

MEMORANDUM TO CABINET

Modifying Reversion Rights in the Music Industry to Better Protect the Rights of Artist-Creators

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MINISTERIAL RECOMMENDATIONS

SUMMARY OF CABINET DECISION SOUGHT

ISSUE: Due to the digitalization of the industry, music is increasingly consumed in new ways. Following traditional licensing schemes, artists license out associated rights to their works to publishers for a significant period of time, during which the value of the work can change dramatically. It is therefore important for there to be a mechanism that allows artists to benefit from these changing market forces and be justly rewarded for their work. Furthermore, there is significant bargaining inequality between artist-creators and their licensees. Reversion of rights currently exists for copyrighted works under s. 14(1) of the *Copyright Act* and can only be invoked by the estates of artists 25 years after their death.¹

DECISION: We propose amending s. 14(1) such that the copyright of a musical work would revert back to its author 10 years after they were exclusively licensed. The reversion would be effective only upon notice to the licensee, to be given by the author 5 years before its exercise. The desired result for Canadians is to democratize and strengthen our domestic music industry by bringing copyright law in line with music creation in the digital age.

RATIONALE AND KEY CONSIDERATIONS:

The legal and socio-economic effects of these proposed amendments on the Canadian music industry as a whole will be considered. These considerations should be evaluated in light of the government's central priorities, as laid out in the Canadian Federal Budget 2019, which promised to "provide \$20 million over 2 years, starting in 2019-20, to the Canada Music Fund" in order to "address some of the challenges faced by Canadian Musicians in the digital era".²

Key Legal Considerations

Exclusive Licensing Schemes. Given that exclusive licenses are the preferred rights-transferring method employed in the Canadian music industry, our proposed framework is applicable to exclusive licenses to ensure that the right of reversion can be widely invoked by artist-creators. In chains of licensing cases, the applicable delays are the ones pertaining to the original license, not the sublicenses.

Registration. In order to promote stability in the licensing chain, registration in the existing registrar of copyrights ought to be encouraged. However, in an effort to protect all artists (who do not all have the means to pay registration fees), rights need not necessarily be registered.

Key Socio-Economic Considerations

Our amended right of reversion would remedy the inequality in bargaining power between artists and producers/distributors by empowering artists to make their own decisions on the use of their own works, and by enabling new licensees (such as producers) to exploit the previously unexploited "back-catalogue" of works of an artist, which will become available to the public.³ All stakeholders in the music industry therefore economically benefit from our proposals (artists, producers/distributors and consumers). They will not apply to the music industry's collective society (SOCAN).

RELATED APPROVALS: That, the Legislation Section of the Department of Justice, in consultation with the Minister of Canadian Heritage and the Minister of Innovation, Science and Economic Development be authorized to draft a bill in accordance with the below drafting instructions and that the Leader of the Government House of Commons be authorized to approve the introduction of the bill in Parliament.

SOURCE OF FUNDS: Our recommendations have no significant funding implications, since all costs are internalized in the already existing Copyright Registrar.

¹ *Copyright Act*, RSC 1985, c C-42, s 14(1) [*Copyright Act*].

² Canada, Department of Finance Canada, *Investing in the Middle Class: Budget 2019* (Ottawa: Department of Finance Canada, 19 March 2019) at 168 [*Investing in Middle Class*].

³ Martin Kretschmer, "Copyright Term Reversion and the 'Use-it-or-Lose-it' Principle" (2012) 1:1 Intl J Music Bus Research 44 at 44-45.

BACKGROUND AND OPTIONS

The framework of rights reversion for copyrighted works exists under s. 14(1) of the *Copyright Act*. According to this provision, the copyright in an original artist-creator's work reverts to their estate 25 years after their death.⁴ We propose the reform of the reversion rights framework in the music industry to address three key issues.

Firstly, the reversion of rights allows artists to adapt faster to the digitization of the market. The music industry is undergoing major changes with new technologies worldwide. In Canada, as early as 2016, the digital music revenues accounted for 63% of recorded music revenues.⁵ Considering the rapid pace at which new platforms evolve and emerge, it is important for musical artists to have their rights revert after a relatively short delay so that they can adapt to the changing market more swiftly while being adequately compensated.

Secondly, by focusing on reversion rights in the music industry, our proposal aims to mitigate the imbalance in bargaining power between creators and producers or distributors, who do not always share the same interests.⁶ For instance, on average in the United States, “14% of sound recordings published between 1890 and 1964 had been re-released by rights holders” whereas “non-rights holders re-released 22% of those recordings”.⁷ Moreover, both the Standing Committee on Industry, Science and Technology (INDU) and the Standing Committee on Canadian Heritage (Heritage) Reports highlight the bargaining inequality between artist-creators and distributors as a key reason for need of copyright reform.⁸ Our recommendations also fit well within the overall architecture of the *Copyright Act* and align with the fundamental principle underlying the *Copyright Act* which seeks to strike a balance between providing the artist with a just reward for their work and the dissemination of artistic works to the public.⁹ Therefore, ensuring that *living* artists (not just their estates) profit from their works 10 or 25 years after an exclusive license contract is entered into is a positive step towards reducing the inequality of bargaining power between stakeholders.

Finally, by focusing on the music industry, our proposal would allow the government to empirically assess the efficiency of a reformed reversion framework applicable to a specific industry before widening the scope of the reform to other industries. While there is currently little empirical research on the rights reversion's impact on the market, our proposal is supported by the INDU and the Heritage reports. Indeed, both recommend the modification of the reversion rights provision in the *Copyright Act* such that the copyright will revert to the artist-creator 25 years after assignment, rather than having the rights revert back to the author's estate 25 years after death (i.e. the current regime).¹⁰

⁴ *Copyright Act*, *supra* note 1, s 14(1).

⁵ Music Canada, News Release, “Canada Climbs to Sixth Largest Global Recorded Music Market in IFPI's Global Music Report 2017” (25 April 2017), online: <musiccanada.com/news/canada-climbs-to-sixth-largest-global-recorded-music-market-in-ifpis-global-music-report-2017/>.

⁶ Carys J Craig, “Meanwhile, in Canada... A Surprisingly Sensible Copyright Review” (1 November 2019) Eur IP Rev [forthcoming in February 2020].

⁷ Tim Brooks, Library of Congress, Survey Of Reissues Of U.S. Recordings V (2005), perma.cc/4ZX2-SSW8. We recognize that the music industry and the copyright framework in the United States and Canada are not identical; however, the reality in the United States serves as a reliable reference point given the similarities between the Canadian and American copyright regimes.

⁸ House of Commons, *Shifting Paradigms: Report of the Standing Committee on Canadian Heritage*, (May 2019) (Chair: Julie Dabrusin) at 30-31 [Heritage Report]; 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 39 [INDU Report].

⁹ See *Théberge v Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34 at para 30, in which the Court also specified, “or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated” at *ibid*.

