For instance, the Canadian requirements for a work to be copyrightable are often at odds with Indigenous approaches to creation. This can be seen in the Canadian approach to the requirement of "originality" as a requirement for materials to attract copyright—the current approach results in a situation where "Traditional songs and stories are not considered original work…However, the act of recording traditional songs and stories can mean that copyright ends up belonging to non-Indigenous people, usually the ethnomusicologists and folklorists who tape songs and stories as

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[52] Tawfik, *supra* note 22 at 248.
[53] Mariana Bourcheix-Laporte, "Canadian Cultural Naitonalism in the Time of Digital Platforms: Reframing Proposed Amendments to the Broadcasting Act" (2003) 48:1 Canadian Journal of Communication 81 at 81.
[54] Allison Schten, "No More Starving Artists: Why the Art Market Needs a Universal Artist Resale Royalty Right" (2017) 7:1 Notre Dame J Int'l & Comp L 115 at 122.
[55] House of Commons, *Statutory Review of the Copyright Act: Report of the Standing Committee on Industry, Science and Technology* (June 2019) (Chair: Dan Ruimy) at 26.

part of their research.".[56] Similarly the requirement of "fixation" also presents problems for Indigenous works: "The fact that Indigenous knowledge can be dynamic, constantly being created and adapted to meet current conditions, can make Canadian copyright law's 'fixation' requirement (that the work be 'fixed' in a tangible medium) difficult to satisfy. Fixation at a specific time often is contrary to the laws of the peoples from whom that knowledge grew.".[57]

Not only are the more technical requirements for copyright under Canadian legislation at odds with Indigenous approaches to creating, but oftentimes, the very philosophical underpinnings and nature of "copyright" is incognizable when applied in these areas of Indigenous creating. Copyright law, by its nature, bestows rights upon an artist, or an author, of a given work—this "authorship" is based on a specific set of values and assumptions: "Authorship in the context of copyright laws has its grounding in Romantic Individualism, which can run directly contrary to authorship as it is conceived of by Indigenous peoples.".[58] Indigenous conceptions of "authorship" differ in that they may consider a given work as communal property, or as having deeper cultural or spiritual significance: "From the Indigenous viewpoint, traditional knowledge is owned by the whole community from which the knowledge originates rather than from a single person. It is considered a mutable collective force of which everyone in the community is deemed a creator, purveyor and owner.".[59]

Additionally, North American approaches to Indigenous works have been critiqued as treating Indigenous works or cultural products as *de facto* within the public domain—meaning that they do not enjoy the same legal copyright protections as other works might. This has the adverse consequence of creating distance between members of these communities and their culture.[60] In addition, this has the adverse consequence of potentially undermining the contractual rights of artists who create works and products in this space. As a result of the

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[56] Allison Mills, "Learning to Listen: Archival Sound Recordings and Indigenous Cultural and Intellectual Property" (2017) 83 Archivaria 109 at 113.
[57] Camille Callison et al, "Engaging Respectfully with Indigenous Knowledges: Copyright, Customary Law, and Cultural Memory Institutions in Canada" (2021) 5:1 KULA 1 at 4.
[58] Megan M Carpenter, "Intellectual Property Law and Indigenous Peoples: Adapting Copyright Law to the Needs of a Global Community" (2004) 7 Yale Hum Rts & Dev LJ 51 at 58.
[59] *Ibid* at 58-62; See e.g. Linsday Paquette, "Bill C-15 and the United Nations Declaration on the Rights of Indigenous Peoples: A Proposal for Intellectual Property Law Reform in Canada for the Protection, Preservation and Prosperity of Indigenous Traditional Knowledge and Cultural Expression" (2022) 34 IPJ 181 at 189.
[60] George Nicholas, "Indigenous Cultural Heritage in the Age of Technological Reproducibility: Towards a Postcolonial Ethic of the Public Domain" (2014) [unpublished, prepared for *Dynamic Fair Dealing: Creating Canadian Culture Online*, edited by R J Coombe and D Wershler].

incompatibility of the current framework for copyright law in Canada and Indigenous approaches to art, the *Copyright Act* has been critiqued as not only being inadequate as a means for allowing Indigenous artists to access copyrights in their work, but also for further perpetuating the devaluation of Indigenous art and encouraging the exploitation of this work and the artists who create them.[61]

While this research primarily focuses on Canadian copyright law as it currently exists, it must be recognized that contractually empowering Canadian copyright artists cannot be successfully accomplished without ensuring that Indigenous artists enjoy adequate protections for the work that they create. This comment is not a novel one—there have been many critiques of the Canadian copyright law framework for failing to adequately account for rights of Indigenous artists, accompanied by many calls for change. For instance, there have been calls for the development of policies and laws that are more in line with the objectives of the *United Nations Declaration on the Rights of Indigenous Peoples*. This could involve implementing measures such as giving legal protections for the use of traditional Indigenous knowledge, as well as the use of databases aimed at preventing third parties from benefiting from holding intellectual property rights in given works or knowledge.[62]

This is particularly relevant in the context of collective bargaining mechanisms, as there is an ever-increasing prevalence of Indigenous-led and Indigenous-focused collectives for artists. For instance: the National Indigenous Media Arts Coalition was created in 2001[63]; the Indigenous Performing Arts Alliance was created in 2005[64]; and the Northern Indigenous Arts Council was created in 2017[65]. This demonstrates a growing recognition of the importance of artist collectives in the Indigenous arts space.

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[61] House of Commons 2019, *supra* note 55 at 26-29.
[62] Paquette, *supra* note 59 at 199-204.
[63] National Indigenous Media Arts Coalition, "About NIMAC" (last visited 6 August 2024), online: <nationalimac.org/ABOUT-NIMAC-1 >.
[64] Indigenous Performing Arts Alliance, "History" (last visited 6 August 2024), online: <ipaa.ca/history/>.
[65] Northern Indigenous Arts Council, "Our Story, Vision, and Mission:" (last visited 6 August 2023), online: <niacpg.com/>.

II. FRAMEWORKS FOR COLLECTIVE BARGAINING IN CANADA

1) History of Collective Bargaining in the Copyright Context in Canada

There is a history of tension between Canadian artists and the federal government in regards to the role that artistic products play in Canada's culture and economy. While the Canadian government relied on and encouraged artists during certain times of hardship, such as during the world wars, Canadian artists have historically expressed that there was a lack of reliable or established support and recognition of the importance that artistic outputs play in Canadian society.[66] In particular, Canadian artists have historically been affected by relatively low incomes, and the need to have more than one job.[67] As a result, since Canadian confederation, there has been a rise in organizations or collectives that seek to bring together artists in order to put pressure on governments, as well as an increasing politicization of issues that affect artists.

Organizations aimed at collective management in the area of copyright have been part of Canada's history for the past century. In 1925, the Canadian Performing Rights Society was launched by the British Performing Rights Society. In the years immediately following its inception, the Canadian Performing Rights Society established a system whereby this society would file statements of royalties which would be subject to modification by Cabinet, and ultimately, the Copyright Appeal Tribunal would have to grant certification to music performing rights tariffs.[68]

In 1951, the Massey-Levesque Report was released, after growing concerns from the then-in power Liberal party that artists were shifting their political support to the politically threatening Co-operative Commonwealth Federation—a party that had a stronger emphasis on cultural policy reform.[69] The report highlighted the deleterious effects of the hostile environment

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[66] Danielle Cliche, "Status of the Artist or of Arts Organizations?: A Brief Discussion on the Canadian Status of the Artist Act" (1996) 21:2 Canadian Journal of Communication 197 at 198-200.
[67] Elizabeth MacPherson, "Collective Bargaining for Independent Contractors: Is the Status of the Artist Act a Model for Other Industrial Sectors" (1999) 7 Canadian Lab & Emp LJ 355 at 357.
[68] Mario Bouchard, "Chapter 9: Collective Management in Canada" in Daniel Gervais, ed, *Collective Management of Copyright and Related Rights* (the Netherlands: Kluwer Law International, 2016) 265, at 265-266.
[69] Cliche, *supra* note 66 at 199.

characterizing the cultural and art sectors in Canada, noting that it is extraordinarily difficult for artists to make a living from their artistic products, and highlighting the problems this might cause for encouraging artists to create new products.[70] The report made a number of indictments against the state of the Canadian cultural sector at the time, and helped to spur two initiatives: the establishment of the National Library in 1953, and the establishment of the Canada Council for the Arts in 1957 (which "…supplies grants and services to salaried Canadian artists and arts organizations, grants prizes and fellowships, and oversees the Art Bank.").[71]

In 1968, the Canadian Artists' Representation was founded in Ontario as a way for artists to collectively organize and in order to "demand the recognition of artists' copyright".[72] In 1971, the Canadian Artists' Representation (now known as "CARFAC") became a union that advocated at the federal level for policies and laws that were more favorable to artists—particularly in the field of copyright.[73]

In 1980, the Canadian government signed the "Belgrade Convention"—a recommendation released by the United Nations Educational, Scientific and Cultural Organization (UNSECO) regarding the status of the artist. As a direct result of the Belgrade Convention, Canada also established the Federal Cultural Review Committee (the "Appelbaum-Hébert Committee") to review Canada's cultural industries. In 1982, the Appelbaum-Hébert Committee released a report, emphasizing the poor conditions characterizing artistic professions and noting that "…the income of many if not most of these artists classifies them as highly specialized working poor".[74]

In 1987 and 1988, Quebec alone introduced two new pieces of legislation aimed at improving the status of artists provincially: *An Act Respecting the Professional Status and Conditions of Engagement of Performing, Recording and Film Artists* and *An Act Respecting the Professional Status of the Artists in the Visual Arts, Arts and Crafts and Literature, and their*

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[70] *Ibid* at 200-201.
[71] Amneet Dhillon, "Massey's Impact on Canadian Culture Today" (2007) The Structure of the Book Publishing Industry in Canada Pub 371 at 372-374.
[72] Canadian Artists' Representation / Le front des artistes canadiens, "CARFAC History" (last visited 17 July 2024), online: <carfac.ca/about/carfac-history/>.
[73] Kirsty Robertson & J Keri Cronin, "Canadian Artists' Representation and Copyright" in Kirsty Robertson & J Keri Cronin, eds, *Imagining Resistance: Visual Culture and Activism in Canada* (Ontario: Wilfrid Laurier University Press, 2011) 49 at 49-51.
[74] Clive Robertson, *Policy Matters: Administrations of Art and Culture* (Toronto: YYZ Books, 2006) at 50.

Contracts with Promoters, respectively.[75] The former "established a process for the recognition of artists' associations representing persons who offer their services" in given industries, while the latter "also provides for the recognition of artists' associations representing individuals in [given industries], but places greater emphasis on the content of individual contracts between these creators and promoters of their works.".[76]

In 1989, several amendments to the *Copyright Act* changed the landscape for collective bargaining in copyright contexts. As Mario Bouchard notes in his chapter *Collective Management of Copyright and Related Rights*:

> The year 1989 represented something of a watershed for Canadian [collective management organizations]. The [*Copyright Act*] was amended in two important respects. First, the Copyright Appeal Tribunal was replaced by the Copyright Board. The Board was empowered to supervise dealings between collectives and individual users or groups of users in areas [other] than music performing rights; collective management was legitimized and its relationship with competition law was somewhat clarified. Second, the use of protected works in retransmitted distant radio and television signals was subjected to a compulsory licensing scheme according to which rights holders could seek remunerations only through a [collective management organization]; for the first time, collective management became the only legally available course of action for the holders of certain types of rights.[77]

In 1992, the federal government introduced the *Status of the Artist Act*, becoming the "…first country in the world to enact legislation granting collective bargaining rights to self-employed entrepreneurs.".[78] In 1997 and 2012, the *Copyright Act* was amended further to expand the reach and relevance of collective management organizations.[79] Notably, because the *Status of the Artist Act* is federal legislation, it is limited in scope and application. The definition section of the *Status of the Artist Act* defines "producer" as government institutions or broadcasting undertakings, and "artists" as independent contractors, and also refers to the *Copyright Act*'s

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[75] *An Act Respecting the Professional Status and Conditions of Engagement of Performing, Recording and Film Artists*, SQ 1987, c 72; *An Act Respecting the Professional Status of Artists in the Visual Arts, Arts and Crafts and Literature, and their Contracts with Promoters*, SQ 1988, c 69 as repealed by Bill 35, *An Act to harmonize and modernize the rules relating to the professional status of artists*, 2nd Sess, 42nd Legislature, Quebec, 2022, c 20.
[76] MacPherson, *supra* note 67 at 358-359.
[77] Bouchard, *supra* note 68 at 266-267.
[78] MacPherson, *supra* note 67 at 355.
[79] Bouchard, *supra* note 68 at 267.

provisions.[80] Section 6(2) limits the application of this act to these parties.[81] In application, "producer" largely captures federal government departments, most federal government agencies and Crown corporations, and broadcasting undertakings under the Canadian Radio-television and Telecommunications Commission. "Artist" is also not exhaustive, and largely requires that an individual be "recognized as a professional artist by their peers"; fall into a given category of artist; and be a member of a certified artists' association.[82]

2) Current Legislation and Policy

Two main pieces of legislation are operative in determining the role that collective bargaining mechanisms play in shaping the contractual rights of copyright artists: the federal *Copyright Act* and the federal *Status of the Artist Act* (the "*SAA*"). As described in more detail below, the *Copyright Act* establishes a system of collective management of copyrights through "collective societies". If an artist (or other copyright holder) elects to have their copyright managed through a collective society, then they must assign their copyright to that collective society. This also means that it is the collective that has the right to enforce that copyright against users of that material.[83] However: "[c]ollective management has also allowed authors to use the power of collective bargaining to obtain more for the use of their work and negotiate on a less unbalanced basis with large multinational user groups.".[84] Therefore, this "collective management" often does reap bargaining benefits for artists.

In contrast, the *SAA* provides a framework whereby "…artists can unionise into artists' associations who represent their members in negotiating contracts with federal producers of artistic works to provide the artists with fair wages, benefits and other terms and conditions of employment.".[85] Therefore, while the terminology and concepts in each statute have some overlap, there are two main collective bargaining mechanisms for artists in Canada: the

[80] *Status of the Artist Act*, *supra* note 7 at s 5.
[81] *Ibid*, at s 6(2).
[82] Julia Winters, "The 'Status of the Artist' under Canadian Law" (2012) 17:3 AA&L 243 at 249-250.
[83] MacPherson, *supra* note 67 at 373-374.
[84] Daniel Gervais & Alana Maurushat, "Fragmented Copyright, Fragmented Management: Proposals to Defrag Copyright Management" (2003) 2:1 CJLT 15 18-19.
[85] Winters, *supra* note 82 at 243.

