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## A Critical Historical Analysis of the Public Performance Right

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A thesis submitted in partial fulfillment of the requirements for the degree in Doctor of  
Philosophy  
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A Critical Historical Analysis of the Public Performance Right  
(Spine title: A Critical History of the Public Performance Right)  
(Thesis format: Monograph)

by

Louis J. D'Alton

Graduate Program in Library and Information Science

A thesis submitted in partial fulfillment  
of the requirements for the degree of  
Doctor of Philosophy

The School of Graduate and Postdoctoral Studies  
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London, Ontario, Canada

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THE UNIVERSITY OF WESTERN ONTARIO  
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**A Critical Historical Analysis of the Public Performance Right**

is accepted in partial fulfillment of the  
requirements for the degree of  
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## Abstract

The legislation of a public performance right in musical works in the late 19<sup>th</sup> century created the opportunity for the formation of an initial copyright collective within the Anglo-American legal tradition. The subsequent widespread expansion of Performing Rights organizations marked an early successful example of trans-national capital. Despite the widespread expansion and subsequent acceptance of copyright collectives, since their inception there has been very little scholarship in this area generally and almost none that attempts to critically pursue the issue beyond simple economic or legal analysis.

This thesis traces the historical establishment and expansion of the public performance right in musical works within those countries united by the Anglo-American legal tradition, with a case study focused on the Canadian experience. The thesis contextualizes the issue within the separate frames of the philosophic justifications of intellectual property as a whole and the nature and constitution of the music industry leading up to the establishment and entrenchment of the public performance right in musical works. Viewing the issue of the public performance right in musical works within a critical Marxist frame, the essential problem leading to the creation of the public performance right in musical works is seen as an outgrowth of the struggle between the author/composers and the dominant publishers which dictated their terms of employment and recompense. Within this frame the historic analysis utilizes Antonio Gramsci's theoretical conceptions of Hegemony to provide the lens with which to view the Canadian case study. Ultimately the struggle is seen as an example of the

dominant publishers' effective absorption of the desires and goals of the creators,  
but reiterated in such a way as to achieve the primary goals of the publisher's interests  
within an evolving hegemonic order.

**Keywords:** music; performance right; intellectual property; critical analysis; Gramsci.

## Acknowledgements

While I recognize that most people will never actually read the acknowledgments in this (or any other) thesis, it is my sincere hope that some do. Without the support of the people noted here I can honestly say that this work would never have been completed.

First and foremost, I would like to thank my parents, my mother Pauline and my father Louis. While they rarely understood what it was I was doing, or why (and I'm not just referring to my thesis here) they nonetheless were a constant source of love and support, with a significant reality check when needed. Likewise, despite the relatively constant bickering one would expect in a family where the only son is also the youngest of four siblings, when the chips have been down I've always known that my sisters, and brother in law and nephew, would have my back. As I've grown older and hopefully a bit wiser, I have come to realize just how lucky I am to have such a family.

On a scholarly level, I must acknowledge the importance of Margaret Ann Wilkinson, whom I met during my MLIS studies and who endeavoured to recruit me to either the doctoral program or the law school. I appreciate the confidence she had in me and her encouragement to pursue scholarly studies. I would be remiss if I did not also acknowledge the two Deans of the Don Wright Faculty of Music, under whose tenure I laboured in my daily life. Jeffrey Stokes not only encouraged my application but also agreed to freeing up my work schedule in a limited manner so that I could attend the course work necessary and in the later stages of my work would also serve as a reader on my thesis. Likewise, Robert Wood during his tenure allowed me the freedom to adjust my schedule so that I could teach within the MLIS program in my final years as a candidate there. I'm also indebted to Tracy Loewen for her editing skills without which

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Finally, and most importantly of all, I want to thank my sons Louis and Sean. Louis was but a toddler when this journey began and Sean was born during the course of it. They have been, and continue to be, a non-stop source of terror and amusement. They have also been extraordinarily understanding of their father's insane schedule. Far too often the both of them have had to hear the phrase "Daddy's got work to do honey, I can't play right now". Finally, Daddy's done, so let the "D'Alton Boy Games" begin.

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## Chapter 1: Statement of Problem

Throughout the twentieth century there has been an increasing expansion of intellectual property protection generally, and copyright protection within that umbrella. During the last twenty years we have seen massive debate both in the courts and the popular press with respect to intellectual property issues: the attempt to patent the Harvard mouse,<sup>1</sup> the Copyright Term Extension Act,<sup>2</sup> the file sharing debate brought to the public by Napster,<sup>3</sup> and the music sampling debate arising out of the urban music scene of the 1980s.<sup>4</sup> Most recently in Canada we have seen an attempt by the collective for reproductive rights, Access Copyright, to expand their collection rights beyond the parameters set within the Copyright Act.<sup>5</sup> Within this larger general frame of intellectual property, the often overlooked public performance right granted under copyright might seem somewhat insignificant. In fact the majority of people would have no idea of what it is, and even less would be aware of its impact. Yet, the success of performance rights organizations has been responsible for the massive growth of copyright collectives,

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<sup>1</sup> The Harvard mouse was a mouse developed specifically for scientific use in research. Under Canadian law the Harvard Regents sought a patent on the original mouse and any subsequent offspring. The case ultimately reached the Supreme Court of Canada where the court found that as a living object the mouse was not patentable (*Harvard College v. Canada*).

<sup>2</sup> The Sonny Bono Copyright Term Extension Act, signed into law on October 27, 1998, amends the copyright laws of the United States by extending the duration of copyright protection. In general, copyright terms were extended for an additional twenty years (Copyright Term Extension Act).