¹⁰ See Heritage Report *supra* note 8; INDU Report *supra* note 8; Copyright Act, *supra* note 1, s 14(1).

To conclude, the reversion right’s reform could help ensure the future sustainability of the music industry in Canada, since it is in the best interest of Canadians to ensure a thriving private sector in the creative industry that limits the reliance of Canada’s creators on taxpayer-funded grants and other support programs.

General Remarks

In all of our proposed options, we are recommending the reform of a right of *reversion*, as opposed to a right of *termination*. Reversion effectively converts the exclusive license into a non-exclusive one, thereby allowing the author to negotiate non-exclusive licenses with other publishers or distributors without affecting the initial licensee’s rights. Conversely, termination completely terminates the licensing agreement between the author and initial licensee.

Parameters	Option 1	Option 2	Option 3
Invoked during lifetime	Yes	Yes	No
Delay	10 years after exclusive license	25 years after exclusive license	25 years after death
Notice (author to licensee)	Yes (5 years before)	No	No
Duty to remind (licensee to author)	No	Yes (10 years before)	No

Table 1: Summary of Proposed Options

OPTION 1 (Recommended): Our recommended option introduces a framework that is only applicable to the music industry. Under this framework, the rights arising from a copyright of a musical work revert back to its author 10 years after it was exclusively licensed. This ten-year period starts on the date that the exclusive license comes into effect. This framework is a supplement to the current reversion scheme, which will still apply to other industries.

The reversion of rights would be effective only upon notice to the licensee, to be given by the author 5 years before its exercise; that is, 5 years after the exclusive license is entered into. In order to avoid confusion as to the date of the exclusive license agreement, both that date and that of the notice may be registered into the existing Registrar of Copyrights at the discretion of the parties. Considering that registration ensures the accessibility of information, our recommendation also includes campaigns aimed at informing author-creators on the benefits of registration. Nevertheless, registration is not a condition to the exercise of the right to reversion.

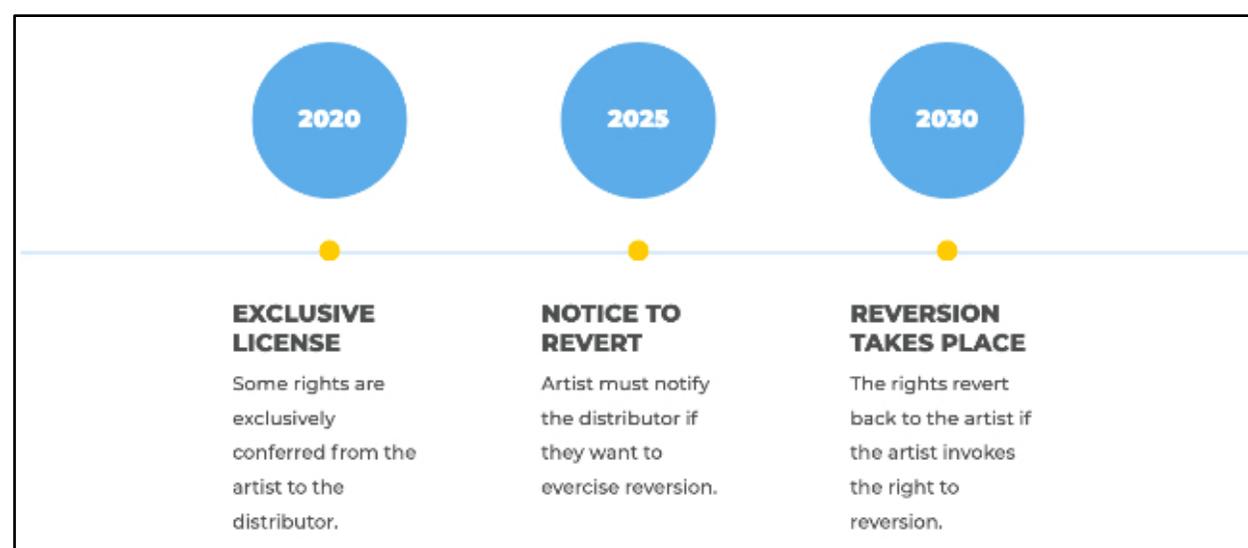


Figure 1: Timeline for the framework proposed in Option 1 (assuming that the author notifies the

licensee as soon as they are authorized to do so).

If the notice is made beyond 5 years after the start of the exclusive license, reversion will only occur 5 years following that period. For example, if an exclusive license was entered into in 2020. The author can send a notice to exercise the right of reversion in 2025. However, if they only notify the licensee in 2026, then the reversion will only occur in 2031. Figure 2 illustrates this example.

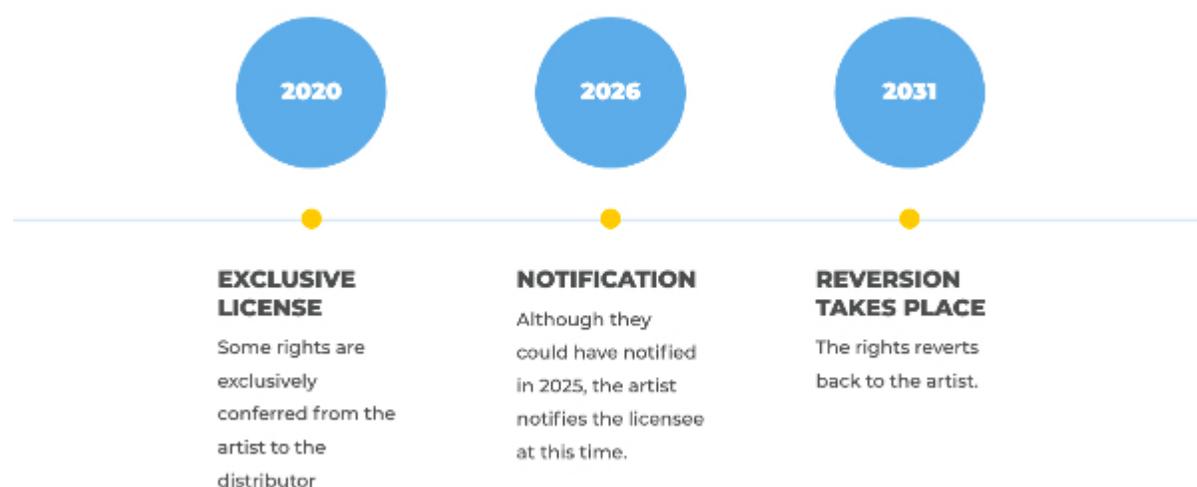


Figure 2: Timeline for the framework proposed in Option 1 if the author notifies after the 5 year period.