Copyright Act's framework of collective management, and the *SAA*'s framework of overt collective bargaining.

While the *Copyright Act*'s framework for collective societies might seem, prima facie, similar to the *SAA*'s introduction of collective bargaining, the two systems have important differences which affect how a copyright holder might manage their copyrights through each regime:

> The regime contained in the [*SAA*] consists of a system that determines, in advance, the minimum remuneration that will apply to an artist's work, by means of negotiation between an artists' association and producers who may wish to use an artist's work at some time in the future. At the point in time when a producer actually commissions a work or seeks to obtain the right to use an existing work, further negotiations between the creator and the producer may take place. In contrast, the regime envisioned in the *Copyright Act* involves a system in which the fees for the use of an existing work ("royalties") are established by a copyright collective society, subject to the approval of the Copyright Board…there is no negotiation process involving the users of copyrighted works, and the [Copyright Board] is the final authority regarding the amount that must be paid for the use of a work.[86]

a. The *Copyright Act*

As an overview, the *Copyright Act* has nine parts. The first outlines the scope of "copyright" and moral rights—including an overview of what works might attract the protection of copyright, the terms and ownership of copyright, and an overview of moral rights. The second part details how copyright and moral rights operate in the context of performances, sound recordings, or communication signals. The third part outlines what constitutes an infringement of copyright and moral rights, as well as important exceptions to infringement (including the exception of "fair dealing", whereby "[f]air dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.", as well as in certain contexts involving criticism and news reporting.).[87] The fourth part of the *Copyright Act* details both civil and criminal remedies for copyright infringement, as well as provisions on importation and exportation. The fifth part contains provisions on administration—including outlining the powers

[86] MacPherson, *supra* note 67 at 375-376.
[87] *Copyright Act*, *supra* note 6 at s 29.

and structure of the Copyright Office and Register of Copyrights, as well as provisions regarding fees. The sixth part contains "miscellaneous provisions" on subjects such as "substituted rights". The seventh part contains provisions which dictate the powers, role, and structure of the Copyright Board. Notably, Part VII.1 under the provisions on the Copyright Board, contains provisions on the "collective administration of copyright": this part of the *Copyright Act* was recently amended, in 2018.[88] The eighth part contains provisions on private copying of copyright materials. Finally, the ninth part of the *Copyright Act* contains "general provisions", which contains a few provisions regarding the totality of legislation in determining copyright, and interpretation provisions.[89]

Notably, section 2 of the *Copyright Act* provides a definition for "collective society".[90] The Supreme Court of Canada has described this definition as follows:

> [3] …Section 2 [of the *Copyright Act*] defines a "collective society" (sometimes referred to as a "copyright collective") as a society, association or corporation that carries on the business of collective administration of copyright for the benefit of artists (among others) who assign, grant a licence, or otherwise authorize the society to act on their behalf with respect to their copyrights so assigned or authorized. Collective societies must either operate a licensing scheme for a repertoire of artists' works whereby the society determines the conditions under which it will authorize the use of such works, or collect and distribute royalties payable under the *Copyright Act* by users of such works…[91]

The *Copyright Act* establishes four distinct frameworks for the collective management of copyrights through collective societies (or, "collective management organizations"): a framework for music performing rights; a general or "residual" framework; a framework for "particular cases" of retransmissions and educational institutions; and a regime for private copying. The different frameworks have different rules concerning how royalties and tariffs may be set, and what the role of the Copyright Board, as an independent administrative tribunal, is in this

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[88] Bill C-86, *A second Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures*, 1st Sess, 42nd Parl, 2008, cl G (assented to 13 December 2018).
[89] *Ibid*.
[90] *Ibid* at s 2.
[91] *Canadian Artis' Representation / Le Front des artistes canadiens v National Gallery of Canada*, 2014 SCC 42 [*National Gallery*] at para 3.

process.[92] For all four frameworks, the process of certifying a tariff is virtually the same: a proposed tariff is filed and then published, to which people may then object. Then, the Copyright Board issues a directive and a timetable for the proceedings, following which the collective management organization and objectors may argue in a hearing. Finally, the Copyright Board will certify the tariff, and publish this tariff along with reasons.[93]

Interestingly, the Copyright Board has been referred to as "unique" when compared to its British or European counterparts. [94] Because the definition of "collective society" is left so open-ended in the *Copyright Act*, the structure and operation of different collective management organizations may vary greatly: the Copyright Board has no power over many of these factors and collective management organizations do not need to receive any kind of formal authorization or certification to be legitimate. However, the Copyright Board does have two main powers that do affect the landscape for collective management organizations: "…the Board must ensure that the payment of royalties for the performance or communication of sound recordings of musical works is made in a single payment that the levy on blank media to compensate for private copying is collected by a single collecting body. In addition…by using its discretion on setting conditions associated with monetary and other aspects of tariffs, the [Copyright Board] indirectly regulates a number of aspects that affect the governance of Canadian [collective management organizations].".[95]

While the Copyright Board might not have much direct power over the structure and operation of collective management organizations, it is empowered by the *Copyright Act* to act in both substantive and procedural manners, including powers to: grant interim decisions, vary decisions, regulate in regards to its own procedure, compel production of evidence, compel appearance of witnesses, make its own objections to proposed tariffs, regulate proceedings, decide questions of law in some contexts, and set royalties higher than those proposed by a

[92] Daniel J Gervais, "Chapter 9: A Uniquely Canadian Institution: The Copyright Board of Canada" in Ysolde Gendreau, ed, *An Emerging Intellectual Property Paradigm: Perspectives from Canada* (United Kingdom: Edward Elgar, 2008) 197 at 199-209.
[93] *Ibid* at 210-21.
[94] *Ibid*.
[95] *Ibid* at 211-212.

collective management organization. However, the Copyright Board is *not* empowered to award costs, dissimilarly to comparable bodies in other countries.[96]

b. The *Status of the Artist Act* and Related Acts

Prior to the introduction of the federal *SAA* in 1992, artists (or other copyright holders) could elect to either manage their own copyright by collecting their own fees and enforcing their own copyrights against others, or to assign their copyright to a collective society. The *SAA* introduced the additional option of overt collective bargaining for copyright holders to utilize in order to manage their copyrights.[97]

As an overview, the *SAA* has two main parts. Part I contains "general principles", and begins with the Canadian Government's recognition of the importance of artists in the cultural, social, economic, political, and artistic health of Canada, as well as the importance of giving artists the appropriate recognition—both in status and in compensation. Part II of the *SAA* is more extensive, and details "professional relations": this includes establishing the role of the Canada Industrial Relations Board, how an artist's association may be formally certified, provisions on "bargaining and scale agreements", and provisions on prohibitions (such as generally prohibiting the use of "pressure tactics" by parties) and remedies.[98]

Notably, the *SAA* is primarily labour law legislation, and is even modelled on the *Canada Labour Code*.[99] In fact, Part II indicates that the Canada Labour Relations Board is responsible for formally certifying artist organizations. In addition to this, Part II creates a framework under which artists organizations and producers may negotiate and bargain to arrive at "scale agreements". While the parties have relatively broad freedom in their bargaining—for instance, in regards to compensation, conditions, benefits, and date of termination—the *SAA* requires that scale agreements stipulate a way to settle differences between the parties or between artists that find themselves bound by the agreement.[100]

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[96] *Ibid* at 211-214.
[97] MacPherson, *supra* note 67 at 373-374.
[98] *Status of the Artist Act*, *supra* note 7.
[99] MacPherson, *supra* note 67 at 360.
[100] *Ibid* at 247-249.

In addition to the *SAA*, there has also been a recent movement towards expanding the scope of the foundation that has been established by the *SAA*. In June 2022, the Quebec legislature enacted a bill entitled "An Act to harmonize and modernize the rules relating to the professional status of artists", repealing the previous legislation "Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters".[101] This act was created in order to expand the types of artists who were able to access collective bargaining mechanisms, and to expand the scope of existing legislation to include provisions regarding psychological and sexual harassment and the prohibition of intimidation and discrimination, as well as making several other adjustments.[102]

Other provinces have similarly enacted supplementary legislation. For instance, Saskatchewan enacted the *Arts Professions Act* in 2010[103], which provided new definitions for professional artist, a definition for "engager" of a given work, and a requirement that contracts between these two parties be written.[104] Ontario enacted the *Status of Ontario's Artists Act, 2007*[105], the provisions of which included the instatement of a "Celebrate the Artist Weekend", and empowering the provincial government to pursue initiatives such as implementing marketing strategies, encouraging training programs, and encouraging the health and safety of artists. Notably, there is no direct reference to collective bargaining.[106]

3) Main Relevant Interest Groups

Therefore, two main categories of interest groups are relevant when considering the effect that collective bargaining mechanisms have on the contractual rights or contractual strengths of artists. The first category is collective societies, as established by the *Copyright Act*. The second category is certified artists' associations, as established by the *SAA*.

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[101] Bill 35, *An Act to harmonize and modernize the rules relating to the professional status of artists*, 2nd Sess, 42nd Legislature, Quebec, 2022, c 20.
[102] *Ibid* at 2-3.
[103] *Arts Professions Act*, c A-28.002 of the Statutes of Saskatchewan, 2009 (effective June 1, 2010).
[104] ArtsNB.ca, "Status of the Artist: An Overview" (July 2019), online (pdf): <artsnb.ca/web/wp-content/uploads/2019/07/2012_05_Status_of_the_Artist_EN.pdf> at 9.
[105] *Status of Ontario's Artists Act, 2007*, SO 2007, c 7, Sched 39.
[106] ArtsNB.ca, *supra* note 104 at 10.

a. Collective Societies

In the aforementioned 2016 chapter *Collective Management of Copyright and Related Rights*, Mario Bouchard offers an overview of the major collective management organizations that are prevalent in different cultural and artistic sectors in which copyright plays a vital role.[107] In regards to the musical sector, "Collective management is divided not only according to rights (performance/communication, reproduction) or subject-matter (work, performance, sound recording), but also to a right holder's craft (musician, singer, backup artist) and linguistic background.".[108]

The Society of Composers, Authors and Music Publishers of Canada (SOCAN) has origins stretching back to as early as 1925, and was formally created in 1990.[109] SOCAN is self-described as "Canada's largest member-based rights management organization", and "[issues] licenses for the public playing, performance, communication, and reproduction of music. The money collected from these licenses is distributed as royalties to the rights holders who have earned them in Canada and worldwide.".[110] SOCAN is also very involved in advocacy in this sector, and often appears before the Copyright Board of Canada.[111] In fact, SOCAN is not infrequently named in the style of cause of cases that go all the way up to the Supreme Court of Canada (SCC). For instance, in the 2004 case *Society of Composers, Authors & Music Publishers of Canda v. Canadian Assn. of Internet Providers* from the SCC, SOCAN argued that Internet Service Providers should bear the liability for royalties on "Canadian copyright in music downloaded in Canada from a foreign country via the Internet.".[112] In the 2022 case *Society of Composers, Authors & Music Publishers of Canada v. Entertainment Software Association* from the SCC, SOCAN argued the *Copyright Act*'s provisions on communication to the public ought

[107] An up-to-date list of collective societies can be found on the Copyright Board of Canada's website: see Copyright Board of Canada, "Collective Societies" (last visited 17 July 2024), online: <cb-cda.gc.ca/en/copyright-information/collective-societies>.
[108] Bouchard, *supra* note 68 at 268.
[109] *Ibid* at 268.
[110] SOCAN, "What we do" (last visited 17 July 2024), online: <socan.com/about/>.
[111] SOCAN, "Advocacy" (last visited 17 July 2024), online: <socan.com/about/advocacy/>.
[112] *Society of Composers, Authors & Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45 at para 1.

to be interpreted in a way that results in users paying two royalties in order to access works that are available online.[113]

Re:Sound – Music Licensing Company (Re:Sound) was created in 1997, and is formed of five sub-collectives: the Musicians' Rights Organization Canada; ACTRA's Recording Artists' Collecting Society; Artisti; Quebec Collective Society for the Rights of Makers of Sound and Video Recordings; and CONNECT Music Licensing Service.[114] Re:Sound has a mandate to advocate on behalf of artists, license businesses to use music, distribute royalties, and facilitate international partnerships.[115] Finally, in 2007, the Independent Digital Licensing Agency was formed as a collective of independent sound recording labels in Canada.[116] The Independent Digital Licensing Agency was established to "provide independent labels and artists efficient and economic digital asset delivery to digital music services, and royalty collection and administration through an organization whose financial interests and directly aligned with its independent artists and label members.".[117]

The main collective in regards to the literature sector in provinces other than Quebec is Access Copyright.[118] Access Copyright is an organization representing "over 10,000 Canadian writers, visual artists and publishers, and their works" that "[licenses] the copyright of [artists] to education institutions, businesses, governments and others. The proceeds gathered when content is copied, remixed and shared are passed along to the copyright-holders.".[119] Similar to SOCAN, Access Copyright often appears in the style of cause of cases arising from Canada's Copyright Board, federal courts, and the SCC. For instance, in the 2012 SCC decision *Alberta (Minister of Education) v. Canadian Copyright Licensing Agency*, Access Copyright argued that certain photocopies of published works did not meet the test for fair dealing.[120] More recently, in the 2021 SCC decision *York University v. Canadian Copyright Licensing Agency (Access*

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[113] *Society of Composers, Authors and Music Publishers of Canda v Entertainment Software Association*, 2022 SCC 30.
[114] Bouchard, *supra* note 68 at 268-269.
[115] Re:Sound – Music Licensing Company, "What we do" (last visited 17 July 2024), online: <resound.ca/what-we-do/>.
[116] Bouchard, *supra* note 68 at 269.
[117] IDLA, "The Independent Distribution & Licensing Agency" (last visited 17 July 2024), online: <idla.ca/>.
[118] Bouchard, *supra* note 68 at 270.
[119] Access Copyright, "About Access Copyright (last accessed 17 July 2024), online: <accesscopyright.ca/about-us/>.
[120] *Alberta (Minister of Education) v Canadian Copyright Licensing Agency*, 2012 SCC 37.