<sup>3</sup> Napster was set up in 1998 as an online digital system for the sharing of files. Subsequently sued by the music industry, Napster defended itself on the basis of the fair use exception to copyright. Napster maintained that its users were sampling the works prior to purchasing elsewhere, or were simply downloading digital copies of works they already owned in analog form. Finally they suggested that much of the material on their site was posted there by musicians seeking an audience. Ultimately the court found for the industry and against Napster. While Napster depended upon a central file system that users accessed, contemporary file sharing systems engage at the local level of each user's hard drive (*A&M Records, Inc. v. Napster, Inc.*).

<sup>4</sup> A recent significant copyright case involving sampling held that even sampling three notes could constitute copyright infringement (*Bridgeport Music Inc. v. Dimension Films*). As a result there is a growing perception that "no use is fair use" and thus a move to a compulsory sampling clearance system has been proposed.

<sup>5</sup> The Access Copyright tariff and its implications within the frame of this thesis will be discussed in detail in chapter nine.

particularly in Canada. Prior to the 1988 Phase I revisions to the Copyright Act, there was only a single type of copyright collective authorized under Canadian law, and those were the collectives for music performance rights. Since the Phase I revisions came into law, more than thirty-four copyright collectives<sup>6</sup> have been registered with the Copyright Board of Canada. With thirty-four registered collectives, Canada has more than double the copyright collectives of any other nation. What accounts for this increasingly common policy response in the Canadian copyright environment?

The increasing commodification of society and its attendant expansion of capital interests have driven the expansion of intellectual property rights. The growth of copyright collectives in particular reflects the unique ability of collectives to extract value from previously existing works. New collectives mean new revenue streams on works already in circulation as well as those yet to be created. The current copyright collectives owe their existence to the establishment and expansion of the public performance right in Canada. Both in Canada specifically and worldwide generally, performance right collectives have been extremely successful at collecting revenues on something that has no physical container, a public performance. Long before digitization, and even before broadcasting, performance right collectives established a territory and have successfully expanded it throughout the century.

If we wish to understand our current intellectual property environment, and, more importantly wish to influence those regimes which affect us and succeeding generations, we must consider the nature of the environment in which they operate, and how they came to be naturalized within our contemporary frameworks. The public performance

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<sup>6</sup> A copyright collective is an agency created under the terms of the *Copyright Act* which collects royalties or licensing fees on behalf of registered copyright owners.

right and the regimes that surrounded, supported and drove its expansion are a perfect example of how a seemingly minor issue can have a significant impact over the long term.

The overarching objective of this research is to attempt to discern how the concept of the public performance right, which on its face had no direct relation to *copyright*, and which had an even more tenuous existence within standard economic practice, came to be naturalized within contemporary society. Despite a history of opposition from industry, government and public, these organizations created a collective empire that stretches around the globe,<sup>7</sup> and is not only no longer questioned, but in Canada has become a cornerstone of public policy.<sup>8</sup> How were performance rights collectives, organizations based on an ideal that would logically seem so counter intuitive, able to successfully establish their domain within copyright and have such a profound impact on the copyright process?

Copyright in Canada can generally be divided into two distinct sets of rights: moral rights and economic rights. Moral rights in the creation of a work are non-assignable and attach directly to the creator (Copyright Act sec. 14 (2)). They are the rights of attribution (the right to be acknowledged as the author) and integrity (the right to insure that downstream uses of your creation are not prejudicial to your honour or reputation without your permission) (Copyright Act sec. 14 (1)).<sup>9</sup> The owner of the work enjoys all the economic rights as delineated in section 3 (1) of the Copyright Act,

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<sup>7</sup> The global reference is in relation to the reciprocal agreements operating between national copyright collectives.

<sup>8</sup> The Bulte report, discussed later in the document, advocated the creation of extended licensing regimes on the internet; concurrently, Daniel Gervais' studies for Canadian Heritage have also supported the extension of collective licensing.

<sup>9</sup> In a landmark moral rights case the sculpture Michael Snow successfully litigated against the Eaton centre for damage to his reputation based on their attaching ribbons (as a seasonal decoration at Christmas) to his sculpture of Canada geese in flight (Snow v. The Eaton Centre Ltd.).

including the “sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof.” These economic rights, unlike the moral rights, are assignable and thus provide the means of economic compensation for the owner of the work.

Historically, in the case of music, the copyright owner has always been the publisher, as the assignment of copyright to the publishing house has generally been a condition of publication (Demers 12). The public performance right is a particular form of recompense unique to cultural goods, and is fundamentally dominant in the area of musical goods. Though the costs of the public performance right are not transparently borne by the individual users, it nonetheless impacts significantly in the operating costs of the larger artistic community.

With respect to the economic rights delineated in the Copyright Act, this study will focus specifically on the right to “perform the work or any substantial part thereof in public.” This owner’s right of public performance should not be confused with the more recently added neighbouring right of a “performer’s performance.” They are two separate economic rights, though they are related.

Most people would be unable to explain the exact nature of the owner’s public performance right though many may have seen the logos of various performing rights organizations on recordings, at the end of film and television performances, or while browsing the program at a concert venue. Nevertheless in 2009, the three major North American performing rights organizations, the Society of Composers, Authors and Music Publishers of Canada (SOCAN), the American Society of Composers, Authors and



Publishers (ASCAP) and Broadcast Music International (BMI) collected a little over \$2.1 billion. In Canada, given the current population of just under 34 million,<sup>10</sup> the SOCAN collection amounted to \$7.55 per capita.<sup>11</sup>

What seems to be lacking in the discussion of the owner's public performance right is why the owners should receive an additional economic right beyond those for reproduction and distribution. This concept of paying to use something, after it has been purchased or rented, was unique in its application to musical works. While the first instance of copyright in the Anglo-American tradition is the Statute of Anne in 1710, an owner's public performance right does not appear until the Dramatic Licensing Act of 1833, and then only with respect to musical-dramatic works such as theatre or opera. In 1842 the Musical Copyright Act would establish an owner's right of public performance, but it would never be enforced. Only in 1914 would an owner's public performance right begin to be collected, 200 years after the Statute of Anne. It is only within the last few decades that any similar right has been extended to books or other works.