Pros. This option presents multiple advantages, most of them economic in nature. Firstly, a shorter time-period for reversion would enable “artist-lead cultural and social innovation”, thus benefiting most stakeholders in the music industry, namely consumers, publishers, and artists.¹¹ Indeed, by allowing artists to negotiate new licensing agreements following the reversion of their rights, our proposal breathes new life into the profitability of previously fruitless works.¹² Studies in the UK and Germany have found that in 2005, literary authors who succeeded in changing the terms of their contract “earned roughly twice the amount of those who had not.”¹³ A shorter delay also allows for more publishers to benefit from the exploitation of an author’s back-catalogue¹⁴ of works.¹⁵ Although no similar data exists in Canada for the music industry, empirical data from the book-publishing sector in the United States has demonstrated that “reversionary schemes have increased the availability of books [from a 1909 book sample] by an estimated 20% to 23%”.¹⁶ Previously out-of-print works were brought back into print and made available to the public, which suggests that a right of reversion operating after a shorter time-period aligns with the public interest in spreading artistic and cultural knowledge. All stakeholders involved therefore either economically or culturally benefit from such a reversion right.

Secondly, imposing a right of reversion that is operative after a shorter time period might be more economically beneficial for both the licensees or publishers and the author. Indeed, “the most intensive commercial exploitation [usually] takes place at the beginning and end of the exclusive term”.¹⁷ Some even argue that “ten years may be longer than necessary.”¹⁸ Therefore, our proposal can serve as a stepping stone for future time-period reductions while still enabling artists to renegotiate deals when it is the most profitable to do so.

Thirdly, by strongly encouraging the registration of the right of reversion, as well as the application of a notice system, our proposal allows for transparency pertaining to the identity of the rights-

¹¹ Kretschmer, *supra* note 3 at 46.

¹² Paul J Heald, “Copyright Reversion to Authors (and the *Rosetta* Effect): An Empirical Study of Reappearing Books” (2018) 66:1 J Copyright Society USA 59 at 65.

¹³ Ruth Towse, “Copyright Reversion in the Creative Industries: Economics and Fair Remuneration” (2018) 41:3 Colum J L & Arts 467 at 485.

¹⁴ A back-catalogue of works is defined as works that are no longer in use which could be revived by renewed exploitation by new publishers, see Kretschmer, *supra* note 3 at 44–45.

¹⁵ *Ibid.*

¹⁶ Heald, *supra* note 12 at 65.

¹⁷ Kretschmer, *supra* note 3 at 46.

¹⁸ *Ibid* at 45.

holder and for licensees to be prepared for the eventual reversion of rights they previously held.¹⁹ Such registration was deliberately made optional because mandatory registration would entail burdensome costs on the parties.

Fourthly, by allowing author-creators to invoke their reversionary right while they are still alive, this option ensures that our framework is used more frequently than the current framework in s. 14(1) of the *Copyright Act*.

Cons. As licensees, the publisher or distributor do not have much time to exploit the works, which could potentially reduce the value of the royalties related to these works.²⁰ Furthermore, such reversion rights in Canada might discourage publishers or distributors from working with Canadian artists. However, these disadvantages are merely illusory. A shorter term for exploitation of a work may not necessarily result in lower profits as publishers will be able to access an array of unexploited works of which the license has expired or the rights have been reverted.

This option may also seem disadvantageous, as it involves costs: it requires an update of the current copyright registration system. Fortunately, such costs would be minor as they could simply be internalized within the budget allocated for the already-existing Registrar of Copyrights.

OPTION 2: The second option introduces another framework that is also only applicable to the music industry. Under this framework, the rights arising from a copyright of a musical work revert back to its author 25 years after the exclusive license comes into effect. Unlike the first option, this option imposes a duty to remind on the licensee. Ten years before the possible exercise of the right of reversion, the licensee must remind the author of his right of reversion. The date of the duty to remind and of the exclusive license may be registered in the Registrar. If the duty to remind is not satisfied, the rights arising from the copyright will nevertheless automatically revert back to the author.

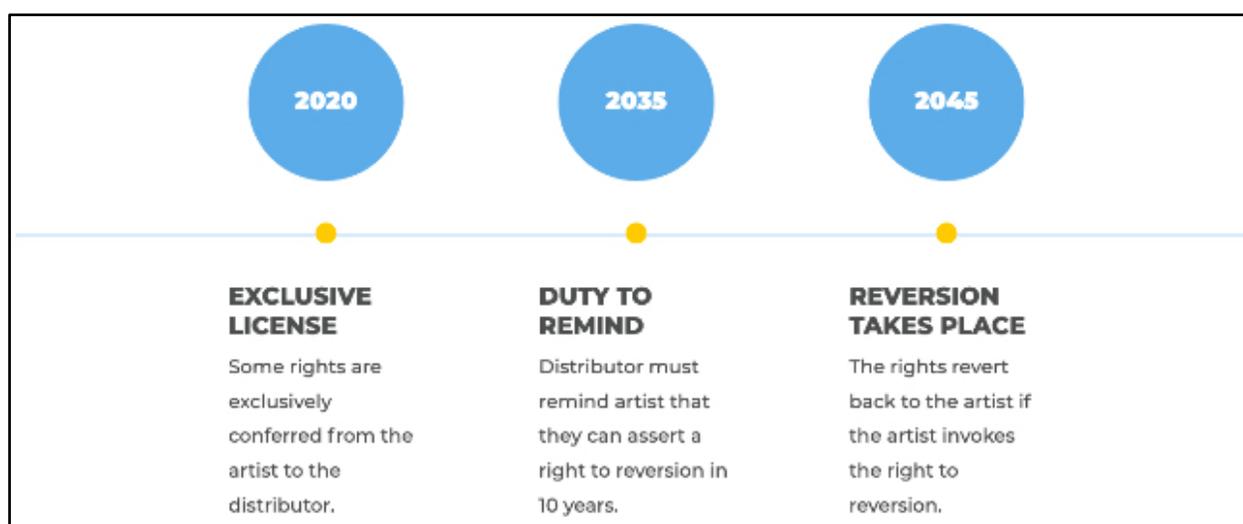


Figure 3: Timeline for the framework proposed in Option 2.

Pros. Firstly, by changing the wording of the provision from “25 years after death” to “25 years after exclusive licensing”, we allow the artists to be able to benefit from the reversion of rights during their lifetime. If they invoke their reversionary rights, the artists are able to renegotiate the terms of their licensing agreement with publishers 25 years after the initial licensing agreement came into effect.

Secondly, out of our three proposed options, this option is the most similar to the recommendations proposed by INDU and Heritage Canada.²¹ Both recommend the reform of s.14(1) by allowing the right of reversion to be exercised 25 years after the transfer of rights, instead of 25 years after death. Therefore, considering the similarities between this option and the INDU and Heritage recommendations, this option will most likely draw support from these two committees. The key distinction between the second option and the INDU and Heritage’s respective recommendations is the duty to remind, which is discussed in the following paragraph.