Copyright), Access Copyright similarly argued that certain materials were not captured by fair dealing.[121]

In the province of Quebec, the Quebec Society for the Collective Management of Reproduction Rights (Copibec) is the primary collective organization.[122] Copibec was founded in 1997, represents more than 30 000 authors and 1 300 publishers and has a mission of ensuring "that the use of works protected by the *Copyright Act* is done in a manner that respects the rights of authors, journalists, freelancers, visual artists and publishers, while guaranteeing a fair redistribution of royalties to rights holders.".[123]

Other notable collective management organizations include organizations involved in the retransmission of radio and television signals (such as the Canadian Broadcasters Rights Agency, the Canadian Copyright Collective, and Major League Baseball Collective of Canada Inc.), those involved in private copying (such as the Canadian Private Copying Collective), and those involved in multimedia (such as the Directors Rights Collective of Canada).[124]

b. Certified Artists' Associations

Several artists' associations have been certified by the Canada Labour Relations Board as being exclusively responsible for collective bargaining in a given sector. There are currently 26 certified artists' associations, according to the Canada Industrial Relations Board's Certification Register.[125]

For instance, the Canadian Artists' Representation (CARFAC) was certified in 1998[126] and continues to be a prominent artist association to this day: "As the national voice of Canada's professional visual artists, CARFAC defends artists' economic and legal rights and educates the public on fair dealing with artists. In doing so, CARFAC promotes a socio-economic climate conducive to the production of visual arts. CARFAC engages actively in advocacy, lobbying,

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[121] *York University v Canadian Copyright Licensing Agency (Access Copyright)*, 2021 SCC 32 [*York University*].
[122] Bouchard, *supra* note 68 at 270.
[123] Quebec Society for the Collective Management of Reproduction Rights, "About Copibec" (last visited 6 August 2024), online: <copibec.ca/fr/mission>.
[124] Bouchard, *supra* note 68 at 271-273.
[125] A list of the decisions regarding certification of artists' associations can be found on the Canada Labour Relations Board's website: see Canada Industrial Relations Board, "Certification Register under the *Status of the Artist Act*" (last visited 17 July 2024), online: <cirb-ccri.gc.ca/en/decisions/certification-register-under-status>.
[126] *Canadian Artists' Representation/le Front des artistes canadiens*, 1998 CAPPRT 029.

research and public education on behalf of artists in Canada.".[127] Other examples of certified artists' associations include the Screen Composers Guild of Canada, which was certified in 2003[128], and the Canadian Federation of Musicians, which was certified in 1997[129].

4) Notable Case Law

The interaction between the *Copyright Act* and the *SAA*, and their respective roles in the contracting process regarding copyrights is articulated succinctly in the single 2014 decision *Canadian Artists' Representation/Le Front des artistes canadiens v. National Gallery of Canada* [*National Gallery*], in which the SCC made a ruling as to the scope of the role that certified artists' associations play in collective bargaining for artists.[130] *National Gallery* involved a dispute between CARFAC and the National Gallery of Canada, which is captured by the definition of "producer" in the *Status of the Artist Act*, after the two parties began negotiating a scale agreement in 2003—a scale agreement which was to include minimum fees for the use of existing works by visual artists. In 2007, however, the National Gallery of Canada asserted that CARFAC "did not have the authority to negotiate scale agreements providing for minimum fees for the licensing or assignment of the copyright in existing works as it did not have written authorization from each artist covered by the agreement.". Subsequently, CARFAC filed a complaint that the National Gallery had failed to bargain in good faith.[131] In ruling in favor of CARFAC, the SCC emphasized that the *Copyright Act* and the *SAA* do not conflict with one another, and noted:

> [22] Artists' associations are simply bargaining agents. They have not taken or granted, and do not purport to have taken or granted, any assignment or exclusive licence, or any property interest, in any artist's copyright…
>
> [23] The [interpretation of the *SAA* endorsed] causes no conflict with the *Copyright Act*'s provisions regarding collective societies…Collective societies have the power to determine tariffs for the works in which they hold the

[127] Canadian Artists' Representation / Le front des artistes canadiens, "About CARFAC" (last visited 17 July 2024), online: <carfac.ca/about/>.
[128] *Guild of Canadian Film Composers*, 2003 CAPPRT 043.
[129] *American Federation of Musicians of the Untied States and Canada*, 1997 CAPPRT 019.
[130] *National Gallery*, *supra* note 91.
[131] *Ibid* at para 6.

> copyright, subject to the approval of the Copyright Board. However, the *SAA* and [precedent] are clear, and none of the parties to this appeal disagree: scale agreements do not bind collective societies…
>
> …
>
> [25] Artists therefore have two options when dealing with federal governmental producers for the use of their existing works. One option is to assign or license their copyright to a collective society or appoint that society as their authorized agent. In that case, tariffs set under the *Copyright Act*, and not the *SAA* and any scale agreements for their sector, will apply to the works. The other option is to deal directly with the producer, in which case they will be bound by any applicable *SAA* scale agreements. Within this option, artists may either accept the minimum fees, terms and conditions set out in the scale agreements and model contracts, or they can attempt to negotiate higher fees or more favorable terms.[132]

In this way, *National Gallery* emphasizes the two distinct avenues that are available to Canadian artists, and the notable differences between them.

III. SOLUTIONS AND BENEFITS AFFORDED BY COLLECTIVE BARGAINING MECHANISMS

1) Theoretical Issues in Copyright Contracts

a. Law and Economics Approaches to Copyright Contracts

In many ways, as discussed in the introduction to this research, economic concepts and justifications have historically played a role in the concept of "copyright" itself in Canada.[133] Similarly, an established body of literature and scholarship analyzes copyright contracts in particular through the lens of the field of law and economics. For instance, in the 1989 article "An Economic Analysis of Copyright Law", William Landes and Richard Posner provide an overview of how copyright law might be considered from an economic standpoint.[134] Landes and Posner find that "[s]triking the correct balance between access and incentives is the central

[132] *Ibid* at para 22.
[133] See e.g. Davies, *supra* note 27 at 8-15.
[134] William M Landes & Richard A Posner, "An Economic Analysis of Copyright Law" (1989) 18 JLS 325.

problem in copyright law. For copyright law to promote economic efficiency, its principal legal doctrines must, at least approximately, maximize the benefits from creating additional works minus both the losses from limiting access and the costs of administering copyright protection.".[135]

The intertwined and interdependent nature of copyright and contract law has been noted: "Only contracts can provide remuneration and thus incentives, while copyright together with its effective enforcement are what pave the way for contracts to be written. That is, without copyright and enforcement, contracts would be impossible. Thus, in short, copyright itself is not an incentive mechanism, but (assuming that it is enforced) it does allow an incentive mechanism, namely contracts, to operate.".[136] Therefore, copyright law without contract law is often considered economically useless.

However, despite this inescapable intertwining of these two areas of the law, contract law is noticeably missing from copyright legislation. As Ysolde Gendreau writes in the introductory paragraph to her 2020 article "What's in a Name? Extended Collective Licenses in Canada": "The Canadian *Copyright Act* pays little attention to contractual issues. Apart from the provision on the reversionary interest, the guiding texts remain very general. This stance is in keeping with the copyright tradition that is exemplified by the British and U.S. statutes and, as such, contributes to distinguishing it from the author's rights system where contractual matters can be the object of relatively detailed provisions. The Canadian approach to this matter moreover matches the constitutional allocation of powers that makes provincial governments responsible for general contract law.".[137] Therefore, despite the importance of contracts for copyright law, the two remained philosophically intertwined yet, in many ways, legislatively separated.

Furthermore, while copyright law might rely on contract law in order to give it economic value, the nature of copyright itself will have an effect on how contracts in this area develop. For instance, it has been noted that, because of the relative incentives for artists and those they contract with regarding their copyrights: "Weak copyright standards might lead to unfavourable contracts for authors, while strong copyright standards might lead to favourable contracts for

[135] *Ibid* at 326.
[136] Richard Watt, "Copyright and Contract Law: Economic Theory of Copyright Contracts" (2010) 18:1 J Intell Prop L 173 at 175.
[137] Ysolde Gendreau, "What's in a Name? Extended Collective Licenses in Canada" (2020) 28 IPJ 269.

authors…Conventional wisdom holds that strong copyright protection increases the value of the contract for the publisher, and thus…some of that additional value can be captured by the author through the contract with the publisher.".[138] In this way, while contracts are important for the economic value of copyrights, the influence also runs the other way: copyright standards are important for the shape that contracts take in this area as well.

b. Unique Features of Copyright Contracts

Several problems arise in the context of copyright contracts in particular. First, there are high transaction costs associated with monitoring unauthorized uses of copyrights and enforcing potential breaches of copyright. The importance of transaction costs in legal analyses has long been recognized. For instance, as early as 1937, Ronald Coase noted in a seminal work that the costs of transactions can account for the existence and structure of firms altogether.[139] Similarly, the application of the concept of transaction costs to contract law analyses in particular has also been long-established.[140]

In the context of copyright contracting, these transaction costs include factors such as: the initial cost of having a copyright holder and ultimate user of the copyrighted material find one another; costs associated with bargaining to come to an agreement regarding the copyrighted work; the costs of monitoring the contract and collecting compensation as per the agreement; and the costs of enforcing the agreement—both against the parties to the contract as well as against third parties.[141] This has called into question the effectiveness of contracts in this space, as due to these high costs, parties might choose to rely more heavily upon copyright law than contract law.[142] This has the potential to undermine the effectiveness of contract in the area of copyright.

Second, copyright contracts have been noted for arising in a context where one party (usually the party that wishes to use a copyright material) is in a substantially better bargaining position than the other party (usually the artist who has created the copyrighted work).[143] This is

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[138] Watt 2010, *supra* note 136 at 178-179.
[139] Francesco Parisi, "Coast theorem and transaction cost economics in the law" in Jürgen G Backhaus, ed, *The Elgar Companion to Law and Economics, Second Edition* (Cheltenham, UK: Edward Elgar Publishing Limited, 2005) 7 at 7, with reference to: Ronald H Coase, "The Nature of the Firm" (1937) 4:16 Economica 386.
[140] See e.g. Daniel A Farber, "Contract Law and Modern Economic Theory " (1983-1984) 78:2 Nw U L Rev 303.
[141] Richard Watt, "Copyright Collectives and Contracts: An Economic Theory Perspective" (2015) Creating Working Paper 2015/08 at 1.
[142] Watt 2010, *supra* note 136 at 179-180.
[143] *Ibid* at 198-199.

a result of different factors. The first factor is that financial schemes that often favour the party that wishes to use a copyrighted work. For instance, individual artists are unlikely to have the same financial resources that companies—such as publishers—are likely to have access to, and might experience more financial or economic pressure to enter into a given contract. Another factor is that parties that want to use a copyrighted work are more likely to present standard form, "take-it-or-leave-it", contracts to an individual artist. In these situations, artists might be pressured to accept a contract with unfavourable terms.[144] Indeed, there is evidence that in the publishing industry, the use of standard form contracts is only propagating in the digital age and as more material becomes available online, worsening the potential for unilateral and unfavourable contractual terms to be included in a copyright contract to the detriment of artists.[145]

An additional factor potentially contributing to the unequal bargaining position between artists and the party who wishes to use a copyright work is that, oftentimes, the latter enjoys monopsony power in a given market. In other words, while there may be many artists who oversaturate a competitive market for creative or artistic goods, the supply for these works is much more limited: as a consequence, a few, more powerful parties can access a copyrighted works for less than would otherwise be paid.[146]

Industries in Canada related to creation and to copyright have long been critiqued as being characterized by a concentration in the market whereby a small number of companies hold a high share of the market power. For instance, prior to 2013, there were six major book publishing houses—in 2013, the publishers of Penguin and Random House merged, leaving the book market with only five major publishers.[147] Additionally, the market for publishing differs across provinces and territories—for English works, the market is primarily centred in Toronto.[148] This means that artists across Canada might find themselves with differing amounts of bargaining power depending on where within Canada they are creating. Similarly, a relatively

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[144] Kate Darling, "Contracting about the Future: Copyright and New Media" (2012) 10:7 Nw J Tech & Intell Prop 485 at 505-508.
[145] D'Agostino 2010, *supra* note 4 at 16-41.
[146] Darling, *supra* note 144 at 509-512.
[147] Jose Antonio Martinez Diez Barroso, "Diversifying the Industry, the Urban Concentration of the Canadian English Language Publishing Industry" (2023) 39:1 Publishing Research Quarterly 1 at 7.
[148] *Ibid*.

early analysis of Canada's videogame market expressed concern that "…the industry [is] entering a phase of stagnation associated with increasing concentration of ownership in the hands of a handful of risk-averse super-publishers.".[149] The music industry in Canada has garnered similar concerns as well—a 2023 report noted that the music industry is far from competitive enough, and noted that "…the music industries in Canada exhibit an oligopoly structure, formed of a handful of non-competitive, non-Canadian firms, which gravely harms both the livelihoods of Canadian musicians and the long term sustainability of Canadian music.".[150]

A further factor that has a bearing on the potential of a power imbalance between parties is the existence of an imbalance in the type of information to which each party has access. For instance, the party that seeks to use the copyrighted work often has more information and knowledge about the economic potential of that work. Furthermore, it is very difficult—and often costly—for individual artists to acquire the level of information and knowledge that other parties have. As a result of this, artists might be left in a situation where they are unable to correctly determine the value of their own work, and often feel pressured to accept terms of a contract for this work that does not reflect the true value of their work.[151]

Relatedly to the imbalance of power between parties, artists often disproportionately bear the risk of uncertainty in copyright contracts. This is because if an artist turns down a contract offered by another party, the value of the copyrighted work in the future, the market for the copyrighted work in the future, and when in the future there might be more demand for that work are all extremely difficult factors to predict. Therefore, artists might face more pressure because of these uncertainties and risks—uncertainties and risks which other parties often do not experience to the same magnitude.[152]

The existence of these potential sources of power and bargaining imbalances between artists and those who wish to use a copyrighted work poses risks not only for the terms of a copyright contract, but also for the very existence of a contract altogether: "The assumption is

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[149] Nick Dyer-Witheford & Zena Sharman, "The Political Economic of Canada's Video and Computer Game Industry" (2005) 30:2 Canadian Journal of Communication 187 at 204-205.
[150] Brianne Selman, Brian Fauteux & Andrew deWaard, *The Lack of Competition in the Music Industries, the Effect on Working Musicians, and the Loss of Canadian Music Heritage* (Winnipeg: A brief presented to: Making Competition Work for Canadians: A consultation on the future of competition policy in Canada, 2023) at 2.
[151] Darling, *supra* note 144 at 512-513.
[152] *Ibid* at 513-515.

that parties are autonomous and sufficiently sophisticated to understand the implications of the bargain they are entering. But more often than not, power imbalances exist between parties entering into a private agreement. Significant power imbalances between parties in a contract can bring into question the legitimacy of the bargain, and thus the contract itself.".[153]

Third, copyright contracts are unique because of the nature of copyright itself. While other contracts might revolve around subject matter that directly and only benefits the parties to the contract, copyright is unique in that it is often described as a public good or as having public good characteristics.[154] Furthermore, copyright exists not only for the benefit of artists or holders of copyright, but to provide a benefit to the public at large.[155] This aspect of copyright also shapes the way that contracts operate in this area. For instance, because of the public good nature of copyright, contracts regarding copyright more often than not involve a restricted access to the copyrighted work, as opposed to full ownership of it altogether.[156] This understanding of copyright as having public interest goals and public good characteristics has even been endorsed by the Supreme Court of Canada. This presents a potential issue for artists: the contracts (or the rights set out in these contacts) may be interpreted by the courts in a way that takes the purpose of copyright as having a public benefit into account.[157]

In summary, these issues that are inherent to contracting in the field of copyright highlight not only the reality that artists wishing to enter into an agreement respecting their copyrighted work have an uphill battle when it comes to establishing favourable terms for themselves, but also the reality that these issues have the potential to introduce incompatibilities between copyright law and contract law outright.