Why has music been treated differently? We do not pay additional fees to the engineer who designed our cars every time we take a drive. Surely the conception, realization and designs that have been borne out in our vehicles are unique, creative and original contributions. Arguably, our lives are enriched in significant ways by the end results of these efforts, and yet there is no payment made to these creators, or the

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<sup>10</sup> From CIA World Factbook, at <https://www.cia.gov/library/publications/the-world-factbook/geos/ca.html>, last accessed January 2011.

<sup>11</sup> Note that in 2004 when this research was begun the total collection was one billion five hundred and fifty four million, and the SOCAN figure was \$6.40 per capita. For all three groups as a whole that amounts to a 38% increase in collections during the period. For SOCAN alone it amounts to a little more than a 14% increase. The collection figures for the various agencies were obtained from their published financial reports. The SOCAN report is available at <http://www.socan.ca/pdf/pub/FinancialReport2009.pdf>, an industry report citing both BMI and ASCAP's 2009 collections can be found at <http://www.socan.ca/pdf/pub/FinancialReport2009.pdf>, all reports were last accessed in January of 2012.

industrial interests that support them, every time we start the engine and drive them down our roads. If we wish to dismiss the automobile as simply a mechanical contrivance, then let us consider the other professions that might be deemed more creative or artistic. The architect who designed our homes does not receive a royalty for each night we spend in them, or for each party we hold. Even if the building were commercial and not a private home, royalties are not paid. When the portrait artist paints his work and sells it to a buyer, his economic interest in it ends there. The portrait artist receives no royalty when it is put on display, nor are the visitors to the home where it hangs counted so that a royalty might be returned to recompense for their viewing. We have struck our economic bargain between artist (be it automotive designer, architect, or a portrait artist) and end user when we purchased or rented their creation. No further rents are paid. Nonetheless, it has somehow become accepted that it is perfectly reasonable for an author/composer, or more specifically the copyright owner (who is often not even the original creator), to be paid for each use beyond the point of sale or rental. The idea may have been justified by an appeal to a romantic conception of authorship, which sees the author/creator as the personification of divine genius, and perhaps it continues to be sustained by the general public sympathy for creative artists. However, it would seem the ability of owners to continue to extract rents on an ongoing basis has much more to do with the influence of the economic industries created around this form of accumulation.

There is no obvious logic or model for an additional economic right to be collected following the initial economic transaction. The standard economic arguments proffered such as incentive for creation would not apply to this additional right,<sup>12</sup> as the

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<sup>12</sup> Such arguments are questionable in any case when applied to artistic creation since artists create for many reasons beyond simple economic recompense. The annals of artistic creation are filled with artists

creator would have been paid when they sold the container in which the work was held. And though large scale uses such as broadcasting may not appear on the surface to adequately recompense the creator given their broad dissemination of the work, broadcast of some kind has always been absolutely necessary for the creation of markets, as evidenced by the long historic practice of payola in the industry.<sup>13</sup> Not only is the owner's public performance right an economic right additive to the reproduction right, it is an economic right collected on something that has no physical existence: a performance.

Like a thought, or a conversation, a performance exists only in the moment and later as a memory. If it is fixed in a medium, then it is no longer a performance, but a recording and, as such, it can be sold or traded. Within this context, the thought of a unique owner's right of public performance seems even more problematic when applied specifically to music. If we consider music as an abstract object, or even simply as a commodity form, its only purpose is performance. Textual or manuscript manifestations serve only as guideposts in the creation or re-creation of a performance. Indeed, if performance were not the intent the composer would not have released the work to the world. More importantly, unlike a recording or a broadcast a performance is not a one-way transmission. Performers respond, react and interact with their audience. A performer can play the same song in the same set every night on a tour for twenty days and each performance will be different and unique. Much of the difference in those

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who left huge bodies of work despite little if any financial success in their own time e.g. Charles Ives, Leadbelly, Van Gogh.

<sup>13</sup> In 2005 the attorney general's office of New York State investigated a number of the music industry's largest corporations. It found that Sony, EMI and Warner Chappel had "provided illegal financial benefits to obtain airplay and boost the chart position of its artists by bribing radio station employees." See settlement with State of New York: [http://www.oag.state.ny.us/media\\_center/2006/jun/jun15a\\_06.html](http://www.oag.state.ny.us/media_center/2006/jun/jun15a_06.html). Last accessed June 2011.

performances will come from the audience and their reactions to the performance. It is an ephemeral and transitory state.

According to Mary Louise Serafine, there exists no culture that does not have music as a part of it (1). The culture may not have a written language, but it has music. What is even more significant, however, is Serafine's assertion that not only do all cultures have music, but that "all peoples have knowledge of it to a consequential degree" (2). Serafine is concerned primarily with Western Music, and certainly within that context makes a strong case for a consequential degree of knowledge across the masses. She bases her claim on the ubiquitous nature of music within North American and European culture at this time as evident in the ability of individuals on the street to "name that tune," whatever the tune might be, the use of specific compositions as evocative marketing tools and the capability of differentiating between styles, folk and hip-hop, rock and classical. It is precisely because music is so completely a part of our everyday existence that we have to a large part become unaware of it.