¹⁹ *Ibid* at 47.

²⁰ Towse, *supra* note 13 at 484.

²¹ Heritage Report, *supra* note 8 at 30–31; INDU Report, *supra* note 8 at 39.

Thirdly, this option imposes a duty on the licensee to remind the licensor that they have the right to invoke the reversion of the copyright. Given the status and influence of publishers, they presumably have more resources than artist-creators to monitor the relevant delays pertaining to the possible reversion. It is possible for artists to be represented by agents, collective societies, and labour unions who can keep these deadlines abreast. However, in the event that an artist is not represented by these bodies and are thus in a vulnerable position compared to publishers or distributors, our proposed legislative framework provides additional protection for such artists.

Cons. This option has three main disadvantages. The first two are shared with the first option, namely: (1) the costs involved in the update of the existing copyright registration scheme, and (2) the potential reversion of rights might reduce the economic value of the licensing agreement. These two disadvantages have been addressed in the discussion of our preferred option.

The third disadvantage involves the second option’s 25-year delay, which is longer than the first option’s 10-year delay. As mentioned above, imposing a shorter delay before the right of reversion is operative might be more economically beneficial for both the publishers and the author. The right of reversion in the United States is seldom invoked, because the 30-year delay is considered too lengthy.²² 25 years might be considered too long of a delay before the right of reversion can be exercised. However, economic modelling consistently finds that 25 years of protection is sufficient to incentivize investments.²³

OPTION 3: The third option maintains the wording of s. 14(1) of the *Copyright Act* as it stands. Under this option, the right of reversion can only be invoked 25 years after the death of the author.²⁴

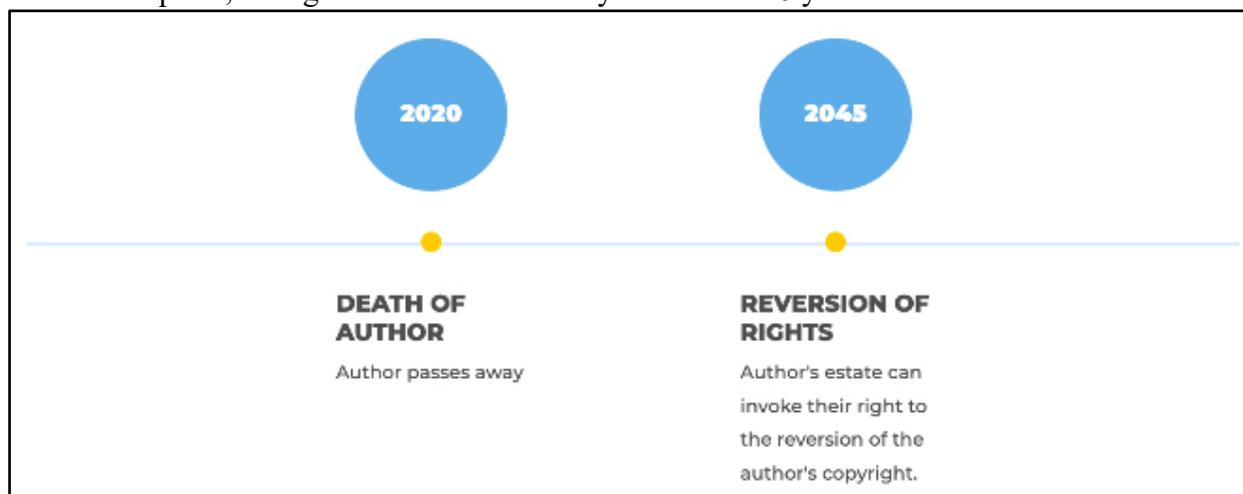


Figure 4: Timeline for framework proposed in Option 3.

Pros. This option is the simplest and most cost-effective one. It requires no implementation strategy and no additional financial or human resources on the part of the government.

Cons. As it stands, the right of reversion provided by s. 14(1) of the *Copyright Act* is seldom litigated in Canada,²⁵ thus suggesting that it is rarely invoked by the estates of Canadian artists. If we maintain the wording of this provision, this framework will remain underutilized. Therefore, despite being the most cost-effective and simple to implement, this option fails to address the shortcomings in the music industry discussed above.

I. LEGAL CONSIDERATIONS

A. Assignment vs Licensing

We have considered whether our proposals should apply to (1) only assignment of copyright, only (2) exclusive licensing of some rights, or (3) both assignment and exclusive licensing of some

²² Rita Matuilonyte, “Empowering Authors via Fairer Copyright Contract Law” (2019) 42:2 University NSW LJ 681 at 708.

²³ Rebecca Gibling, “A New Copyright Bargain? Reclaiming Lost Culture and Getting Authors Paid” (2018) 41:3 Colum J L & Arts 369 at 396; Saleh Al-Sharieh, “The Blessing of Talent and the Curse of Poverty: Rectifying Copyright Law’s Implementation of Authors’ Material Interests in International Human Rights Law” (2018) 8:2 Notre Dame J Intl & Comp L 62 at 79.

²⁴ *Copyright Act*, *supra* note 1, s 14(1).

²⁵ Bob Tarantino, “Long Time Coming: Copyright Reversionary Interest in Canada” in *Développements récents en droit de la propriété intellectuelle* (Montréal: Barreau du Québec, Service de la formation continue, 2013) 3 at 24.

rights. An assignment transfers all of the economic rights associated with a copyright of a work leaving nothing to the grantor. A license is the transfer of a beneficial interest but not of the ownership over the work. We chose to make our proposals applicable to only exclusive licenses.

Exclusive licenses are the preferred rights-transferring method employed in the Canadian music industry. Therefore, we made our proposed frameworks applicable to exclusive licenses to ensure that the right of reversion can be widely invoked by artist-creators. Furthermore, it is inappropriate to allow an assignor to invoke the reversion of rights that they have assigned considering that they are no longer the owner of the assigned work.

B. Chain of Licensing

No provisions in the *Copyright Act* govern sub-licenses. Licensees are permitted to enter into sublicensing agreements as long as there are no provisions in the initial license to the contrary.

In the context of our proposed framework, regardless of the intentions of the sublicensees or of the time at which the sublicenses came into effect, the applicable deadlines are the ones of the original license. For example, under option 1, if the initial exclusive license comes into effect in 2020, the original licensor can invoke their right of reversion in 2030, regardless of whether or not there are sublicenses involved.

Furthermore, under option 1, the licensor only has to notify the first licensee that they intend to exercise their reversionary interest. Under option 2, only the first licensee has the obligation to remind the artist-creator (licensor) that they have the right to exercise reversion.

C. Collective Works

Sound recordings may involve overlapping rights for various members of the music industry, such as artists, sound engineers, editors, arrangers. Where the musical work is collective, our proposed reversion frameworks would not be applicable. To do otherwise would threaten the viability of the music industry since it is foreseeable that one individual to whom the right reverts could block the re-licensing of works or deliberately penalize other members.