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[153] Giuseppina D'Agostino, "Contract *lex rex*: Towards copyright contract's *lex specialis*" in Graeme B Dinwoodle, ed, *Intellectual Property and General Legal Principles: Is IP a Lex Specialis?* (Cheltenham, UK: Edward Elgar Publishing Limited, 2015) 4 at 10.
[154] Zijian Zhang, "Rationale of Collective Management Organizations: An Economic Perspective" (2016) 10:1 Masaryk U JL & Tech 73 at 79-80.
[155] Daniel J Gervais, "The Purpose of Copyright Law in Canada" (2005) 2:2 U Ottawa L & Tech J 315 at 324-325.
[156] Richard Watt, "Contract theory and information goods" in Ruth Towse & Trilce Navarrete Hernández, eds, *Handbook of Cultural Economics, Third Edition* (Cheltenham, UK: Edward Elgar Publishing Limited, 2020) 106 at 110.
[157] For instance, see the discussion in the introduction to this research regarding the public interest role of copyright law, see e.g. *Théberge*, *supra* note 33.

2) Theoretical Justifications for Collective Bargaining Mechanisms

There are also economic justifications that inform collective bargaining mechanisms. However, the way that these economic justifications operate differ between the two main mechanisms for collective bargaining in Canada: the *Copyright Act*'s collective societies and the *SAA*'s artists' associations.

a. Economic Justifications Informing Collective Societies

First, collective societies are largely aimed at reducing costs associated with contracting in the space of copyright: "Under the standard economic theory of copyright collectives…the foundational aspect upon which a copyright collective forms is the existence of transaction costs that can be efficiently shared when copyrights are exploited together.".[158] For instance, copyright collectives may lower costs associated with contracting in the space of copyright by providing a central administration of copyrights for artists or other copyright holders. In this way, collective societies are largely aimed at reducing transaction costs because they allow for the sharing of costs involved in activities such as monitoring and enforcement (so that one artist or copyright holder does not need to bear it alone), as well as simplifying processes of locating and bargaining.[159]

In fact, the economic benefits of collective societies in reducing transaction costs in particular was acknowledged by the Supreme Court of Canada in 2021: "By facilitating the users' ability to clear large numbers of copyrights through a single source and reducing transaction costs, collective societies made it easier to acquire rights and, as a corollary, for owners to be paid…the purpose of collective administration is to facilitate an efficient, functioning marketplace for the exchange of copyright-protected works'…Collective societies were also able more effectively to monitor the use of works within their repertoire and, in some cases, to assist copyright owners with infringement actions…".[160] More specifically, these copyright collectives can assist with: establishing a "…*standard* regarding the terms of use…for a large bundle of copyright works from a great number of different rights holders.", as well as assist in the "bundling" of many different works together under a comprehensive license or

[158] Watt 2015, *supra* note 141 at 1.
[159] See e.g. Stanley M Besen, Sheila N Kirby & Steven C Salop, "An Economic Analysis of Copyright Collectives", (1992) 78:1 Va L Rev 383 at 390-395.
[160] *York University*, *supra* note 121 at paras 60-61.

agreement.[161] Implementing these standards and "bundling", which apply to a variety of works, have the potential to reduce transaction costs—including those related to monitoring and enforcement.[162]

Second, collective societies may be able to correct some of the imbalances that characterize the contractual relationships between artists and those who wish to use a given work. For instance, similar to how these societies reduce transaction costs by spreading large costs among many individuals and achieving economies of scale, these societies may also help to equalize the bargaining power between artists and other parties by allowing the former to access more resources than they would be able to access individually. Another way in which collective societies might ameliorate some of the problems inherent to copyright contracting is by providing a potential source for artists to gain more market power, evening the bargaining positions between parties.[163] The collective bargaining mechanisms that are afforded by collective societies may be able to bestow more market power on artists than they would have if they bargained individually.[164]

Finally, collective societies can also help ameliorate some of the problems that arise due to the nature of copyright as inherently involving a public interest component.[165] This can be achieved because collective societies allow for the occurrence of some degree of price discrimination. This operates because the presence of public goods in a market often allows for "free riders" to emerge, whereby people are able to access and use a good without adequately being excluded from using that good, or without adequately bearing the cost of using that good. As a result, these types of goods are often underproduced in a given market.[166]

However, if price discrimination is possible, the negative effects of the existence of a public good will likely be mitigated, as "…by selling goods at a price closer to the willingness to pay by different customers – or even charging a single consumer a different price for each unit purchased, a price-discriminating monopolist could be selling more products than with a single

[161] Christian Handke, "Joint Copyrights Management by Collecting Societies and Online Platforms: An Economic Analysis" (11 March 2016), online: <ssrn.com/abstract=2616442> [dx.doi.org/10.2139/ssrn.2616442].
[162] *Ibid* at 5-6.
[163] Besen, Kirby & Salop, *supra* note 159.
[164] Handke, *supra* note 161 at 6
[165] In fact, the Copyright Board is explicitly required to take the "public interest" into consideration when fixing royalty and levy rates, see *Copyright Act*, *supra* note 6 at s 66.501.
[166] Zhang, *supra* note 154 at 79-81.

price.".[167] Relatedly, the "bundling" of copyrighted goods under different licenses or agreements can also assist with allowing for price discrimination, and can "increase social welfare where it encourages greater investments in the provision of quasi-public goods.".[168] More specifically, collective societies may implement different types of licenses for different levels of compensation, such as per use contracts or blanket licenses—each of which allows the other party to an agreement to have different levels of access or use of copyrighted works.[169] Indirectly, if copyright contracts are better able to be in the public interest, then there is less of a risk that the legislature or judiciary will intervene in copyright contracts to ensure that the public interest is furthered, or less of a risk that copyright contracts will be interpreted in ways that take this into account.

b. Economic Justifications Informing Collective Bargaining

In contrast to collective societies, the collective bargaining regime that is allowed by the *SAA* is informed by theoretical concepts that relate more to labour law than they do to purely contract law.

As a preliminary point, it is important to establish that the market for copyrightable works—the market within which artists create these works—has many similarities with markets for labour. For instance, the presence of monopsonies and oligopsonies, or a market with a high concentration of demand for a given service, is also a characteristic that is common in labour markets.[170] As a result of these similarities between the two markets, the role of the freelance artist takes a unique shape in the market for copyrightable works. The role of the freelance artist—as understood as a self-employed artist who might work irregular hours—in the market for copyrighted works is important because freelance artists make up the vast majority of the Canadian artistic workforce. For instance, in 2021, 65% of artists were self-employed (compared to 14%-16% of the general labour force).[171] The *SAA* was enacted to address some of the disadvantages of being a freelance, or self-employed, artist , and was largely intended to bring

[167] *Ibid* at 82.
[168] Handke, *supra* note 161 at 6.
[169] Zhang, *supra* note 154 at 81-84.
[170] Darling, *supra* note 144 at 509-510.
[171] Kelly Hill, *Artists in the pandemic: Recent and long-term labour force trends* (Hill Strategies Research Inc, Statistical Insights on the Arts (SIA) report 56, 2022), online: <hillstrategies.com/wp-content/uploads/2022/02/sia56_artists_pandemic.pdf> at 1.

some of the tools from labour law into the area of copyright. Mostly notably, freelance artists are often considered by the law to be independent contractors as opposed to employees. This distinction has many consequences for what rights a given artist might be able to access:

> In the labour and employment law context, it has been important to distinguish between employees and independent contractors. For example, with respect to employees, employers are subject to statutory requirements regarding witholdings and levies such as employment insurance, pension and health insurance premiums and income taxes. Employees have statutory entitlements to severance pay and, in some jurisdictions, to statutory protection from wrongful dismissal. Independent contractors, on the other hand, must rely on the common law of contract when their services are terminated prematurely. Only workers who hold employee status can benefit from the right to organize and bargain collectively, independent contractors who attempt to do so risk being found to be involved in a conspiracy in restraint of trade under anti-combines legislation.[172]

Economic approaches to labour law offer insight into how, at least theoretically, the *SAA*'s regime for collective bargaining might be able to correct some of the issues and problems that are prevalent in copyright contracts. For instance, in his 1984 article "Some Economic of Labor Law", Richard Posner writes that "…labor law is best understood as a device for facilitating, though not to the maximum possible extent, the cartelization of the labor supply by unions.".[173]

Indeed, many of the purported economic benefits of labour law in general relate to correcting imbalances between parties—in fact, "The idea of 'inequality of bargaining power' has traditionally functioned as *the* primary justification for the law of work.".[174] In particular, labour law is noted as being potentially useful in situations where: one party enjoys market controls such as would occur in a monopsony; there is an imbalance of bargaining power; a public good is involved; and there is an information asymmetry between parties.[175] Therefore, by allowing more artists—despite their status as independent contractors—to access tools from labour law, the *SAA*'s collective bargaining mechanisms strive to harness some of the benefits that might be found in labour law to

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[172] MacPherson, *supra* note 67 at 355-356.
[173] Richard A Posner, "Some Economics of Labor Law" (1984) 51:4 U Chi L Rev 988 at 990.
[174] David Louis Cabrelli, "Traditional Justifications of Labour Law" (28 September 2023), online: <ssrn.com/abstract=4586541> [dx.doi.org/10.2139/ssrn.4586541] at 2.
[175] Stewart J Schwab, "Law-and-Economics Approaches to Labour and Employment Law" (2017) 33:1 International Journal of Comparative Labour Law and Industrial Relations 115.

address some of the issues that are inherent to copyright contracts. This can be contrasted with the collective bargaining mechanisms that are afforded by the *Copyright Act*'s framework for collective societies, which does not aim to address the standing of many artists as independent contractors.

3) Evidence Regarding the Effectiveness of Collective Bargaining Mechanisms in Canada

While the collective bargaining mechanisms articulated in the *Copyright Act* and the *Status of the Artist Act* offer many theoretical benefits and solutions to artists as they enter into contracts regarding the use of copyrighted works, whether or not these benefits are actualized or have materialized requires further scrutiny.

In 2022, the Government of Canada released a report entitled "Canadian Artists and Content Creators Economic Survey Report". This report, which was primarily aimed at discussing findings from the "Canadian Artists and Content Creators Economic Survey", made a number of findings which indicated that, in many ways, artists in Canada continue to face many economic challenges.[176] Notably, this report found that 25% of respondents indicated their income from their creative work could fluctuate by up to 100% within a year (while 60% indicated their income could fluctuate by 50% in the same time period); 36% of respondents indicated they had a total income of less than $40,000 in 2019, and 59% of respondents indicated that they were not able to work full time in their creative capacity.[177]

This report also examined whether or not respondents used an "industry [intermediary] (e.g. unions, managers, online platforms, rights collectives)".[178] In this way, the report equated "industry intermediary" with any kind of collective society, artist association, or any other type of intermediary. The report found that reliance on industry intermediary did not vary between different types of artists or artists (e.g. between writers and visuals artists), but did find that respondents who earned less than 25% of their total income from their creative work were the

[176] Canadian Heritage, *Canadian Artists and Content Creators Economic Survey Report* (Ottawa: Canadian Heritage, 2022).
[177] *Ibid*.
[178] *Ibid* at 15-16.

demographic less likely to use on industry intermediaries. However, 267 respondents indicated that they relied on "Rights collectives" as an industry intermediary, while 794 respondents indicated that they used "Professional unions, guilds, or associations" (out of a total of 4,747 responses).[179] This indicates that less than 6% of respondents relied on rights collectives, while less than 17% of respondents relied on professional unions, guilds, or associations.

This report paints a bleak picture for artists in Canada: by and large, artists seem to face low and unstable income, and more often than not must rely on other sources of income to supplement what they earn from their creative work. Furthermore, artists do not seem to actively engage in collective bargaining mechanisms, as a small percentage of artists reported relying on the relevant collectives and associations. In regards to the *SAA* in particular, many have expressed concerns that the legislation "…has not improved the socioeconomic status of cultural workers in a meaningful way.".[180]

These trends do not seem to be improving over time, either, in the way that one might expect them to improve if collective bargaining mechanisms were operating to the benefit of Canadian artists. A 2021 report summarized the findings of a survey that had been conducted in 2002: "[The 2002 survey] concluded that the [*SAA*] has not substantially improved the working conditions or socio-economic position of artists…Survey respondents indicated that direct measures – such as income averaging, tax exemptions, and access to social benefit programs – were of greater importance to them than access to collective bargaining. The study concluded that artists regarded the [*SAA*] as not, by itself, sufficient to improve their socio-economic position.".[181] This 2021 report also acknowledges that the 2002 survey was conducted in an environment where a fewer number of smaller artists' associations had established agreements, and at a time where the *SAA* did not yet contain a "first arbitration provision".[182] However, subsequent reports and surveys indicate that many of these issues have not meaningfully improved.

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[179] *Ibid* at 15-17.
[180] House of Commons, *Strengthening the Status of the Artist in Canada: Report of the Standing Committee on Canadian Heritage* (March 2023) (Chair: Hedy Fry) at 7.
[181] Sara Slinn, *Collective Representation and Bargaining for Self-Employed Workers: Final Report* (Employment and Social Development Canada, 2021) at 18.
[182] *Ibid*.

For instance, in 2019, 44.6% of respondents to the aforementioned report reported making between 0% and 25% of their income from their creative work: in 2021, 64.1% of respondents indicated the same.[183] While this report was also aimed at analyzing the effect of the Covid pandemic on artists (and therefore, these percentages might not be a true reflection of the state of creative industries without the presence of a pandemic), previous reports indicate that in many ways, artists have faced many of the same economic challenges for decades. For instance, a 2005 report found that there was 26% gap between the income of artists and the general labour force.[184] Another report, analyzing information from a 2011 study, found that artists had an income that was 32% lower than that of the general labour force.[185]

More recently, a June 2024 report analyzed the state of the artistic industry in Canada. This report found that many of the trends identified in the 2022 report continue today, and are perhaps even worsening over time.[186] This 2024 report found that 51% of respondents reported an income below $40,000 and 71% of artists have more than one job.[187] Furthermore, this report also found that 70% of respondents indicated that they were "financially stressed", 34% of respondents had to take on debt[188], and 42% of respondents indicated that the "[l]ack of value that your community has placed on your work" as a challenge related to support for their work (with 13% of respondents indicated that this was the challenge they would change first if they could).[189]

Therefore, even if the benefits from collective bargaining mechanisms can be realized in theory, the fact remains that artists in Canada continue to struggle, and that only a relatively small proportion of these artists are willing to engage in collective bargaining mechanisms or to view these mechanisms as a primary option for increasing their socio-economic status as artists.