Serafine also discusses the idea of music being learned from the time of childhood, usually at the feet of our parents. In this regard, she is primarily concerned with establishing music as thought. Her thesis posits that music is a form of thought and as such develops over the life of an individual, much as would language skills or mathematical reasoning. (5). One argument for this continuing evolution is the incessant desire for new musical compositions. As Serafine points out, there are over a million new compositions registered for copyright every ten years in the U.S. alone (5). It is worthwhile to note that this figure only represents a portion of the music actually written

and performed since it deals only with America, and not all composers copyright their work.

The instinctive desire both to create and to participate in the musical experience by banging on a drum, snapping fingers or singing a song is very much a part of the human experience. It is a demonstrative part of our communicative process, and if anyone doubts that for a moment, they need only watch a movie. Given the abilities of the commonplace digital video disc (DVD) player it is relatively simple now to add the subtitles to your film in your choice of language. By so doing we can (in a very minimalist way) step back to the era of the silent film. Enjoy the film in silence, with only the text and image to define it. Then play the scene back again but with the sound added in and notice the immense impact of the overall sound canvas on the human response to the work. Clearly the impact can and will vary depending on the sound designer, but even at a minimal level the addition is significant, which in part explains the immense popularity of music as part of the performance during the silent film era.

Serafine's work reminds us that ultimately music is part of what it means to be a human being, and not merely a commodity to be traded. Indeed, in many ways the ultimate effect of the industrialization of music into a "music industry" was the alienation of music-making as part of the communal human experience. Similarly, the tacit acceptance of performance as something other than the live communally shared experience has alienated us from what a performance is and what it should be, as opposed to simply another means of extracting value from dead labour.

### **1.1 Justification**

During the period spanning 1930 and up to the beginning of the 1970s, there was

a paradigm shift in policy with regard to the public performance right collectives in Canada. The objects of investigation in the 1930s became the successful models of the 1970s.<sup>14</sup> In 1971 an Economic Council of Canada report recommended adopting a similar revenue collection structure in relation to the loaning of books, or the collection of revenues on behalf of computer programmers (McDonald). The Report on Intellectual and Industrial Property was even more enthusiastic noting that “continuing technological change appears to make inevitable a greater use in the future of copyright ‘collectives’ such as the performing rights societies” and recommending “an adjustment of the Copyright Act to permit the wider use of the performing rights society approach, including its extension into the field of printed and other materials.”

Since that time, the contemporary information environment has undergone massive changes. The digitization of information in all forms has become commonplace. This transformation to an increasingly digital landscape has enabled the release from the limitations of the physical container and has resulted in the rapid deployment, transfer, absorption and creation of information at previously unimagined speeds. Intellectual Property (IP) regimes have traditionally depended upon the container to provide the physical embodiment of artificial scarcity. In a digital environment, the myth of scarcity is even harder to maintain. How can IP regimes ensure their continued dominance? Increasingly one of the responses being suggested to address that concern is that of collectivization. While the expansion of collectives within the copyright regimes has largely gone unnoticed by the public, these agencies have collected rents in excess of

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<sup>14</sup> See chapters 7-9.

\$320 million from Canadian users. Even using this undoubtedly low figure,<sup>15</sup> it still amounts to almost \$10 for every man, woman and child in Canada.

The May 2004 Report of the Standing Committee on Heritage, chaired by M.P. Sarmite Bulte made nine recommendations with respect to IP reforms to the Copyright Act of Canada. Three of those recommendations advocated the creation of extended collective licensing regimes on the internet. These regimes were being extended in the sense that they were being posited to cover areas previously not licensed, specifically educational uses of the internet, file sharing online, and library transmission of digital documents. More significantly, the areas in which the collectives were being posited as a plausible means of operation arguably fall within copyright exemptions. The March 2004 ruling of the Supreme Court of Canada would seem to indicate that such collective licenses are not only unnecessary,<sup>16</sup> but would in fact be an infringement of users' rights.<sup>17</sup>

Within the context of the Library and Information Science literature there is a great deal of general discourse in respect of copyright but almost nothing in respect of the public performance right.<sup>18</sup> The discourse seems primarily focused upon informing

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<sup>15</sup> This figure is based on the available information from only four of thirty-four registered collectives, and while it does include the largest, SOCAN, it is not a true reflection of the actual per capita cost which will be undoubtedly higher. The SOCAN report can be accessed at <http://www.socan.com/pdf/pub/FinancialReport2009.pdf>; COPIBEC at <http://www1.copibec.qc.ca/pdf/Copibec%20-%20Annual%20Report.pdf>; Canadian Private Copying Collective at <http://cpcc.ca/english/finHighlights.htm> and Access Copyright at [http://www.AccessCopyright.ca/media/6371/2010\\_annual\\_report.pdf](http://www.AccessCopyright.ca/media/6371/2010_annual_report.pdf). All sites last accessed June 2011.

<sup>16</sup> The Supreme Court ruling of March 2004 concerned itself with claims of copyright infringement made by publishing interests against the Great Library of Osgoode Hall. The library claimed its use of the publisher's material fell within the permitted exceptions of the Act. The ruling by the SCC was a landmark decision clearly stating (in plain language) the existence of user's rights under the Act. For detailed information, see *CCH Canadian Ltd. v. Law Society of Upper Canada*.

<sup>17</sup> See Trosow and Wilkinson in Geist: the recent SCC rulings have been explicit in their statement that user's rights are just that, rights, and not simply loopholes to copyright.