We would similarly exclude film soundtracks as is currently envisioned by the *Copyright Act*²⁶ since to allow for reversion rights in this context would be inappropriate. We would similarly exclude video game sound recordings from reversion.

D. Death or Incapacity of the Artist-Creator

The Government must equally consider the impact of copyright amendment to reversionary rights will have in situations of death or incapacity of artist-creators. The current regime creates a situation where the artists' rights revert to the estate after 25 years.²⁷ We propose that, where artists become incapacitated, their mandataries will have the ability to administer their rights.

Upon the death or incapacitation of the artist-creator, their heirs and successors should have standing to assert their rights as if they were the artist pursuant to the relevant provincial laws governing succession. If the author were to die 2 years after exclusive license, the heirs and successors would still have to wait 8 years (option 1) or 23 years (option 2) before the rights could revert to the estate, with all the requisite formalities required now of the estate.

Given how few cases have drawn from the current protections, it seems unlikely that heirs and successors will be negatively impacted by any change.

From the Government's point of view, this modification will not result in any substantial change.

E. Registration Formalities

While copyright does not need to be registered to exist under the *Copyright Act*, it would be advisable that the Government implement a policy strongly encouraging registration, though not

²⁶ See *Copyright Act*, *supra* note 1, s 2.

²⁷ *Ibid*, s 14(1).

requiring it as a precondition for reversionary interests stemming from licensing.

i. Registration through the Copyright Registry

Fortunately, the *Copyright Act* already provides for a Registrar of Copyrights,²⁸ and there is already a database containing this information.²⁹ Registration costs are currently set by the Governor in Council,³⁰ and it would be fairly easy to increase the fees in accordance with the requirement to send out notifications. Currently, registration and assignment fees are set at \$65.00.³¹ For registration purposes, the formalities set out the *Copyright Regulations* should be sufficient.³²

ii. Education

CIPO could equally continue the trend towards ensuring that Canadians are aware of their rights through public communication initiatives. This function aligns with the 2017-2022 CIPO strategic plan, which seeks to promote Intellectual Property education and awareness.³³ By integrating notification assistance as part of the CIPO's mandate, we would be able to increase access to copyright knowledge.

iii. Evidentiary Burden

In addition to transparency, the registration of licenses could equally serve as a useful tool for evidentiary burdens setting out when the rights can be reverted. By strongly suggesting parties to register, uncertainty would be mitigated when disputes arise. However, this said, since registration is not mandatory, where parties choose not to register, the burden of proving the date of license would lie with the artist-creator.

iv. Registry Implementation Costing

Since the registry is already operational and tracks licensing and assignment of copyright, there should not be any start-up costs associated with the implementation of the proposed changes. There may be an increase in the number of registrations; however, this should not result in significant operating costs since these are already internalized.

There are currently approximately 9,200 unique copyright applications per year.³⁴

F. Constitutionality

Copyright is vested as a federal power under s. 91(23) of the *Constitution Act*,³⁵ and thus Parliament can validly enact legislation related to copyright. Copyright typically exists as an exception³⁶ to generally recognized principles of private law, which fall under provincial competencies per s. 92(13) of the *Constitution Act*.³⁷ Since copyrights ultimately constrain other

²⁸ *Ibid*, s 46.

²⁹ Canadian Intellectual Property Office, "Canadian Copyright Database" (last modified 29 March 2020), online: Canadian Intellectual Property Office <ic.gc.ca/app/opic-cipo/cpyrghts/dsplySrch.do?lang=eng>.

³⁰ See *Copyright Act*, *supra* note 1, s 59.

³¹ SOR/97-457, s 5(2).

³² *Ibid* at ss 5–8.

³³ See generally Canadian Intellectual Property Office, *Canadian Intellectual Property Office Five-Year Business Strategy 2017-2022*, online (pdf): <[ic.gc.ca/eic/site/cipointernet-internetopic.nsf/vwapj/StrategieAffaires-BusinessStrategy20172022-eng.pdf/\\$file/StrategieAffaires-BusinessStrategy20172022-eng.pdf](http://ic.gc.ca/eic/site/cipointernet-internetopic.nsf/vwapj/StrategieAffaires-BusinessStrategy20172022-eng.pdf/$file/StrategieAffaires-BusinessStrategy20172022-eng.pdf)>.

³⁴ *Ibid*. In an attempt to determine how many exclusive licenses are currently licensed, our team contacted the CIPO hotline. However, they were unable to tell us precisely how many exclusive licenses were registered in the system. This said, the data could likely be pulled from the database with the assistance of the registrar's back-end tech-support.

³⁵ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5, s 92(13) [Constitution 1867].

³⁶ *Ibid*, s 91(23).

³⁷ *Ibid*, s 92(13); Jean Leclair, "La Constitutionnalité des dispositions de la loi sur le droit d'auteur relatives aux droit des distributeurs exclusifs de livres" (1998) 11:1 CPI at 2.

property and civil rights, there will always be a certain amount of provincial-federal overlap.³⁸ Jeremy DeBeer has argued that depending on how far the federal government trenches on provincial jurisdiction, different constitutional validity tests requiring various degrees of scrutiny may be used to find some copyright provisions *ultra vires*.³⁹ However, courts have only rarely considered the constitutional constraints that the division of powers holds for copyright, and the validity licensing regimes have yet to be considered.

While our proposed amendments to the *Copyright Act* could have some impact on property rights, they would remain *intra vires* the federal government since the fundamental core of the regulatory regime is federal. The proposal does not ultimately modify the nature of copyright but merely presents the owner of the underlying copyright with an opportunity to have the rights in the licensed works revert after a certain period of time. It is, in effect, no different than what is currently foreseen under s.14(1), or other limitations on copyright such as its termination after 50 years. It is merely part of a larger regulatory framework which, even if it may encroach minimally, still falls entirely under federal jurisdiction.

G. International Obligations and Applicability to Foreign Artists

i. Berne Convention

Although the Berne Convention imposes restrictions on the term of copyright,⁴⁰ our recommendations do not infringe them. Indeed, the Berne Convention imposes a minimum copyright term of the life of the author plus 50 years,⁴¹ but the Convention does not prevent the reversion of the licensee's right within this time framework. Moreover, the Berne Convention grants minimum rights, but these do not prevent a country from adopting a more protective framework for the rights holder.⁴²

ii. Parties Outside of Canada

Since the right of reversion or any other copyright is attached to the author or owner and not the publisher or licensee, foreign artists cannot invoke that right merely because they have exclusively licensed their work to Canadian publishers.⁴³ Furthermore, since copyright is territorial, works exploited in a jurisdiction will be subject to that territory's laws. As such, artists from a Berne Convention country whose works were exploited in Canada can exercise their reversion rights with a foreign publisher, regardless of what the exclusive licensing agreement stipulates.⁴⁴ The Berne Convention does not prohibit artists in the latter situation from exercising their right of reversion against foreign publishers.⁴⁵

iii. Contracting out of Right of Reversion Through Private International Law

Although reversion and termination rights are applicable "notwithstanding any agreement to the contrary,"⁴⁶ parties could potentially contract out of the right of reversion through a choice-of-law clause or via private international law. This has already been done in a UK case involving Duran Duran.⁴⁷ However, the outcome of this case is insignificant in Canada. Unlike the United

³⁸ Jeremy De Beer, "Copyrights, Federalism, and the Constitutionality of Canada's Private Copying Levy" (2006) 51:4 McGill LJ 735 at 748.