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[183] *Ibid*, at 12-13.
[184] Hill Strategies, *Key stats on the arts in Canada, May 2005* (Hill Strategies, 2005), online: <hillstrategies.com/resource/key-stats-on-the-arts-in-canada-may-2005/>.
[185] Kelly Hill, "A Statistical Profile of Artists and Cultural Workers in Canada: Based on the 2011 National Household Survey and the Labour Force Survey" (2014) 12:2 Statistical Insights on the Arts at 4.
[186] Kelly Hill, *How are Canada's artists doing?: Analysis of a survey of affordability and working conditions in early 2024* (Report prepared for the Cultural Human Resources Council, 2024), online: <culturalhrc.ca/sites/default/files/research/arts2024/CHRC-KellyHill-artists-analysis-2024.pdf>.
[187] *Ibid* at 1.
[188] *Ibid* at 12.
[189] *Ibid* at 14.

IV. LIMITATIONS OF COLLECTIVE BARGAINING MECHANISMS IN COPYRIGHT CONTRACTS

1) Prominent Shortcomings of Collective Bargaining Mechanisms

A review of the literature on collective bargaining mechanisms in copyright contracts in Canada indicates that there are four main areas where collective bargaining mechanisms may be falling short of their goals to provide artists with a more favourable economic environment in which to create. These areas are: the failures of collective bargaining mechanisms in improving the position of artists; the inability of collective bargaining mechanisms to adequality respond to and remain relevant in light of technological advances; the incompatibilities between collective bargaining mechanisms and other relevant areas of law; and the scope and reach of current legislation governing collective bargaining mechanisms in this area.

a. Failures in Collective Bargaining Mechanisms

A well-established body of literature addresses some of the failures of collective bargaining mechanisms to operate as intended. These sources primarily address some of the shortcomings or problems that might underpin the rationale for these mechanisms in the first place or how these collective bargaining mechanisms have unintended consequences or realities in practice.

One of the most notable authors in this regard is Ariel Katz, who wrote a number of articles which explore the limitations of collective bargaining mechanisms. In his 2005 article "The Potential Demise of Another Natural Monopoly: Rethinking the Collective Administration of Performing Arts", Katz considers the argument underpinning the collective administration of copyrights in the specific instance of the public performance of music that there is the existence of a natural monopoly in this context—largely due to transaction costs.[190] Katz refers to the *Copyright Act* and outlines that "The general idea behind the proliferation of collective administration of copyrights is that, because individual administration is often impracticable, or

[190] Ariel Katz, "The Potential Demise of Another Natural Monopoly: Rethinking the Collective Administration of Performing Rights" (2005) 1:3 Journal of Competition Law and Economics 541.

at least uneconomical, collective administration is the most efficient method for licensing, monitoring and enforcing copyrights…[T]he argument behind collective administration of copyrights in general, and performing rights in particular, is that the market for the licensing of such rights is a natural monopoly.".[191] In this way, Katz also indicates that his argument has broader applications for copyrights outside of the specific instance of the public performance of music.

Katz indicates that collective administration of copyrights in the public performance of music necessarily involve competition law, as organizations aimed at this collective administration are able to essentially remove the price competition between different copyright holders.[192] This results in some negative consequences for the copyright holders who make up the membership of these organizations, as organizations are therefore able to use the power they wield over individual copyright holders to make them subject to unfavourable terms, or to potentially discriminate against certain copyright holders. Additionally, while competition law is necessarily involved, Katz notes that while other jurisdictions subject comparable organizations to standards or laws from the field of competition law, this may not be the case in Canada: in particular, because the *Copyright Act* dictates that the Copyright Board is responsible for overseeing the operation of these organizations and is able to make a decision as to the applicable tariffs should the parties fail to reach an agreement, these organizations are "[probably] outside the ambit of Canadian competition law, at least in the majority of cases.".[193] Ultimately, Katz concludes that the natural monopoly justification of the collective administration of copyrights might not be as persuasive as many assert—this is because many of the benefits of collective administration can be achieved without resorting to reliance on a monopoly, and because many of these benefits are exaggerated regardless.[194]

In his 2009 paper "Commentary: Is Collective Administration of Copyrights Justified by the Economic Literature?", Katz contributes further to his examination of the economic underpinnings of collective administration of copyright by considering to what extent "bundling"

[191] *Ibid* at 543.
[192] *Ibid* at 544-547.
[193] *Ibid* at 546.
[194] *Ibid* at 590-593.

can operate as a persuasive justification for the collective administration of copyrights.[195] Katz begins his article by explaining how the common rationale for bundling in such situations operates: "…collective management remains an efficient mode to administer copyrights because what collectives do is bundle large repertoires of works under a single blanket licence…Essentially, bundling allows the seller to price discriminate without needing to know how different consumes value different works.".[196] Katz finds that this justification is not as strong as many have purported it to be—largely because this justification relies on an oversimplification of the market for copyrighted works (for instance, as Katz points out, the bundling justification erroneously relies on the assumption that individual copyrights holders must elect between managing their own individual copyrights, or relying on the collective administration of copyrights through "mega-bundles" of copyrights).[197] A further problem with the bundling justification is identified as being the disregard for the practical realities of the copyright market in Canada. For instance, bundling is unable to account for a number of the features of Canadian music market.[198]

In his 2009 paper "Copyright Collectives: Good Solution but for Which Problem?", Katz refers to his previous arguments that are made primarily in the context of the collective administration of copyrights related to the public performance of music—namely those made in his 2005 article "The Potential Demise of Another Natural Monopoly: Rethinking the Collective Administration of Performing Arts" and his 2006 article "The Potential Demise of another Natural Monopoly: New Technologies and the Administration of Performing Arts" (discussed in more detail in the following section)—and expands them to apply to other areas of collective administration of copyrights.[199] Katz goes on to find that "…with rare exceptions, efficiency-based justifications for [collective administration] are too weak to justify departure from the competitive paradigm and that in most cases collusion and rent-seeking are the main drivers of the formation of copyright collectives. I suspect that only rarely may such rent seeking may be

[195] Ariel Katz, "Commentary: Is Collective Administration of Copyrights Justified by the Economic Literature?" in Marcel Boyer, Michael Trebilcock & David Vaver, eds, *Competition Policy and Intellectual Property* (Toronto: Irwin Law Inc, 2009) 449.
[196] *Ibid* at 451.
[197] *Ibid* at 451-456.
[198] *Ibid* at 456-459
[199] Ariel Katz, "Copyright Collectives: Good Solution but for Which Problem?" (11 June 2009), online: <ssrn.com/abstract=1416798> [//dx.doi.org/10.2139/ssrn.1416798].

justified as a matter of policy, either as a way to improve the incentives to create socially valuable works or on distributional grounds.".[200]

In addition to Katz's works on the subject, other authors have called into question the weight that the established justifications for collective administration of copyright ought to have. In Christian Handke and Ruth Towse's 2007 paper "Economics of Copyright Collecting Societies", the authors question economic literature informing these justifications.[201] Ultimately, they find that there are significant gaps in this literature and in relevant research—gaps which have the potential to undermine the justifications altogether. For instance, Handke and Towse comment that there is a gap in knowledge regarding how differing interests between members and those who manage the collective, or even between members themselves, might affect the operation and success of a collecting organization.[202]

b. Inadequacies of Collective Bargaining Mechanisms in the Wake of Technological Developments

In addition to the literature that addresses how the underlying justifications for collective bargaining mechanisms might not hold up under closer scrutiny, there is also a body of literature that addresses the changes that evolving technology bring to the market for copyrightable works. By and large, these works suggest that digitization and computerization have the effect of further lowering the appeal of these collective bargaining mechanisms.

In his 2006 article "The Potential Demise of Another Natural Monopoly: New Technologies and the Administration of Performing Rights", Katz writes in order to explain how what were then new technologies have changed the landscape for the market for copyrightable works, further eroding the persuasiveness of the justifications underpinning the collective administration of copyright.[203] He refers to technological developments such as the preeminence of the internet, the digitization of the management of copyrights, and the emergence of digitized scanning capabilities for musical performances as factors that have continued to lower the transaction costs associated with contracting in the field of copyright. For instance, the internet

[200] *Ibid* at 3.
[201] Christian Handke & Ruth Towse, "Economics of Copyright Collecting Societies" (2007) 38:8 Int'l Rev Indus Prop & Copyright L 937.
[202] *Ibid* at 946-947.
[203] Ariel Katz, "The Potential Demise of Another Natural Monopoly: New Technologies and the Administration of Performing Rights" (2006) 2:2 Journal of Competition Law and Economics 245.

assists in helping parties find one another, and provides a forum for websites that are directly aimed at licensing copyrighted works.[204] "Digital rights managements systems" (which encompasses devices such as technological protection measures) are able to lower transaction costs by restricting access to copyrighted works and by lowering the costs of enforcement.[205] Finally, digitized scanning has reduced transaction costs because it allows a much easier way for parties to keep track of who has broadcasted which one of their copyrighted works.[206]

While Ariel Katz touches on the role that technological developments have on the suitability of collective administration of copyrights in his 2006 article detailed above, more current works indicate these developments, and other changes to the environment in which copyrightable works are created in today's world, continue to present problems and challenge the foundations upon which many collective bargaining mechanisms are built.

In the 2010 article "Fragmented Copyright, Fragmented Management: Proposals to Defrag Copyright Management", authors Daniel Gervais and Alana Maurushat identify the primary problem to the collective management of copyright as "fragmentation", which "…occurs on many different levels: rights stemming from the law recognizing several economics rights (reproduction, communication to the public, adaptation, rental, etc; within the market structure; within licensing practices; within a repertory of works; within different markets (language, territory); and through the interoperability of rights clearance systems.".[207]

Within the context of this argument, Gervais and Maurushat discuss the debate on the effect of technology on the justification for copyright collectives. They acknowledge that there is an established argument that collective management of copyrights may actually become *more* efficient in the wake of technological changes. This is because tools such as the internet make accessing and distributing a given copyrighted work much easier: copyright collectives might be able to negate the deleterious effects of this by bringing their knowledge and resources to act as intermediaries in helping to manage these copyrightable works. However, the authors also

[204] *Ibid* at 247-248.
[205] *Ibid* at 248-251.
[206] *Ibid* at 251-252.
[207] Gervais & Maurushat, *supra* note 84 at 15.

acknowledge that technology might have the opposite effect, making the individual management of copyrights more effective and appealing than the collective management of these rights.[208]

In the 2016 article "Collective Societies in a Transactional World", Adriane Porcin writes in response to the Supreme Court of Canada's 2015 decision *CBC v SODRAC*[209], in which the SCC found that decisions made by the Copyright Board as to copyright licenses (as per section 70.2 of the *Copyright Act*) are not mandatory for copyright users to accept.[210] Porcin refers to this decision as primarily being about "technological change, and who should benefit from it"[211] and as demarcating the "dawn of a new transaction world"—largely because these technological changes may allow individual copyright holders to negotiate more easily with individual copyright users, undermining the transaction cost justification for copyright collectives[212]. Ultimately, Porcin concludes that copyright collectives still play an important role in the modern copyright regime—however, they may have to change the way in which they operate if they hope to retain this role as technology advances.[213]

While much of the research and literature in this area focuses more on the problems that technology presents for collective bargaining mechanisms, as Gervais and Maurushat refer to, this is not without controversy: there is also an established argument that technological advances make collective organizations *more* efficient.

This side of the debate is not a recent school of thought. In the 1992 article "An Economic Analysis of Copyright Collectives", authors Stanley Besen, Shiela Kirby, and Steven Salop identify, in a relatively early article, the potential ways in which copyright collectives might be able to better address the needs of copyright holders and copyright users.[214] While this article is written primarily from the American perspective, it contains an analysis of copyright collectives with more general applicability. In this article, the authors provide a broad overview of the economic underpinnings of copyright collectives, and go on to analyze the legal role of copyright collectives in society. Importantly, the authors focus on technological changes which

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[208] *Ibid* at 19-20.
[209] *Canadian Broadcasting Corp v SODRAC 2003 Inc*, 2015 SCC 57.
[210] Adriane Porcin, "Collective Societies in a Transactional World" (2016) 28:3 Intellectual Property Journal 419.
[211] *Ibid* at 420.
[212] *Ibid* at 421-422.
[213] *Ibid*.
[214] Besen, Kirby & Salop, *supra* note 159.

make reproducing copyrighted works much easier. In regards to the role of these changes, the authors comment: "…new collectives can be expected to arise as technologies such as the videocassette recorder, the personal computer, and the photocopying machine facilitate more widespread and decentralized use of copyrighted materials and make individual monitoring even more difficult.".[215]

In the 2016 article "Rationale of Collective Management Organizations: An Economic Perspective", Zijian Zhang, in a piece written for a European journal, provides an analysis of the economic justifications underpinning copyright collectives.[216] Similar to Besen, Kirby, and Salop's 1992 article, Zhang's analysis has a more positive view of the role of developing technologies for the justifications of copyright collectives than do other authors. More specifically, Zhang focuses on "digital rights management technologies", which increase efficiency in the copyright market by controlling who accesses copyrighted work, and make it easier to monitor who is accessing these works and in what context. This allows copyright markets to achieve some of the economic benefits that may be realized in practices of price discrimination.[217] Ultimately, Zhang finds that copyright collectives are still very much positioned to reduce the transaction costs associated with contracting in the space of copyright—largely because they are able to harness the benefits that technological changes afford.[218] Interestingly, however, it must be noted that the argument that technological developments bolster the justifications for copyright collectives is more common in work arising from—and primarily situations in—jurisdictions outside of Canada.

c. Incompatibilities between Collective Bargaining Mechanisms and Other Relevant Areas of Law

There are many arguments against the effectiveness of collective bargaining mechanisms based on the incompatibilities of the mechanisms with other areas of law that are necessarily engaged when contracting in the area of copyright. Most often, these arguments focus on the incompatibility of collective bargaining mechanisms and the areas of labour law and competition law.

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[215] *Ibid* at 387.
[216] Zhang, *supra* note 154.
[217] *Ibid* at 81-84.
[218] *Ibid* at 89-93.