<sup>18</sup> For example, see the copyright sections of the Canadian Library Association website at <http://www.cla.ca>, and those of the American Library Association at <http://www.ala.org>.

librarians as to the existence (and possible violations) of copyright collectives generally. However, the current state of library collections is increasingly inclusive of media formats. Indeed, in academic libraries the public performance right consideration will likely become a significant issue given the current trend of music and cultural studies departments and faculties to offer courses in popular music and media.<sup>19</sup> The issues of how to make such recordings available, in what formats, and under what restrictions will likely pose greater levels of concern for librarians. In addition to library media concerns, there is the increasingly large scope of Access Copyrights tariff requests, which will affect all libraries. Access Copyright exists as a direct result of the successful establishment of the public performance right collectives. Finally, from a policy perspective virtually all copyright issues impact libraries and their users in respect to access. Whether that access is to cultural goods or textbooks is irrelevant. Access remains a core issue for libraries and librarians.

This thesis, therefore, is timely since it arrives not only during a period of copyright debate worldwide, but also at a time when both the previous and sitting governments of Canada have made it known that reform of the Copyright Act is a serious priority.<sup>20</sup> The new Conservative majority government of Canada made its intent clear when it noted in the throne speech opening the forty-first session of Parliament that “our

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<sup>19</sup> The Don Wright Faculty of Music at the University of Western Ontario has recently begun offering a Bachelor of Music degree in popular music which received a significant amount of press in Canada with respect to it being the first such program of its kind in Canada. However, while this may have been the first Bachelor degree in popular music, it is by no means the first offering of such programming. Even within musical studies only there are at least four programs offering streams in Canada, online at <http://www.iaspm.net/iaspm/unis.html>. Note also that this does not take into account cultural studies programs, or programs specializing in Jazz studies. For a further discussion of the growth of similar programs, see the National Post, October 18 2005, page A1.

<sup>20</sup> The Industry Canada official website maintains a page dedicated to copyright reform at <http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/home>, last accessed June 2011. Similarly, Heritage Canada also maintains copyright information on its website as part of its Copyright Policy Branch at <http://www.pch.gc.ca/eng/1274442720821/1274443077996>, last accessed January 2012.



Government will introduce and seek swift passage of copyright legislation that balances the needs of creators and users.”<sup>21</sup> Indeed, as this thesis nears its completion, Bill C 11: The Copyright Modernization Act is in the process of second reading.

As the case study will indicate, it is the public performance right that laid the foundation for the establishment of copyright collectives in Canada. However, unlike much of the policy analysis done in the copyright arena previously, this thesis takes a critical approach to the topic, viewing it not only from its economic outcomes, but also from its social and cultural impacts. While the increasing recourse to collective licensing as a policy response is of great concern, the almost total lack of critical analysis of collective licensing is far more disturbing. Given the historical opposition to these collective organizations, the contemporary acceptance of their existence and tacit encouragement of their expansion raises questions as to the operation of the policy process generally. It is the contention of the author that collective licensing regimes have evolved as extremely successful examples of a hegemonic process as delineated by Antonio Gramsci.

## **1.2 Theoretical Framework**

Gramsci’s theoretical interpretations of Marxism are particularly well suited to provide an analytic framework for the case study, as the standard economic and philosophic rationales proffered as justification do not fare well. The economic literature in particular seems to indicate a reality contrary to the justifications historically offered, and thus one wonders why exactly the naturalization of the public performance right has been so successful. Gramsci’s hegemonic framework will be used to construct an

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<sup>21</sup> Speech from the Throne to open the 41<sup>st</sup> session of Parliament, June 3<sup>rd</sup>, 2011, page 4 of pdf. Full text available at [http://www.speech.gc.ca/local\\_grfx/docs/sft-ddt-2011\\_e.pdf](http://www.speech.gc.ca/local_grfx/docs/sft-ddt-2011_e.pdf). last accessed January 2012

organizing rationale behind the successful imposition of, and expansion of a public performance right. The organizing societies as well as the copyright and policy experts within the larger community can in analysis be seen to be an outgrowth of the process of hegemony. Despite the fact that the economic literature indicates the ineffectiveness of the copyright regimes in achieving the stated policy objectives, the public performance right collectives have been extremely successful in their imposition and expansion, spanning the globe and collecting billions of dollars every fiscal year. Gramsci's concept of hegemony explains the success of the public performance right collectives in spite of the failure of the policy objectives.

Gramsci's concept of hegemony is situated within a political economic view of society. Within the hegemonic framework the dominant class relies upon not only coercion and naked power to achieve their goals, but rather utilizes consent by means of the creation of cross-class alliances. By means of the utilization of the institutions of society (church, schools, government, media) the dominant class is able to implant and lead society to accept the goals of the dominant class as the natural evolution of the social process. Hegemony requires that the dominant class, wherever possible, incorporate the goals of the subordinate class while at the same time maintaining the necessity of "naturalizing" the dominant classes goals within the larger society, to the point where they are seen as the natural evolution of that society as a whole (Bocock).

For Gramsci, the creation of a hegemonic order was dependent upon the establishment of a "historic bloc," a first alliance between classes usually to achieve an economic end. In the case of the performance right that historic bloc may be seen to be the alliance between capital interests in the form of the publishing industry and the

composers/authors required to form the public face of the collectives. While the interests of publisher and composer were historically at odds, the opportunity for enhanced commercial return provided a basis on which to create an alliance.