³⁹ *Ibid* at 750.

⁴⁰ *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, 828 UNTS 221 (entered into force 5 December 1887), art 7(1) [*Berne Convention*]. See also Jane C Ginsburg, "Foreign Author's Enforcement of U.S Reversion Rights" (2018) 41:3 Colum J L & Arts 459 [Ginsberg].

⁴¹ *Berne Convention*, *supra* note 40, art 7(1).

⁴² *Ibid*, art 19.

⁴³ *Copyright Act*, *supra* note 1, s 5(1)(a).

⁴⁴ Ginsburg, *supra* note 40 at 465–66.

⁴⁵ *Contra Berne Convention*, *supra* note 40.

⁴⁶ 17 USC at para 203(a), 305(c)(5).

⁴⁷ Kenneth D Freundlich & Michael J Kaiser, "A View from Across the Pond: Duran Duran's Termination Rights Under the US Copyright Act Come Undone By British High Court Decision" (2017) 33:2 Ent & Sports Lawyer 1 at 1 [Freundlich & Kaiser]; *Gloucester Place Music Limited v LeBon, et al*, [2016] EWHC 3091 (Ch) at para 44

Kingdom, Article 7(1) of the Rome Convention is binding in Canada. This Article “provides for the application of mandatory rules of the law of another country with which the situation has a close connection” and would likely “have militated in favour of applying US [reversion rights]” in the British case.⁴⁸

Therefore, our proposals for a reformed right of reversion are applicable to foreign works and foreign licensees, once again proving their usefulness in the creative industries landscape.

II. SOCIO-ECONOMIC CONSIDERATIONS AND ANTICIPATED STAKEHOLDER REACTION

A. Economic Considerations for Stakeholders and Impact on Contractual Practices

Multiple economic concerns arise from the proposed implementation of a right of reversion operative during the lifetime of the author. While it is indisputable that the contractual landscape in the music industry will be significantly impacted if our proposals come to fruition, we posit that this impact will be rather positive than negative.

Firstly, some may argue that a right of reversion impedes the parties’ freedom of contract, and reflects an overly “paternalistic approach to the treatment of authors on the part of a benevolently disposed legislature”.⁴⁹ This critique ignores that restrictions to freedom of contract are consistently made to satisfy broader social, economic, or cultural aims.⁵⁰ Our proposed right of reversion would remedy the inequality of bargaining power between artists and publishers. Artists will be empowered to decide how their works are used and exploited and how much they are to be remunerated from such exploitation, as they would harness the ability to swiftly react to market changes.⁵¹ The restriction on freedom of contract is therefore justified. In the same vein, rights reversion should not be a contractual right that parties choose to include into their licensing agreements. Instead, it should be imposed by statute. The practice of contracting into a reversion rights framework fails to address the difficulties faced by artists in asserting their rights through a contract.

Secondly, some may be concerned about the publishers’ unwillingness to invest in a work if they know that the rights therein will revert back to the author after a certain number of years.⁵² If the “publisher faces competition in the market for products using the work”, the publisher may not want to “invest in an artist’s long term career”.⁵³ At first blush, this critique makes sense from an economic standpoint. However, it remains merely speculative as it is not supported by any empirical evidence.⁵⁴ Moreover, this argument assumes that artists make rational economic decisions and ignores the reality of the “irrational market” in which creative industries operate. In fact, artists often accept to license their works for much less than their actual market value, which supposes that implementing a reversion right during the lifetime of the author will not adversely affect artists that much more economically.⁵⁵ Rather, it is a measure that gives artists the option to seek more economically beneficial transactions with publishers. Lastly, the implementation of a reversion right after a certain period following exclusive licensing could arguably incentivize more profitable initial terms for the author between themselves and the publisher. The latter would presumably want to make the most out of the time it has to exploit their rights over the artist’s work.⁵⁶

B. Utility of the Reversion Right

Given that most Commonwealth countries, including the United Kingdom, Australia, and New

[*Gloucester Place*].

⁴⁸ *Ibid* at para 15; Freundlich & Kaiser, *supra* note 47 at 40–42.

⁴⁹ Tarantino, *supra* note 25 at 24.

⁵⁰ Joseph Yuvaraj and Rebecca Giblin, “Why Were Reversionary Rights Abolished (and What Can We Learn Where They Remain)?” (2019) 41:4 *Eur IP Rev* 232 at 247 [Yuvaraj and Giblin].

⁵¹ *Ibid*.

⁵² Tarantino, *supra* note 25 at 24.

⁵³ Towse, *supra* note 13 at 484.

⁵⁴ Yuvaraj and Giblin, *supra* note 50 at 248.

⁵⁵ *Ibid*.

⁵⁶ *Ibid*.

Zealand, have repealed this right of reversion following erroneous contentions⁵⁷ of violation of the Berne Convention and of lack of usefulness for artists, many equally call for its elimination in Canada.⁵⁸

These criticisms are founded on the premise that the right of reversion is only triggered after the author's death, once it is no longer conducive to remuneration in the author's lifetime. However, our first two proposals, which render reversion of rights operative a number of years after the *exclusive licensing* of a work (presumably during the lifetime of the author), serve to ensure the just compensation to the author while they can still enjoy it. The proposed frameworks will confer the right of reversion with a more tangible purpose providing effective economic and cultural benefits to multiple stakeholders.⁵⁹

Paradoxically, the reversion right in the United States, which operates 35 years after assignment is seldom used.⁶⁰ However, our proposals are of a different nature, and more useful than their American counterpart. The waiting period for the reversion right as we propose it to operate is much shorter than that of the United States (10 in Option 1 and 25 years in Option 2), which would increase its utility since the value of the work has not significantly decreased. Furthermore, the notice requirement in our proposals will be streamlined so as to reduce the necessity of costly legal advice: a notice template will be provided online for parties to use.⁶¹ These changes will make the right of reversion more attractive to authors.