For instance, Elizabeth MacPherson notes in her 1999 article "Collective Bargaining for Independent Contractors: Is the *Status of the Artist Act* a Model for Other Industrial Sectors?" that one of the main barriers to collective bargaining as is put forward by the *SAA* are the uncertainties surrounding which department of the federal government is responsible for which parts or areas of collective bargaining or negotiation.[219] Similarly, Leah Vosko notes in the 2005 chapter "The Precarious Status of the Artist: Freelance Editors' Struggle for Collective Bargaining Rights" that the *SAA* has been less powerful than some say is necessary, largely because it remains subject to other legislation, including the *Canada Labour Code*, the *Public Service Staff Relations Act*, the *Copyright Act*, and the *Competition Act*: "This creates a potential for conflict between several legal regimes within the federal government's legislative authority, and it narrows the scope for collective bargaining in the arts." [220].[221]

First, the potential incompatibilities between collective bargaining mechanisms in the area of copyright contracts and Canadian labour law have been a source of concern from very early on—as early on as 1991 when discussions were taking place regarding what would then become the *SAA*.[222] In the 1996 paper "Rogues, Vagabonds, and Actors: an essay on the status of the performing artist in British Columbia", Mike Puttonen addresses one of these such conflicts: at the time he was writing, actors in British Columbia were classified by the provincial *Labour Relations Act* to be employees, while the *SAA* categorized them as self-employed workers.[223] This highlights the problems that might arise when federal and provincial legislation conflict.

Second, collective bargaining mechanisms for contracting in the area of copyright have been described as being, in many ways, at odds with Canadian competition law. In the 2022 chapter "Competition and Labour Law in Canada: The Contestable Margins of Legal Toleration", author Eric Tucker writes on where the boundary between labour law and

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[219] MacPherson, *supra* note 67 at 373.
[220] Leah F Vosko, "The Precarious Status of the Artist: Freelance Editors' Struggle for Collective Bargaining Rights" in Cynthia J Crawford et als, eds, *Self-Employer Workers Organize: Law, Policy, and Unions* (Montreal & Kingston: McGill-Queen's University Press, 2005) 136 at 148.
[221] These works are also cited as evidence of conflict between collective bargaining mechanisms and other relevant areas of law, see Slinn, *supra* note 181 at 18.
[222] Allan Michael (Mike) Puttonen, *Rogues, Vagabonds, and Actors: an essay on the status of the performing artist in British Columbia* (MA Thesis, University of British Columbia, 1996) at 72.
[223] *Ibid*.

competition might lie.[224] Notably, Tucker indicates the *SAA* avoids conflicting with the *Competition Act* as "artist associations certified to bargain on behalf of artists are deemed to be associations of employees, and agreements between producers pertaining to terms and conditions of artists' engagement are also deemed to be exempted.".[225] Tucker goes on to point out, however, that the *SAA* is limited in application to artists who are federally regulated as per the statute. Therefore, any provincial act that attempts to exempt artists from federal competition legislation would not have the authority to actually do so. This can be seen arising in the current state of legislation—as Quebec legislation currently provides artists with the right to collectively bargain, and could therefore (at least in theory) found to be overstepping—but also highlights the potential issues that provinces might face if they attempt to legislate further in this area.[226]

Furthermore, the fact that collective bargaining mechanisms are exempted from competition law standards might be problematic in itself. Some of the issues with this exemption are outlined by Ariel Katz in his aforementioned 2005 article, in which he suggests that the lack of oversight by or accountability to copyright standards might have detrimental effects for artists.[227] Likewise, in the 2008 article "Canadian Copyright Collectives and the Copyright Board: A Snapshot in 2008", Howard Knopf identifies these types of exemptions as one of the main drawbacks to copyright collectives. Knopf writes that "Oversight by the Copyright Board does not necessarily address concerns about competition law, since the Copyright Board has no expertise in competition law and has no mandate to take it into account. While the Commissioner of Competition is empowered and arguably expected to become involved in certain Copyright Board matters, neither she nor any of her predecessors have ever done so.".[228]

d. The Scope of Relevant Legislation

The final category of critique of the current framework of collective bargaining mechanisms in copyright contracts is the scope—or rather, the lack thereof—of relevant

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[224] Eric Tucker, "Competition and Labour Law in Canada: The Contestable Margins of Legal Toleration", in Sanjukta Paul, Shae McCrystal & Ewan McGaughey, eds, *The Cambridge Handbook of Labor in Competition Law* (Cambridge: Cambridge University Press, 2022) 127.
[225] *Ibid* at 134.
[226] *Ibid* at 139.
[227] Katz 2005, *supra* note 190.
[228] Howard P Knopf, "Canadian Copyright Collectives and the Copyright Board: A Snapshot in 2008" (2008) 21 IPJ 117 at 126.

legislation in this area. These critiques on the scope of relevant legislation are primarily aimed at the *SAA* and its failure to be meaningful to enough artists in enough contexts.

As a preliminary point, the scope of relevant legislation is limited by constitutional boundaries and divisions of powers: copyright is under federal jurisdiction, while contract law and labour law are largely under provincial jurisdiction.[229] Therefore, the ability of federal copyright legislation to interfere with contractual elements—or, conversely, the ability of contract and labour-related legislation to interfere with copyright elements—is extremely limited by the constitution itself. For instance, a significant problem that has been identified with the *SAA* is that it is quite narrow in its application: it only applies to creation that is done within the scope of federal jurisdiction.[230] As Julia Winters notes in her 2012 article "The 'Status of the Artist' under Canadian Law", the majority of artists create within the context of provincial jurisdiction—not federal jurisdiction.[231] This means that the majority of artists will find themselves unable to access the collective bargaining mechanisms established by the *SAA*.

Another concern with the scope of the *SAA* is the requirement that an artist must meet the definition of "professional" as per the *SAA* in order to benefit from the legislation.[232] This requirement has been critiqued as being difficult for artists to satisfy, and because of the danger that it might create a hierarchy between artists.[233] For instance, the term "professional" excludes artists who are "hobbyists".[234]

Additionally, the *SAA* has been critiqued for being *too* focused on collective bargaining mechanisms, to the detriment of other policies that might be effective in improving the position of artists in society. For example: "The report of the Sub-Committee on the Status of the Artist…made eleven recommendations for the improvement of the status of the artist. These included giving self-employed artists the right to bargain collectively, giving artists dual status as employees for unemployment insurance purposes and as self-employed persons for taxation purposes, establishing private group benefit plans for creative artists, providing bankruptcy protection for self-employed artists, and implementing income averaging tax provisions for

[229] *Constitution Act 1867*, *supra* note 39 at ss 91(23), (92(13); Library of Parliament, *supra* note 43.
[230] Slinn, *supra* note 181 at 18.
[231] Winters, *supra* note 82 at 263-64.
[232] *Status of the Artist Act*, *supra* note 7 at ss 6(2)(b), 18(b).
[233] Slinn, *supra* note 181 at 18.
[234] Vosko, *supra* note 220 at 148-149.

artists. Of these, only the collective bargaining recommendation was implemented…". Furthermore, surveys have indicated the collective bargaining might be the least of artists' concerns.[235] Therefore, there is a concern that the *SAA* is out of touch with initiatives that actually have the potential to improve the status of artists.

If collective bargaining mechanisms such as those put in place by the *SAA* are to be accessible to artists working within provincial jurisdiction, then provincial governments need to implement these pieces of legislation themselves.[236] While many provinces have passed supplementary legislation to the *SAA*, there are further problems with this supplementary legislation in particular, and with provincial differences in approaching the role of artists in society in general.

First, this approach raises questions as to the governance of artists and of the artistic and cultural sectors in Canada. As outlined in the first chapter of this research, Canadian cultural policy has primarily been aimed at supporting a *Canadian* cultural and artistic industry: this is as opposed to provincial industries. For instance, copyright law in general falls within federal jurisdiction, not provincial jurisdiction.[237] Introducing a piecemeal framework for collective bargaining for artists in this area poses a risk of fostering a legal environment where artists in one province ostensibly have different rights and bargaining positions than artists in another province. This has the potential to undermine the federal government's vision of a Canadian artistic and cultural industry, and is a possible source of yet another hierarchy system within creative industries.

For instance, British Columbia has, to date, enacted no supplementary legislation to the *SAA*. However, it has been noted that "…the British Columbia Labour Relations Board has been the most aggressive in the country in finding that artists can be considered "employees" for purposes of labour relations in the province". Furthermore, in the British Columbian context: "To be valid in the province, an agreement must be negotiated and ratified locally. This has led to a restructuring of organization relationships. For example, the [B.C. division of ACTRA] is responsible for negotiating and administering an agreement to cover independent producers who

[235] Winters, *supra* note 82 at 265.
[236] *Ibid* at 264-66.
[237] *Constitution Act 1867*, *supra* note 39 at s 91(23).

work there. This agreement has a number of substantive differences from the nationally-bargained agreement that applies in every other province.".[238] Similarly, Quebec's framework for artists in this area differs significantly from the rest of Canada.[239]

Second, this piecemeal legislative framework also raises issues as many of these provincial pieces of legislation have been critiqued for not going far enough to fill some of the gaps left in the federal *SAA*. For instance, in 2004-2005, the government of Ontario held consultations and released the "Report of the Status of the Artist Sub-Committee", which made 23 different recommendations in a variety of areas to improve the socio-economic conditions for artists—including recommendations regarding collective bargaining. Thereafter, the provincial government introduced the *Status of Ontario's Artists Act, 2007*. However, the provisions of this piece of legislation have been described as "modest": "The only reference to collective bargaining is oblique; the Government undertakes to 'strengthen the ability of arts and culture organizations to provide support to artists.'…There is yet no concrete action that will improve the daily working lives of Ontario artists or assist them to make a living as professionals".[240]

2) Suggestions for Improving the Effectiveness of Collective Bargaining Mechanisms

In response to many of the criticisms identified above, and which highlight the potential shortcomings of collective bargaining mechanisms in Canada in regards to copyright contracts, there have also been many calls for change and many recommendations for policy initiatives to improve the effectiveness of collective bargaining mechanisms in improving the status of the artist. These suggestions for improvements fall into three broad categories: improvements aimed at changing the role that collective bargaining mechanisms play in the Canadian copyright landscape altogether; improvements aimed at amending the *SAA* to become more useful and beneficial to artists; and improvements aimed at filling some of the gaps of the *SAA* and the *Copyright Act* to provide further benefits to artists.

[238] ArtsNB.ca, *supra* note 104 at 11.
[239] *Ibid* at 6-8.
[240] *Ibid* at 9-11.

a. The Appropriate Role of Collective Bargaining Mechanisms

Due to the limitations and shortcomings of collective bargaining mechanisms, some have advocated for a change in the role that these mechanisms play altogether. As a result of many of the doubts that have been raised as to the strength of the justifications underlying implementing collective bargaining mechanisms in copyright contracting, arguments have been made that these collective bargaining mechanisms should play less of a role in the copyright contracting process, and that other mechanisms might be more justified. For instance, Ariel Katz noted that the role that intermediaries—such as publishers or record companies—play in the process is often downplayed or even ignored. Katz argues that negotiations between intermediaries and the ultimate user of a copyrighted work are possible, and in many cases, might be better able to achieve the goals that copyright collectives purport to achieve.[241]

Katz also argues that even if there is an important role for copyright collectives, these copyright collectives are not looked at closely enough to determine if they are, in fact, achieving their goals and acting as beneficial tools in creative industries: "…even if we accept that [performing rights copyright collectives] exhibit some natural monopoly characteristics and that their associated advantages outweigh their anti-competitive harms, regulators should adopt a fine-tuned approach to their regulation in an attempt to identify what elements are indeed natural monopoly, which aspects of [these copyright collective's] operation could be carried out more competitively and whether there are other arrangements that could obviate the need for collective administration in the first place.".[242] Katz indicates that the innerworkings of copyright collectives often go unexamined, and that policymakers or other decisionmakers do not take a close enough look at the details and circumstances surrounding copyright collectives.[243]

Katz also argues that the justifications underpinning copyright collectives are affected by technological developments, and that "…even if endorsing the regulated monopoly framework for dealing with [performing rights copyright collectives] has not been totally erroneous given old technologies, any theory based on transaction costs should be revisited when new technology dramatically changes those costs.".[244] Therefore, in these ways, Katz argues that the role of

[241] Katz 2005, *supra* note 190.
[242] *Ibid* at 591.
[243] *Ibid* at 593.
[244] Katz 2006, *supra* note 203 at 283-284.

copyright collectives in the copying contracting landscape might not be ideal, and might not be an optimal way of meeting many of the objectives that they were introduced to achieve. Copyright policymakers and decisionmakers therefore ought to more closely examine the current scheme of copyright collectives and the details of how these collectives work, in the context of technological developments to determine if they are operating in a beneficial way. To further this, more research conducted in this area would be useful. A restructuring of the current framework for copyright contracting might be needed—including putting an increased reliance on intermediaries in the process of contract negotiation and formation.

b. Improving the Provisions of the *Status of the Artist Act*

Many of the most direct proposals for reform in this area arise from the 2023 report "Strengthening the Status of the Artist in Canada", released by the Standing Committee on Canadian Heritage.[245] This report identifies three ways in which the *SAA* may be changed in order to more effectively operate to the benefit of artists in Canada. First, the *SAA* should implement provisions that reflect technological neutrality, requiring "producers to negotiate minimum working conditions for any new broadcasting channel or any new means of production within a reasonable period of time after their first use.".[246]

Reflecting the notion of technological neutrality would bring the *SAA* more in line with other aspects of copyright law. For instance, the overriding approach to copyright law in modern Canadian jurisprudence is that copyright law must strive to maintain a balance between users' rights and artist's rights. As noted by the Supreme Court of Canada in 2002: copyright law ought to be concerned with achieving a "balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator".[247] The concept of technological neutrality is considered imperative in upholding the balance that exists in Canadian copyright law.[248] In the 2012 decision *Public Performance of Musical Works, Re*, the SCC is tasked with determining whether the downloading of video games on the internet constitutes a "communication" as per the *Copyright Act*. In its analysis, the SCC comments on the importance of technological neutrality in Canadian copyright law: "The

[245] House of Commons 2023, *supra* note 180.
[246] *Ibid* at 12.
[247] See e.g. *Théberge*, *supra* note 33 at para 30.
[248] Gendreau, *supra* note 5 at 3-4.

principle of technological neutrality requires that, absent evidence of Parliamentary intent to the contrary, we interpret the *Copyright Act* in a way that avoids imposing an additional layer of protection and fees based solely on the *method of delivery* of the work to the end user. To do otherwise would effectively impose a gratuitous cost for the use of more efficient, Internet-based technologies.".[249]

Therefore, amending the *Status of the Artist Act* to reflect the importance of technological neutrality would align this legislation with both the *Copyright Act* and also with Canadian copyright jurisprudence. This would also broaden the scope of the *SAA*, allowing more artists to access and benefit from its collective bargaining mechanisms in more contexts.