Gramsci recognized that at various times within hegemonic order crises would develop, and while some would be insignificant, others would be symbolic of deep pockets of discontent within society. Such crises would create the opportunity for new classes to overthrow the established order. If unsuccessful, they would simply fade back into society until another opportunity would arise. Within the context of the public performance right, the various government investigations along with public and private oppositions presented such moments of crises, and yet the historic bloc publisher and creator were able to weather the various crises via negotiation, or supplication. However, Gramsci also noted that occasionally there would be a crisis of an “organic” nature. Such a crisis was systemic and was generally the result of a failure of the dominant party to actually lead in any true fashion. Such failures were a result of the disengagement with the subordinate groups. The inability of the governing order to make the interests of the subordinate groups, or at least aspects of them, their own would also negate their ability to inculcate their choices.

The current state of digitization may present the first truly organic crisis for the bloc in that the overwhelming use of digital means for the exchange of music has significant implications for the hegemonic order. The current practice of file sharing via the internet would seem to raise a serious question. Is it illegal downloading, or does it represent a shift in the social order that needs to be addressed in law? In other words, is it simply an anomaly that will eventually be addressed in law, or has there been a

fundamental shift in how society in general views the concept of copyright as it pertains to artistic works? If the latter, then the existing hegemonic order faces a truly organic crisis which may result in its downfall.

### **1.3 Thesis**

The general thesis of this work is that the public performance right as established within the Anglo-American legal tradition is fundamentally flawed, and was successfully imposed only as a result of capital interests. As a result of its imposition, contemporary copyright policy has come to rely upon the use of collective management regimes within the copyright environment with little critical evaluation of their nature, justifications or impact upon the larger society of information users.

The historic commodification of social practices, coupled with the expansionary nature of capital and its need to continue to extract value, have resulted in increasing layers of bureaucracy and collectivization throughout the information environment. Through a case study of the public performance right collectives the author will posit a model for the creation of a hegemonic structure which not only entrenched the public performance right as a *natural* outcome of social economic processes, but also profoundly influenced the acceptance of collective rights management generally as a natural outcome of the same processes. This general thesis leads to a series of research questions, which seek to identify the key actors in the area and their influence on the various sectors.

### **1.4 Objectives and Research Questions**

The overarching objective of this research is to attempt to discern how the concept of the public performance right which on its face had no direct relation to *copyright*, and

which had an even more tenuous existence within standard economic practice, came to be naturalized within contemporary society and create a legal concept that would come to form a cornerstone of Canadian public policy. Given that the current public performance right organizations generated more than \$2.1 billion of income in the 2009 calendar year, the research may also serve as a warning in regards to the increasing collectivization and commodification of information resources.

The objective of this work is to answer the following questions:

1. Historically copyright justifications are couched in the rhetoric of *protecting the creator*. Is the performance right justifiable on that basis? If so, what are the social costs created by a robust performance right?
2. Has there been any notable shift in the manner in which public performance rights issues are considered at the State level over time?
3. Has the policy network surrounding the public performance right changed in any significant manner since the period marked by the 1988 Copyright amendments?
4. Has the influence of the original public performance right collectives continued to significantly impact the larger collective rights management network since the 1988 copyright revisions, or has the network seen the establishment of new key players?
5. Given the membership numbers of performing rights organizations such as SOCAN, is there a disproportionate representation of their interests in the legislative process?
6. Given the internal membership both historical and current of SOCAN, is there a disproportionate amount of influence wielded by publisher interests as opposed to those of the creator?

7. With respect to financial returns have the interests of the dominant and subordinate groups in the hegemonic process been equally well served?

### **1.5 Methodology**

This study is situated within the critical-historical paradigm and will utilize both empirical and theoretical inputs. Such research “typically goes beyond mere description and attempts to interpret the facts as reconstructed. . . . the historian attempts to give meaning to the facts in light of a relevant theory” (Powell 137). Following an explication of the theoretical framework, the investigation will begin with a preliminary discussion of justificatory theories underpinning the existence of copyright in general and the public performance right in particular. From that foundation, the case study will outline the establishment and expansion of the public performance organizations with a particular emphasis on the Canadian experience. The analysis will be made using multiple data sources including legal decisions, government policy documents, media reports, stakeholder internal publications, and other source of data reflecting the positions of the various stakeholders within the policy process.

It has been noted in previous works (McCann, DeWhitt, Ryan) that the private nature of Performing Rights Organizations results in highly limited access. They are not public institutions and therefore have no duty to share access to their historical records or archives, other than might be mandated in respect of their members. In general, the histories of such organizations, if available at all, have been created by their own members and are largely public relations exercises. As a result, the most effective sources of data with respect to performance right organizations have come from government documentation. Through the analysis of the documentation generated by the committees

and departments involved with the copyright reform process generally and the public performance right issue specifically, the intersection of networks and the dominant players within those networks can be illustrated.

For the purposes of the research, the case being studied will be defined as the actors and roles performed within the system surrounding the public performance right in Canada. The term *surrounding* is used to provide linkage to both the foundational networks, which led to the creation of the system, as well as those extended collective management organizations, which may be seen to have in some way derived from the public performance right system. While the focus of the research is the public performance right, noting the linkage recognizes that the public performance right exists as an embedded unit within the larger collective management network.

The author notes that quite often discussions of copyright (within which framework the public performance right exists) will ground themselves almost entirely on the basis of legal rulings. As Cyril Ehrlich wrote in his monograph on the history of the Performing Right Society in Britain, “Such interpretations of history give undue weight to intricacies of law, a common tendency in this field of study, and pay scant regard to economic realities”(3). Thus while legal systems may provide the coercion necessary to insure adherence to whatever regimes are established, they do not, as a rule, create law purely for their own interests. With respect to issues of copyright the law is usually responding to economic issues and as Paul Romer notes in the *American Economic Review*, it behoves economists to “explain that the policy goal should be to maximize consumer welfare, not such popular proxies as ‘exports’ or ‘industry revenues’”(215). Thus, the focus will be upon the holistic nature of the network itself and the socio-

economic framework surrounding it as opposed to merely law or economics.