C. Collective Societies (SOCAN)

A collective society is an association or corporation that collectively administers copyrights or remuneration rights for the benefit of those who, by assignment or grant of license, authorize it to do so.⁶² It operates through a licensing scheme and collects and distributes royalties.⁶³ Currently in the music industry, SOCAN administers both the reproduction rights and the right of communication to the public for its members. It is a condition of membership that each member assigns its interest and title in any performing rights it holds to SOCAN during its term of membership.⁶⁴ On the other hand, the license to SOCAN regarding the reproduction rights may be exclusive or non-exclusive.⁶⁵ It is important to note that the effects for the assignment and for the exclusive license of copyright are the same in practice.⁶⁶

Our proposals aim chiefly to break the asymmetric relationship between artists and producers when the copyright is exclusively licensed to the producer. In this situation, the reversion gives the artist the possibility to modify the clauses of his contract. However, collective societies act on behalf of the author, as an intermediary between the artist and the producer. Regardless, the reversion right is not intended to protect the artist against the collective society acting in the interests of authors. Moreover, the author may withdraw from SOCAN at any time, unlike when he or she deals directly with the producer, which is why it is unnecessary to apply the reversion right scheme to collective societies.⁶⁷ Hence, our proposals do not disrupt the stability of collective management of works, as they will not apply to them.

D. Anticipated Reaction of Stakeholders

We anticipate that our proposals will garner positive feedback from musical artists and various other interest groups in Canada. Indeed, Canadian singer-songwriter Bryan Adams suggested to the Ministry of Canadian Heritage that assigned rights should revert back to the author 25 years

⁵⁷ Yuvaraj and Giblin, *supra* note 50 at 240–44.

⁵⁸ *Ibid.* See also Douglas A Smith, “Recent Proposals for Copyright Revision: An Evaluation” (1988) 14:2 *Analyse de pol* 175 at 175; Linda Hansen, “The Half-Circled ‘c’: Canadian Copyright Legislation” (1992) 19:2 *Government Publications Rev* 137 at 144–48; Tarantino, *supra* note 25 at 12.

⁵⁹ Yuvaraj and Giblin, *supra* note 50 at 250.

⁶⁰ Matuilonyte, *supra* note 22 at 708.

⁶¹ *Ibid* at 708–10.

⁶² *Copyright Act*, *supra* note 1, s 2.

⁶³ *Ibid.*

⁶⁴ SOCAN, By-Laws (13 June 2017), online (pdf): <socan.com/pdf/en/mem/SOCANByLaws.pdf>.

⁶⁵ SOCAN, “Reproduction Rights Representation Agreement” (24 September 2018), online (pdf): <sodrac.ca/wp-content/uploads/2018/09/RRRA-ENG-V2018-09-24.pdf>.

⁶⁶ *Euro-Excellence Inc v Kraft Canada Inc*, 2007 SCC 37 at para 128 (Abella J).

⁶⁷ *Ibid.*

after assignment, stating that “an author or composer can see a further potential financial benefit of their work in their lifetime and reinvest in new creation, and this would happen by having a reversion—it's an incentive.”⁶⁸ Mr. Adams further emphasized his point by claiming that he is “standing for the young artists and authors of Canada who are coming forward”.⁶⁹ Finally, while Mr. Adams had suggested 25 years after assignment as a time-frame for reversion of rights, he assured that he is “not settling on 25” and would be “happy if you [the legislature] went for 10.”⁷⁰

Dr. Brian Fauteux and Brianne Selman, speaking for the Cultural Capital Project, both caution against a term extension of copyright in favour of a rights reversion scheme, which can “exist within the Berne Convention” and can remedy the “stunning inequality among musicians”.⁷¹

In addition, the general public and consumers of music will be happy to hear that there will be an increase in works available for consumption thanks to our amended reversion right.

However, the Professional Music Publishers’ Association (PMPA) are reluctant to implement such a measure, citing “a number of avenues available”. These avenues are mostly contractual.⁷² Relying on parties to individually assert a reversionary interest is unrealistic given the power imbalance between artists and publishers. Furthermore, music publishers can rest assured that they will also economically benefit from the implementation of a reversion right. Finally, we acknowledge that other industries might want to benefit from such a right as well. As mentioned, our proposal will first be exclusively circumscribed to the music industry to assess the efficiency of the framework before expanding its implementation to all creative sectors in the future.

III. RISKS

Rights reversion after exclusive licensing risks deterring publishers from exploiting rights in Canada, as they prefer contracting in a jurisdiction where reversion rights do not exist.⁷³ As well, the possibility to contract out of the right of reversion, despite its statutory inalienability, is a potential concern.⁷⁴ However, as we have stated, rights reversion is economically beneficial for all parties, including publishers.⁷⁵ Additionally, Article 7(1) of the Rome Convention can be employed to mitigate a potential “contracting out” of the right of reversion, such that this right is rendered both effective and attractive.⁷⁶

⁶⁸ CHPC, Evidence, 1st Session, 42nd Parliament, 18 September 2018 at 1135 (Bryan Adams).

⁶⁹ CHPC, Evidence, 1st Session, 42nd Parliament, 18 September 2018 at 1140 (Bryan Adams).

⁷⁰ CHPC, Evidence, 1st Session, 42nd Parliament, 18 September 2018 at 1200 (Bryan Adams).

⁷¹ CHPC, Evidence, 1st Session, 42nd Parliament, 27 September 2018, 1115–20 (Brian Fauteux, Primary Investigator, Cultural Capital Project).

⁷² INDU, Evidence, 1st Session, 42nd Parliament, 19 September 2018, 1605, 1645 (Jérôme Payette, Professional Music Publishers Association [PMPA]).

⁷³ Chase A Brennick, "Termination Rights in the Music Industry: Revolutionary Or Ripe for Reform" (2018) 93:4 NYU L Rev 786 at 809.

⁷⁴ *Ibid* at 812.

⁷⁵ Kretschmer, *supra* note 3 at 44–45.

⁷⁶ Freundlich & Kaiser, *supra* note 47 at 40–42.

ANNEX A: PARLIAMENTARY STRATEGY

Our proposals aim to economically empower artists in the music industry and to increase the availability of Canadian art and culture to the public. There is ample evidence that these objectives align with government priorities. Indeed, the Canadian Federal Budget 2019 promised to “provide \$20 million over 2 years, starting in 2019-20, to the Canada Music Fund” in order to “address some of the challenges faced by Canadian Musicians in the digital era”.⁷⁷ Likewise, the Speech from the Throne from the 43rd Parliamentary Session emphasized the importance of “strengthening the middle class” and “reducing poverty”.⁷⁸ A new and reformed right of reversion for musicians in Canada is a positive, albeit sector-specific step towards the implementation of this larger goal. A micro-level approach to the implementation of this goal paves the way for future reform, and permits the much-needed just rewarding of musicians.

A. Parliamentary Environment

The two Ministers responsible for introducing the legislation in Parliament would be either the Minister of Canadian Heritage, Steven Guilbeault or the Minister of Innovation, Science and Industry, Navdeep Bains. Of the two, since a significant part of our proposal impacts the copyright registry system, Minister Bains may be best suited to bringing the amendment.