Second, it has been suggested that change is needed in regards to the definitions that are established by the *SAA*. More specifically, it has been noted that the definitions for both the term "artist" and the term "producer" ought to be changed to be more encompassing, so that a broader range of artists in a broader range of scenarios might benefit from the collective bargaining mechanisms in this legislation.[250] Currently, sections 5 and 6(2)(b) indicate that an "artist"—to whom the *SAA* applies—is an "independent contractor" who is a "professional" involved in a set list of creative activities. This definition captures people who: "are authors of artistic, dramatic, literary or musical works within the meaning of the *Copyright Act*, or directors…"; are involved in performance, singing, and acting; and who contribute to creating a production related to music, dance, film, and other categories.[251] This is also supplemented by the *Status of the Artist Act Professional Category Regulations*, which lists further categories under which people might be considered "artists".[252]

It has been argued that the definition of "artist" as per these categories is not sufficiently broad or inclusive, and that it has failed to keep up with or reflect changes in creative industries as technology has advanced. Some groups have indicated that the definition is confusing and out of touch with both what is standard practice for creative communities, and Canadian jurisprudence. There is support for changing the definition of "artists" in the *SAA* to more closely mirror the comparable legislation in Quebec, which defines an artist as "a natural person who

[249] *Public Performance of Musical Works, Re*, 2012 SCC 34 at para 9.
[250] House of Commons 2023, *supra* note 180 at 12-14.
[251] *Status of the Artist Act*, *supra* note 7 at ss 5, 6(2)(b).
[252] *Status of the Artist Act Professional Category Regulations*, SOR/99-191.

practices an art on his own account and offers his services, for renumeration or other monetary consideration, as a creator or performer.".[253]

Similarly, this requirement of "professional" also presents obstacles for artists in accessing the provisions of the *SAA*. Currently, the legislation dictates that for determining "professional" status, it is relevant to take into consideration: whether the independent contractor at issue is paid for their display or presentation of their work; and whether the independent contractor is "in the process of becoming an artist according to the practice of the artistic community" or "is a member of an artists' association.".[254] As discussed above, this requirement has been critiqued as being difficult to satisfy.[255] Therefore, amendments in respect of the definition of "professional", or of the factors that must be taken into account when determining if an artist meets this requirement, would provide clarity and could allow for more artists to access the provisions of the *SAA*.

Third, as "[s]ome witnesses said that negotiating the first scale agreement was the biggest challenge"[256], there have been calls for introducing a binding dispute resolution process into the *Status of the Artist Act*—this would ensure that an initial scale agreement may be secured.[257] For instance, some groups have suggested that the *Status of the Artist Act* should more closely resemble the Quebec legislation (as well as federal labour legislation) on this issue the Quebec legislation already has a provision in place to trigger a binding arbitration process. Other groups go further, and indicate that a binding dispute resolution process should be available to all agreements, not just initial ones.[258]

c. Implementing or Amending Related Legislation to Fill in the Gaps left by the *Copyright Act* and the *Status of the Artist Act*

Finally, as discussed in more detail above, the current approach to provincial legislation in this area is piecemeal, and in many respects, lacking. Therefore, the current framework of collective bargaining mechanisms in regards to the area of copyright contracts could benefit from

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[253] House of Commons 2023, *supra* note 180 at 13-14, referring to *Act respecting the professional status and conditions of engagement of performing, recording and film artists*, c 3-32.1 at s 1.1.
[254] *Status of the Artist Act*, *supra* note 7 at s 18(b).
[255] Slinn, *supra* note 181 at 18.
[256] House of Commons 2023, *supra* note 180 at 14.
[257] Slinn, *supra* note 181 at 14-16.
[258] *Ibid* at 14-16.

provincial legislation that is consistent across provinces and that addresses many of the issues and practical realities that artists face.

V. THE FUTURE OF COLLECTIVE BARGAINING MECHANISMS IN CANADA

1) Lessons from Abroad

Historically, Canada's framework for collective bargaining mechanisms in copyright have been more prominent than comparable mechanisms in similar jurisdictions: "Canada's Copyright Board plays a greater role in the collective administration of copyright than comparable tribunals in Australia, the USA, UK and other common law countries, and probably all other major developed countries.".[259] However, as demonstrated in the earlier chapters of this research, the current Canadian framework in this area is not faultless. When considering the future of collective bargaining mechanisms for Canadian copyright contracts, it is useful to consider the collective bargaining mechanisms that exist for artists in other jurisdictions—even though these jurisdictions might have different constitutional limitations than Canada. Of particular note are the jurisdictions of: the United States, Germany, and the Nordic countries.

a. The United States

The framework for collective bargaining in copyright contracts in the United States is useful to examine because, in many respects, the United States has the dominant market for many creative industries. For instance, the United States leads the world in revenue from recorded music.[260] Two types of copyright groups are prevalent in the United States: the first is "copyright collectives", within which terms regarding the applicable copyrights are set by the

[259] Knopf, *supra* note 228 at 117.
[260] Qinqing Xu, *Collective Management of Music Copyright: A Comparative Analysis of China, the United States and Australia* (London: Routledge, 2023) at 53.

collective; and the second is "collecting societies", within which the society enforces and collects fees as per the terms set by individual members.[261] Notably, copyright collectives have come under scrutiny in the United States because of their anti-competitive consequences: they remove any possible competition between their members as to the terms of licensing.

As a result of this, there has been ongoing litigation since as early as the 1930s as to whether or not copyright collectives therefore violate anti-trust and competition litigation. This controversy and its ensuing litigation has resulted in some copyright collectives and the Department of Justice entering into "consent decrees", which reintroduce some level of competition into the operation of these collectives.[262] One of these consent decrees—entered into by the American Society of Composers, Authors, and Publishers and the Department of Justice—introduces a "rate court" which is responsible for settling disputes between the collective and users of a copyrighted work regarding the terms of licensing, and for making decisions regarding distribution, transparency, and access to information. The consent decrees create a system whereby there is a significant amount of control over some of these collectives.[263]

The American approach to copyright collectives has been lauded as an effective way of keeping the anticompetitive tendencies of collectives in check and of mitigating some of the harms that might arise from allowing collectives to operate with monopolistically-orientated procedures.[264] However, it has also been commented that the American approach to copyright collectives "…is not in existence in any other country and depends too much on the special characteristics of the U.S. legal system to be of any direct use or application in Canada.".[265] Regardless of the practicality of implementing an American system into the Canadian framework, the general approach that the United States takes towards regulating copyright collectives, with an eye towards the anticompetitive nature of these collectives, is not irrelevant for the Canadian approach: "The lesson from the U.S. antitrust treatment of [copyright collectives] is that details do matter, that it makes a difference whether [copyright collectives]

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[261] Glynn Lunney, "Copyright Collectives and Collecting Societies: The United States Experience" in Daniel Gervais, ed, *Collective Management of Copyright and Related Rights* (The Netherlands: Kluwer Law International, 2006) 319 at 319.
[262] *Ibid* at 319-322.
[263] Daniel J Gervais, "Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective" (2002) 1:2 Canadian Journal of Law and Technology 21 at 31-32.
[264] See e.g. Katz 2005, *supra* note 190.
[265] Gervais 2002, *supra* note 263 at 33.

obtain exclusive licenses or not, and whether less restrictive practices than blanket licensing to all users all the time could be available.".[266]

b. Germany

It is useful to examine the German approach to collective bargaining mechanisms as Germany is recognized as the country in Europe with the "biggest domestic market for copyright-based goods and services".[267] Examining the German approach to copyright collectives and the role of collective management in copyright contracts reveals that there are two ways in which the German approach might serve as a lesson for the Canadian model moving forward. First, the German approach to copyright collectives differs significantly from the Canadian approach largely because of how extensive government policy has been in this area: "In Germany, [copyright collectives] are governed by the *Administration of Copyright and Neighbouring Rights Act*, perhaps the most extensive model of sector-specific State control of the operations of a [copyright collective] anywhere in the world.".[268] For instance, under the German system, governmental bodies (usually the German Patent Office) have control over, among other activities: approving the formation of a copyright collective, revoking approval of a copyright collective, appointing board members and revoking board members, approving distribution plans of copyright collectives, and penalizing and sanctioning copyright collectives.[269]

An increased amount of control over copyright collectives might work well in Canada, as this system operates beneficially for societies that consider copyright collectives as performing a "public function". For instance, it has been noted that: "Treating [copyright collectives] to a certain extent as entities playing a 'public' role, and consequently imposing a certain right to oversee their operations, may lead to greater credibility because users who know that [copyright collectives] are subject to certain obligations may find it easier to deal with them. By the same token, 'approved' [copyright collectives] may find that it is easier to negotiate and/or enforce the rights entrusts to them.".[270] Given the increasing emphasis on the public interest as a goal of

[266] Katz 2005, *supra* note 190 at 593.
[267] Jörg Reinbothe, "Collective Rights Management in Germany", in Daniel Gervais, ed, *Collective Management of Copyright and Related Rights* (The Netherlands: Kluwer Law International, 2006) 205 at 205.
[268] Gervais 2002, *supra* note 263 at 32.
[269] *Ibid* at 32-33.
[270] *Ibid* at 33.

copyright law in Canada (as elucidated by the Supreme Court of Canada in recent decisions, as outlined in the first chapter of this research), there is an increasingly persuasive argument that in the Canadian copyright regime, copyright collectives do indeed perform a public function. Therefore, the German model for copyright collectives—which is characterized by a more highly regulated framework—might be inspirational for the Canadian approach moving forward.

Second, Germany has also implemented some provisions which enable artists to have increased access to collective bargaining mechanisms in a unique way.[271] For instance, German labour law was amended to allow for "quasi employee status for freelance artists".[272] In addition to allowing eligible artists to access labour courts to adjudicate disputes regarding contracts and entitling these artists to minimum standards or benefits, this quasi employee status allows artists to take advantage of laws on collective agreement in creative fields: "…the fees and conditions of employment can be regulated by collective agreements, contrary to the competition laws which normally rule out such instruments. In the arts and media field, collective contracts exist for freelancers working in broadcasting, the press, as well as – in a more restricted sense – for designers.".[273] These German provisions are not without controversy, however. It has been argued that, due to the general nature of these laws (as they are not aimed directly at artists, but apply to all categories of workers), they are not direct enough to meet the needs and status of artists. Additionally, many artists who do not fall within the definition of "quasi employment status" might find themselves much worse off than their "quasi employed" counterparts, and might find themselves without effective protection in regards to collective bargaining mechanisms.[274] This model is useful moving forward, as Canadian policymakers might learn from the benefits of implementing a similar "quasi employee" status for artists (or, similarly, might learn from the drawbacks to the current German system in this regard).

c. Nordic Countries

The collective bargaining mechanisms available to artists in Nordic countries are also notable, and may be of relevance for Canada's framework in the future. Canada's *Copyright Act*

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[271] ArtsNB.ca, *supra* note 104 at 12.
[272] European Institute for Comparative Cultural Research, *The Status of Artists in Europe* (Brussels: European Parliament, 2006), online: <andea.fr/doc_root/ressources/enquetes-et-rapports/51b5afb01bb8d_The_status_of_artists_in_EU.pdf> at 15.
[273] *Ibid* at 15.
[274] *Ibid* at 15.

establishes a system for collective bargaining that is by and large voluntary: this means that artists can elect whether or not to rely on a copyright collective. Interestingly, the Canadian framework in this regard is unique among comparable frameworks in other jurisdictions: "…the Canadian [*Copyright Act*] is original in the way it limits recourse available to rightsholders who do not participate in a collective scheme. For example, section 76 of the *Copyright Act* provides that an owner of copyright who does not authorize a Collective Management Organization to collect royalties for that person's benefit is only entitled to be paid those royalties by the collective designated by the [Copyright Board] subject to the same conditions as those to which a person who has so authorized that collective is subject.".[275]

Nordic countries implement "extended collective licensing" as a way to bridge the gap between artists who have elected to participate in a copyright collective and artists who have elected not to.[276] Extended collective licenses have been implemented in many Nordic countries—including Denmark, Finland, Iceland, Norway, and Sweden—since as early as the 1970s.[277] Under extended collective licensing, a given copyright collective, once assessed as representing a substantial amount of artists in that field, may enter into agreements concerning copyrightable works, and these agreements affect both members of that collective as well as relevant non-members.[278] This differs from the current Canadian model because while the *Copyright Act* establishes an "opt-in" system, extended collective licensing is notable for establishing an "opt-out" system—relevant artists who do not wish for the agreements established under extended collective licensing to apply to them may elect as such.[279]

There are several purported advantages to implementing extended collective licensing. First, extended collective licensing addresses many of the problems that are inherent to contracting in the field of copyright in general. For instance, one of the rationales underpinning extended collective licensing is that it reduces transaction costs and increases efficiency. Another rationale is that it assists in correcting the power imbalances that exist between artists and the

[275] Gervais 2002, *supra* note 263 at 28.
[276] *Ibid* at 29.
[277] For an overview of the history of extended collective licensing in these countries, see Daniel J Gervais, "Application of an Extended Collective Licensing Regime in Canada: Principles and Issues Related to Implementation" (1 June 2003), online: < ssrn.com/abstract=1920391> [dx.doi.org/10.2139/ssrn.1920391] at 47-63.
[278] Gendreau 2020, *supra* note 137 at 270-271.
[279] Gervais 2003, *supra* note 277 at 5.

users of copyrighted material—this is because extended collective licensing allows copyright collectives to involve more artists.[280] A consequence of this increased efficiency could also benefit the artists directly: "…by accelerating the acquisition of rights, the extended collective licence also increases the efficiency and promptness of royalty collection. The monies redistributed to rights holders are thereby increased.".[281] Second, extended collective licensing may be able to better respond to some of the challenges to collective bargaining that arise in the wake of increasing digitization and increasing technological developments. For instance, while increased digitization has made it easier to violate copyrights through unauthorized reproduction and dissemination of copyrighted material, extended collective licensing has provided a solution to enable artists to still be renumerated for their material without a potential user having to undergo significant costs to obtain the necessary legal authorizations. Furthermore, extended collective licensing provides a system by which this might occur without a given country putting in place extensions or "compulsory licenses" (which have the potential to breach international copyright treaties).[282]

The use of extended collective licensing has been described as potentially very useful in Canada in particular. Extended collective licensing seems to hold benefits especially for societies that: are cohesive; rely to some degree on foreign material, which introduces further difficulties and costs in obtaining legal authorizations; and contain artists who are both organized and informed.[283] Furthermore, Canada has a comparably large number of copyright collectives. This presents difficulties for copyright collectives because it introduces the problem of "…[acquiring] an adequate repertoire so that they can respond to the request of users and gain the credibility and relevance necessary for them to thrive.".[284] Extended collective licensing may be able to ameliorate this difficulty by providing a means through which these copyright collectives—especially newer or smaller collectives—may become more established.[285]

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[280] Jiarui Liu, "Copyright Reform and Copyright Market: A Cross-Pacific Perspective" (2016) 31:2 Berkeley Tech LJ 1461 at 1481-1484.
[281] Gervais 2003, *supra* note 277 at 16.
[282] *Ibid* at 20-22.
[283] *Ibid* at 4, 16.
[284] *Ibid* at 22.
[285] *Ibid* at 22-23.