## **1.6 Organizational Plan**

The study will proceed along the following organizational plan.

Chapter one will introduce the problem under study and place it within the context of information policy. It will also outline the justification for the research and its proposed implication for the field.

The primary goal of chapter two is to introduce the theoretical work of Antonio Gramsci. Gramsci's conception of hegemony provides the theoretical framework that will be used to underpin the case study analysis of the performance right regimes. Gramsci's work is an interpretation of orthodox Marxism and given the dominant awareness of the orthodox reading, some of the major differences between the systems will be noted; in particular, Gramsci's interpretation of the orthodox Marxist notions of economic determinism within the hegemonic framework and its role in allowing for a more malleable dialectic relationship between classes. Gramsci's concept of hegemony will be used to construct an organizing rationale behind the successful imposition of, and expansion of a public performance right. The hegemonic framework explains the success of the public performance right collectives in spite of the failure of the policy objectives, which will be discussed in chapter four.

Chapter three will review the literature surrounding the public performance right and performance right organizations. Given the critical historical basis of this study the literature used will necessarily flow from a number of sources and will rely on no single source to the exclusion of others. The literature may be grouped in the context of five primary streams: government documents, legal literature, economic analysis, industry



publications and socio-historical approaches. Some works will situate themselves directly within a given stream, while others are less easily labelled and may be seen to co-exist in more than one area. Viewing the associated literature in the field within these frames will allow the assessment of strengths and weaknesses of the undertakings thus far. In turn, this will better situate the study as it undertakes a critical historical analysis of the performance right collectives in Canada.

Chapter four will consider the nature of copyright generally and the public performance right in particular with respect to their philosophic and economic rationales and their relation to authorship. Beyond simply the historical justifications, this chapter will attempt to situate the rationales within the context of current social construction. Given the transformations of society and culture between the late nineteenth and late twentieth centuries, the issue of how well the historical frameworks regarding authorship and ownership fit within contemporary social thinking will be considered.

Chapter five will develop an historical analysis of the public performance right collectives as a subset of the music industry. In terms of this analysis of the music industry, it is useful to break down the history into three periods. The initial period begins with the invention of the printing press (1450) and continues until the end of the nineteenth century, focusing on the emergence and establishment of an industry particularly within the booming culture of Victorian Britain. This period is marked by the establishment of various enterprises surrounding the publication of music, and the imposition of the public performance right.

Chapter six will encompass the music industry from the period at the turn of the twentieth century until 1970 (the second period) and will consider the massive changes

which occurred as a result of technological advancements, such as radio broadcasting, machine based reproduction, reproductive sound technologies, and the nature of the musical experience which accompanied those technological changes. The latter part of the chapter looks at the most recent period from approximately 1970 to present day with an emphasis on the impacts of digital and reproductive technologies.

The structural establishment of the public performance right collectives will be covered in chapter seven. Though chapter six has laid the background, this chapter will look at the actual roots of the three major organizations: The Performing Right Society of Great Britain, the American Society of Composers, Authors and Publishers and the Canadian Performing Right Society, which would eventually become the modern day SOCAN. In addition to describing their establishment this chapter will outline some of their early challenges and successes, which have significant outcomes for the future regimes.

Chapter eight deals with beginnings of the Canadian Performing Right Society as it attempted to establish itself in Canada. Following an account of the establishment of the Society, the two Royal Commissions called to investigate its operations are also examined. As will become clear over the course of the chapter, the establishment of a performing rights society in Canada was a direct result of the interest of foreign performing rights societies. The primary unit of analysis will be the appearance of the various interest groups in the public record. It is not the intent of the study to exclude other factors, however bearing in mind the limited access, the one clear method available is simply to track the appearance and reappearance of the various groups over time. By analysis of the documents, it is possible to discern not only the key players, but also

indications of their significance to the process in the area. Also, by viewing the network at discrete intervals (approximately decades) appreciable changes will be visible in the membership and relationships of the community over time.

The period encompassing the Phase I and Phase II copyright reform process in Canada will provide the field of analysis for chapter nine. This period might well be thought of as the pinnacle of the hegemonic order with the successful expansion beyond the performance right in music, and the wholesale adoption of collective management as a policy tool. The chapter will consider closely the policy implications of the Phase I copyright reform which allowed the creation of new collectives within the framework of copyright reform. Chapter nine will also consider the current state of digitization and its implication for the hegemonic order. Specifically, can the contemporary fascination with digital media, particularly the attachment to music and its online sharing, be viewed as a moment of organic crises for the established hegemonic order? If so, the risings of Napster, Kazaa and others may be considered as failed attempts to overthrow the established order, while the attempts of capital to expand via legal networks such as Apple iTunes may be more clearly viewed as last-ditch efforts to maintain the hegemonic order.

Finally, chapter ten will be divided into three parts. Part I will provide an overview of the historical process as seen through the lens of Gramsci's hegemonic concept. By viewing the establishment of the public performance right regimes both globally and within the Canadian experience, key moments can be noted in the creation and inculcation of a hegemonic order and its overall effect in the subsequent creation of collective management as a cornerstone of public policy process. Part II will consider the

effectiveness of the thesis with respect to the research questions. Following the discussion of these questions, Part III will consider possible alternatives to the current policy solutions that might more effectively achieve the intended policy objectives, but with a reduced social cost.