Whether Minister Bains or Minister Guilbeault sponsors the bill, given the unique minority governing environment facing the Liberal Government in the House of Commons, it would be necessary to seek cross-party support for legislative amendments to reversion rights. However, we believe that our proposals have the potential to draw from a broad support base amongst left-of-centre opposition parties such as the Bloc Québécois and the NDP who have both committed to supporting artists in their respective election platforms. For example, the Bloc proposal specifically mentions amending the *Copyright Act* to ensure that (Quebec) artists receive equitable remuneration for online distribution.⁷⁹ This emphasis on ensuring that artists are adequately compensated could likely be leveraged in support of the amendments sought. Support for the arts was also a pillar of the New Democratic Party’s platform, and they notably stated “that artists should be able to earn a decent living wage from their art and that the government has an important role to play in making sure that a diversity of Canadian voices tell our stories.”⁸⁰ Bridging the gap to create legislation that improves conditions for artist bargaining should be welcomed by these parties, and with their support, the Liberals would easily have the requisite votes needed to amend legislation. Given the uncertainty surrounding the leadership of the Conservative Party, it is difficult to gauge whether or not they would support amendments. Of course, the promises on which federal parties campaign, and what they ultimately end up supporting do not always align neatly.

The path forward in the Senate may be somewhat less straightforward given that the Liberal government no longer has any representatives in the Upper Chamber, and senators are largely permitted to vote as they choose. Still, should it pass the House, there are undoubtedly members of the Chamber from the Independent Senator Group who would be willing to support this type of legislation. For example, Senator René Cormier, a former arts administrator at the National Arts Centre and artist and musician of Acadian descent would be a suitable ally for artist-focused initiatives such as the options proposed.

B. Delivery Strategy

In order to facilitate the transition towards a reversion regime based on the date of exclusive license, it would be advisable for the Copyright Office to begin preparing for the eventual transition.

Creation of Reversion Notification Templates Available online

⁷⁷ *Investing in Middle Class*, *supra* note 1 at 168.

⁷⁸ *Debates of the Senate (Hansard)*, 43-1, No 151 (5 December 2019) at 1530 (Hon Julie Payette).

⁷⁹ Bloc Québécois Platform, “Le Québec C’est Nous” s 12, online (pdf): <blocquebecois.org/wp-content/uploads/2019/10/Plateforme_Bloc2019_web-1.pdf>.

⁸⁰ NDP Platform, “Supporting Canadian Arts and Culture” online: <ndp.ca/communities>.

Templates for notices to be sent by authors to their licensees should be made available on the Copyright Board’s website, and these forms should be promoted to arts-related organizations such as SOCAN so that their members can be informed of their rights.

Human and Material Resources

Efforts should be made to internalize resources to ensure that enough resources are allocated to the Registrar for copyright. Adequately staffing the registrar would ensure that templates are created and uploaded effectively, and that delays do not occur with regard to processing time.

Education

Educating the public on their intellectual property rights is a core mandate of the 2017–2022 CIPPO Five Year Business Plan, and given the extensive funding already being allocated towards education programming and outreach initiatives, leveraging these resources to inform the public of changes to the reversion of rights scheme seems feasible.

C. Key Players in Delivery Strategy

The core players in this strategy are the licensor (artist-creators; collective societies) and the licensee (publishers; distributors), as well as collective societies and artist unions as mentioned above. However, there are two key pillars which must be firmly in place prior to implementation: ensuring that the database is properly equipped to deal with these types of assigned rights, and educating concerned parties, as well as the public, about the existence of these new rights.

Copyright Registry

The Copyright registry is housed within CIPPO, and as such its staff play an important role in ensuring the effective delivery of this change since it requires proof of registration. By extension, this means the registry must be adequately equipped to deal with the influx of new registered copyrighted works, as well as additional staff to send out notifications to both parties. Beyond this, though, very little will be required of the registry.

Education

Educating the public will undoubtedly be a much larger issue since without awareness being raised as to what the formal requirements are for the regime to exist, it is unlikely to achieve success. This second component will require not only the CIPPO’s media team, but also collaboration between multiple non-governmental players who are well-versed in the area of artist rights. This will require the CIPPO media team to adequately broadcast the change, not only on the website, but also through partners such as SOCAN, music publishers, artist rights groups, etc. CIPPO may also wish to reach out to “influencers” such as Bryan Adams, who appeared before the Heritage Committee in preparation for their report, whose social media presence is considerable.⁸¹ These types of collaborations are already in existence in many government departments, and could be effectively mobilized through education outreach initiatives.

⁸¹ Bryan Adams, Instagram Page @bryanadams (accessed on 30 March 2020), online: <instagram.com/bryanadams/?hl=en>; Bryan Adams, Twitter Page @bryanadams (accessed on 30 March 2020), online: <twitter.com/bryanadams?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor>. As of March 30, 2020, Bryan Adams’ current instagram following at the time of submission was 741,000 followers, and his Twitter following was 660,700 followers.

ANNEX B: KEY MESSAGES

The proposed rights reversion schemes:

- (1) Allow the creator to adapt more swiftly to the digitalization of the music industry and adequately compensate them in light of these changes;
- (2) Call for a rebalancing in bargaining power within the music industry between producers and artists without using taxpayer-funded grants and other support programs;
- (3) Aim to remedy the current lack of use of the reversion right in Canada by increasing its usefulness in allowing artists to invoke their reversionary right while they are still alive.
- (4) Are economically efficient because they impose a right of reversion that is operative after a shorter time period, which is beneficial for both the licensees or publishers and the author. An increasing number of works are made available for exploitation to publishers;
- (5) Are culturally beneficial to consumers as they increase the availability of works to the general public, thus spreading artistic and cultural knowledge.

ANNEX C: DRAFTING INSTRUCTIONS

We propose that the recommended provisions be drafted as follows in the *Copyright Act*. They will not replace s. 14(1) of the *Copyright Act*, but will simply serve as an addition.

14 (1.1) Where the author of a **musical work** is the first owner of the copyright therein, no **exclusive license** of the copyright therein, made by him, otherwise than by will, is operative to vest in the exclusive licensee any rights with respect to the copyright in the work beyond the expiration of **ten years from the date the exclusive license was entered into**, and the reversionary interest in the copyright expectant on the termination of that period shall, notwithstanding any agreement to the contrary, **devolve on the author**, and any agreement entered into by the author as to the disposition of such reversionary interest is void.

(1.2) The reversionary interest as described in subsection (1.1) shall not take effect, unless the author provides **notice** thereof to the exclusive licensee no later than **five years** after the date the exclusive license was entered into.

(1.3) Upon death of the author, the reversionary interest described in subsection (1.1), where it has not already been fully exercised by the author, shall be exercised by the author's estate.

[our emphasis]