Despite its potential benefits for the Canadian copyright regime, extended collective licensing has not gained much practical traction in Canadian legislative initiates: while many of the potential benefits of extended collective licensing for Canada have been identified since 2003, 2012 amendments to the *Copyright Act* opted for a regime that encompasses more copyright exceptions instead.[286] The divergence between the historical tendency of Nordic countries to embrace extended collective licensing and the Canadian reluctance to implement it (and the Canadian focus on policies such as exemptions) have been explained by reference to the different philosophies and goals underpinning the two different systems of copyright: "In the Nordic countries, the development of the extended collective licence mechanism over more than 50 years reflects a preoccupation for the representativeness of [copyright collectives]. In Canada, on the other hand, what has dictated the intervention of the legislator is the concern for the potential abuse of the monopolistic position by the [copyright collectives] during the course of their dealings with users of works.".[287]

Furthermore, additional challenges to implementing extended collective licenses in the Canadian context have been identified. The first challenge stems from Canada's constitution: if extended collective licensing was to establish a copyright collective that represents a Canada-wide group of artists, it would conflict with the *SAA*, as well as with supplementary provincial legislation in this area.[288] The second challenge is regarding the "representative" nature that characterizes extended collective licensing: this is due to the requirement that in order for extended collective licensing to operate, a copyright collective must represent an adequate number of artists in a given area. Typically, this requirement mandates that the copyright collective "…represents the rights on a 'substantial' or 'significant' portion of the repertoire it licenses.".[289] However, in certain industries in Canada (such as online music streaming, for instance), there is a real risk that this requirement might not be met, or would operate in a problematic way for copyright collectives.[290] Third, the current role of the Copyright Board, as dictated by the *Copyright Act* is likely not sufficiently expansive to allow the Copyright Board to

[286] Gendreau 2020, *supra* note 137 at 272.
[287] *Ibid* at 273.
[288] *Ibid* at 278-283.
[289] Lucie Guibault, "Extended Collective Licensing as Rights Clearance Mechanism for Online Music Streaming Services in Canada" (2020) 18:2 CJLT 213 at 243.
[290] *Ibid* at 243-247.

play the role it would need to play in order for expansive collective licensing to operate successfully. Therefore, the role of the Copyright Board would need to be amended, to accommodate for situations where the Copyright Board would need to intervene in scenarios regarding the relationship between a copyright collective and an artist.[291]

Despite the challenges that might be inherent in introducing extended collective licensing to Canadian collective bargaining mechanisms in the field of copyright, the benefits that may be afforded by this mechanism remain compelling. Nordic countries, many of which have been successfully implementing extended collective licensing for decades, remain an intriguing model for how this method of licensing might benefit Canada.

2) Future Directions of Canadian Copyright Policy

The environment in which copyrighted material is created and disseminated is changing rapidly. These changes affect not only the nature of copyright itself, but also have the potential to affect the role that collective bargaining mechanisms play in the Canadian copyright landscape. This can be seen particularly in two main areas: the rise of users as a dominant force in copyright, and the rise of artificial intelligence in copyright industries.

a. Adjusting to the Dawn of the Users' Age

As is demonstrated earlier in this research, Canadian jurisprudence has shifted over the years to emphasize the rights of *users* of copyrighted worked, rather than the rights of artists. This presents potential problems for artists, as they now find themselves contracting in an area where laws and jurisprudence might favour the user of a copyrighted work as opposed to the artist of a copyrighted work. Furthermore, with the ease of distribution and dissemination though digitization and the internet, there are now many more possible users with whom copyright artists might interact. The rise of the "user" has caused a shift in copyright law in general: "Historically, copyright was a tool designed to support contractual relations between professionals…or to fight professional pirates. It is not a legal tool that rightsholders can use against *end-users*, including consumers.".[292]

[291] *Ibid* at 248-249.
[292] Gervais 2005, *supra* note 155 at 327.

Furthermore, the rise of users is also accompanied by a rise in contracts with these users—including contracts such as end-user license agreements. The role and enforceability of these end-user license agreements and related contracts is controversial and the subject of much debate—there is an argument that due to the unilateral nature of these licenses, they might not be enforceable as contracts at all.[293] This is notable for the role and relevance of collective bargaining mechanisms in copyright contracts because it changes the nature of how contracts are made and which types of contracts are the most common, as well as calling into question the role of contracts altogether in the area of copyright.

b. Copyright Collectives in an era of Artificial Intelligence

One of the most controversial areas of modern copyright law is the role of artificial intelligence in copyright. This is particularly true in regards to generative artificial intelligence, which enables systems to make "new" content based on prompts fed to it by users. For instance, in regards to the use of generative artificial intelligence in Canada, a 2023 report found that coders of software could complete tasks in 56% less time by using generative artificial intelligence.[294] Another 2023 report found that tasks centred around writing and that used generative artificial intelligence could be completed in 37% less time and were more well-written than were those writing tasks completed without artificial intelligence.[295] In regards to the creative industries, a 2022 report found that 14% of survey respondents were already using generative artificial intelligence in some capacity.[296]

The potential value of generative artificial intelligence in art, and in other copyright-based fields, is staggering. For instance, in 2018 a computer-generated piece of artwork was sold at auction for $423,500 USD.[297] The role that artificial intelligence ought to play in creative fields is a source of much debate. For instance, in 2023, an American court was tasked with

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[293] Renee Zmurchyk, "Contractual Validity of End User Licence Agreements" (2006) 11 Appeal: Rev Current L & L Reform 55; For a discussion on the role that end-use license agreements might play in online or virtual worlds, see also Kimberly Barker, *MMORPGs: The Fairness of the Copyright Contract approach for users?* (PhD Thesis, Aberystwyth University, 2013) [unpublished].

[294] Accenture & Microsoft, *Canada's Generative AI Opportunity* (2024), online: <microsoft.com/en-us/industry/microsoft-in-business/wp-content/uploads/sites/28/2024/06/Canadas-Generative-AI-Opportunity-White-Paper-FINAL-English.pdf> at 13.

[295] *Ibid* at 13.

[296] *Ibid* at 13.

[297] Jon McCormack, "The Value of AI Art" in Miguel Carvalhais et al, eds, *The Book of X: 10 Years of Computation, Communication, Aesthetics and X* (Portugal: I2ADS, 2022) 181 at 183-184.

determining the issue of whether or not copyright could vest in a piece of artwork created by a machine using artificial intelligence.[298] In finding that such a scenario could result in a copyrightable work, the court also commented on the problems that artificial intelligence might pose for the area of copyright in general:

> Undoubtedly, we are approaching new frontiers in copyright as artists put AI in their toolbox to be used in the generation of new visual and other artistic works. The increased attenuation of human creativity from the actual generation of the final work will prompt challenging questions regarding how much human input is necessary to qualify the user of an AI system as an "author" of a generated work, the scope of the protection obtained over the resultant image, how to assess the originality of AI-generated works where the systems may have been trained on unknown pre-existing works, how copyright might best be used to incentivize creative works involving AI, and more.[299]

Therefore, the rise in prominence of artificial intelligence has enormous implications for the area of copyright—and for the role of collective bargaining in copyright contracts. In many ways, the concerns that surround the widespread utilization of generative artificial intelligence—are not new. For instance, a 2023 study noted that:

> In the wake of widespread use of generative AI tools, an increasing number of stakeholders in the creative industries have expressed concerns about the impact of this technology on the copyright framework. For a number of stakeholders, they see AI undermining rights holders' ability to consent to the use of their creative works and to receive due credit and compensation. Particularly, they are concerned about the uncompensated use of copyright-protected works in the development of AI systems, the potential for AI-generated outputs to infringe existing copyright-protected works, and the lack of practical enforcement remedies for rights holders.[300]

This demonstrates that despite the novelty of artificial intelligence, the concerns of artists or other copyright holders are not necessarily novel, and mirror many of the concerns that have always plagued artists—particularly in reaction to new technology: artists remain concerned about the unlawful use of their copyrighted work, and the inability of enforcing their copyrights against those who are not legally authorized to use such work. These concerns have implications

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[298] *Thaler v Perlmutter*, case No. 1:22-cv-01564, (D.D.C. 8/18/23).
[299] *Ibid* at 13.
[300] Innovation, Science and Economic Development Canada, *Consultation on Copyright in the Age of Generative Artificial Intelligence* (Ottawa: Innovation, Science and Economic Development Canada, 2023) at 4.

for collective bargaining mechanisms because these are the very concerns that are often upheld as justifications for the existence of collective bargaining mechanisms altogether. For instance, generative artificial intelligence may create a problem where the owner or user of a generative artificial intelligence technology might need to incur significant time and expense to locate copyright owners and negotiate with these owners. Furthermore, the owners of such technologies are likely in a much better bargaining position than individual copyright holders. Therefore, collective bargaining mechanisms might become *more* relevant in the rise of artificial intelligence.[301] However, as was demonstrated in Part IV of this research, the rise of technology in making it more difficult for copyright collectives to protect copyrighted works and enforce copyrights against those who are not legally authorized to use given works is often cited as a reason why these justifications underpinning collective bargaining mechanisms might fail.

While artificial intelligence might not raise necessarily new concerns regarding the role of technology in copyright, it does intensify these concerns. For instance, artificial intelligence makes it even more difficult for someone to identify exactly *who* is infringing their copyright: "Determining liability and infringement may become increasingly complex as the level of human involvement in AI-generated works decreases and AI's capacity to independently create works increases.".[302] Artificial intelligence also makes it even more difficult to determine in what way, or how much, of a artist's work was used in an alleged copyright infringement—presenting further difficulties for artists to establish liability.[303]

Therefore, collective bargaining mechanisms in copyright contracts in Canada will inevitably and unavoidably have to deal with artificial intelligence issues as technology as this space develops. For the future of collective bargaining mechanisms, it will be important to keep in mind the difficulties that artificial intelligence may present. Additionally, there is another problem presented by artificial intelligence: "…[collective management organizations'] licensing and monitoring activities have the propensity to hinder smooth effective development, training and deployment of generative and creative AI systems.".[304] Thus, if collective bargaining

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[301] Yang Gao, Paul Kossof & Yan Dong, "Research on the Dilemma and Improvement of the Copyright Fair Use Doctrine Related to Machine Learning in China" (2022) 22:1 UIC Rev Intell Prop L vii at 19-21.
[302] *Ibid* at 15-16.
[303] *Ibid* at 16.
[304] Desmond Oriakhogba, "WIPO Good Practice Toolkit for Collective Management Organisations 2021: Suggestions for Possible Amendment" (2024) Joint PIJIP/TLS Research Paper Series at 6.

mechanisms respond too severely to the challenges presented by artificial intelligence, in terms of monitoring and enforcement, it may have a deleterious effect on the development of artificial intelligence technology.

CONCLUSION

Collective bargaining mechanisms in Canadian copyright contracting have been available for artists since the late 20th century. The primary examples of these mechanisms—the *Copyright Act*'s "collective societies" and the *SAA*'s "artists' associations"—are based on correcting many of the problems that are inherent to contracting in the field of copyright in general. More specifically, these mechanisms are informed by an intention to place artists in a better contractual bargaining position vis-à-vis those with whom they enter into agreement regarding copyrighted work. At least theoretically, these mechanisms reduce transaction costs associated with contracting, correct imbalances that exist between the two types of parties, correct some of the issues that are inherent to contracting in an area concerning a public good, and ameliorate some of the problems that arise from the tendency to categorize artists as independent contractors (as opposed to employees).

However, despite the purported benefits of collective bargaining mechanisms in copyright contracting, the practical and economic realities that Canadian artists continue to face indicate that these mechanisms might not be as effective in providing artists with a favourable contractual environment as policymakers and artists might have initially hoped. Not only do artists continue to endure grim economic conditions—such as unstable and low incomes, having to work more than one job in order to make ends meet, and other financial stressors—but they also continue to be unwilling or unable to utilize available collective bargaining mechanisms in their favour.

There are several ways in which the current framework for collective bargaining mechanisms may be flawed. First, there are doubts as to the strength of the justifications that underpin collective bargaining mechanisms altogether. Second, there is a concern that technological developments continue to erode these justifications and have the potential to

further make these collective bargaining mechanisms an unsuitable means for strengthening the contractual position of artists. Third, as a result of the structure of Canadian federalism and other areas of federal law, there is a concern that these collective bargaining mechanisms potentially conflict with other established areas of law. Finally, the legislation that collective bargaining mechanisms arise from have been critiqued as being insufficient in scope and reach.

As a result of these limitations, there have been many suggestions for improving the effectiveness of collective bargaining mechanisms. Some indicate that the role that collective bargaining mechanisms play in the broader copyright contracting space ought to be changed—or at least more closely examined to determine if they are indeed still aligned with the justifications that underpin them. Others call for amendments to existing legislation, and in particular, amendments to the *SAA*, to reflect modern developments, broaden the scope of legislation, and introduce more concrete means ensuring that initial scale agreements are attainable for artists' associations. These amendments might also be accompanied by supplemental provincial legislation.

These suggestions for improving the current framework for collective bargaining mechanisms might also be accompanied by taking into account the frameworks for these mechanisms that exist in other jurisdictions. For instance, the American approach—which is more intertwined with competition law—might be useful to consider to determine the appropriate role of competition considerations in collective bargaining mechanisms. The more highly regulated German approach might allow Canadian mechanisms to adapt to the increasing emphasis on understanding copyright as a public good. The use of extended collective licensing, which is prevalent in Nordic countries such as Denmark, Finland, Iceland, Norway, and Sweden, has long been flagged as a source of potential inspiration for the Canadian framework. Regardless of any changes or amendments in this area, the future of collective bargaining mechanisms in Canadian copyright contracts will inevitably be affected by the rise of focus on the "user" of copyrights, as well as the ongoing development and proliferation of artificial intelligence in this area.

If Canadian artists are unable to find themselves in a place where they are able to enter contracts that are not lopsided or unfavourable, it has implications for the future of creation in Canada. If collective bargaining mechanisms are unable to become useful or meaningful for

Canadian artists, there is a real risk that creation in Canada will languish significantly—or, in Irving Layton's words—will be at risk of being swallowed up at any time by a tidal wave of history or of nature.

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