## Chapter 2: Theoretical Framework

The primary goal of this chapter is to introduce the work of Antonio Gramsci, whose concept of hegemony provides the theoretical framework for the case study analysis of the performance right regimes. Gramsci's theoretical interpretation of Marxism provides an ideal analytic frame for the case study because the standard economic and philosophic rationales proffered as justification for copyright in general are not adequate explanations.<sup>22</sup> The economic literature in particular seems to indicate a contrary reality to the justifications normally offered, thus leading the researcher to question why exactly the naturalization of the performance right has been so successful. Gramsci's concept of hegemony explains the success of the performance rights networks in spite of the failure of the policy objectives. The case study will show that the public performance right fits neatly within a hegemonic framework, and that the success of the hegemonic process is concurrent with the success of the performance rights collectives.

### 2.1 The Value of Social Theory

Discussions of copyright policy is all too often limited to issues of legislation, case law and litigation. This legalistic tendency is particularly manifest when the broader discussion pertains to music industry issues. While legal discourse may form the edifice of copyright, it is not the only pertinent one with respect to issues of justice, fairness or economic viability. It is too easy to forget that copyright law did not exist *a priori*, nor does it operate outside of a socially constructed reality. Nevertheless, in the context of a law that functions as an objective social agent, these very real limitations often proceed unnoticed.

The fundamental justification for copyright law within the Anglo-American

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<sup>22</sup> These two claims will be further discussed in chapter four.

tradition has been an economic one. Although we might prefer to see *the law* as objective, we know from history that quite clearly it has been influenced in varying degree by those powerful in society, and therefore whatever objectivity it may seem to have is in reality the result of a series of historical decisions made by social actors. Bearing this notion of objectivity in mind, Gramsci's work is particularly well suited to an analysis of legal issues within the larger frame of the music industry. With respect to the law, Gramsci notes:

If every State tends to create and maintain a certain type of civilization and of citizen (and hence of collective life and of individual relations), and to eliminate certain customs and attitudes and to disseminate others, then the Law will be its instrument for this purpose (together with the school system, and other such institutions and activities). It must be developed so that it is suitable for such a purpose—so that it is maximally effective and productive of results. (*Prison*. 246)

Within Gramsci's theoretical framework, society envisions an ideal citizenry suited to the creation and growth of a specific form of civilization. In order to achieve this ideal, an appropriate, structured, and particular set of values and morals is created that permeates the legal and educational systems. The concept of property rights is a perfect example of the law as a tool for the moulding of a society and citizenry.

Historically, an increasing movement toward the commodification of lands, materials and production led also to an increasingly rigorous legal system, explicitly constructed to protect the ownership rights of property. David Landes in his analysis of the economic development of nations makes note of the fact that under the ideal

conditions for the growth and development of a society, the society would possess and foster the types of political and social institutions that would:

1) Secure rights of private property, the better to encourage savings and investment; 2) Secure rights of personal liberty, against both the abuse of tyranny and private disorder (e.g. crime and corruption); 3) Enforceable rights of contract, explicit and implicit; [a] table government, not necessarily democratic, but itself governed by publicly known rules (i.e. a government of laws rather than men—the rule of law); 4) Responsive government that will hear complaints and make redress; 5) Honest government such that economic actors are not moved to seek advantage and privilege inside or outside the marketplace (i.e., no rents to favour and position); and 6) Moderate, efficient, ungreedy government, holding down taxes, reducing government’s claim on the social surplus and avoiding privilege. (217-18)

The necessity of legal systems for the growth and expansion of market-based economic societies is clear from Landes’ first point: the need for secure private property rights.

Within the broader frame of the interaction between law and economics, Douglas Arner notes:

Law and institutions play a variety of important roles in a financial system. First, they provide a fundamental “rules of the game”. Second, they support availability of information. Third, they support fairness in markets. Fourth, they assist with the operation of monetary policy. Fifth, they act to reduce and manage systemic risk. Overall, law and institutions

play a central role in supporting confidence in the financial system and its constituents. (52)

Within the tradition of Marxist legal theory, Evgeny Pashukanis constructed a unified Marxist theory of law which rested upon a commodity exchange theory. In essence Pashukanis posited that the legal system was simply an extension of capitalist ideology used to maintain the existing social relations under capital while at the same offering creation and protection of rights of ownership necessitated by commodity exchange.

...[T]he economic relationship of exchange must be present for the legal relationship of the contract of purchase and sale to arise. In its real movement, the economic relationship becomes the source of the legal relationship...(Pashukanis, ch 3, n.pag.)

Clearly, and regardless of ideological differences, economic interests have always been intertwined with the rule of law, in particular the secure rights of property. Property rights have been extended beyond the merely physical, such as buildings, land or material commodities, into the realm of the intangible, which has become the domain of intellectual property. The increasing commodification of cultural artefacts such as music has also resulted in the expansion of intellectual property rights regimes into an even more nebulous area, the public performance of music, so as to allow further commodification and extraction of value.

## 2.2 Gramsci

Any discussion of Gramsci's work must begin with an awareness of the circumstances under which it was created. A leading member of the Italian Communist



party as well as a highly critical journalist, Gramsci was arrested by the Italian Fascist state in November of 1926. He would remain in prison until he was transferred to a clinic in 1935 and then a hospital where he would die in April of 1937. Even after his medical transfer to the clinic, he remained under guard both within the clinic and the hospital. It was during this period of incarceration suffering from prolonged ill health and under constant scrutiny of the censors that Gramsci created the *Prison Notebooks*.<sup>23</sup> As has been noted by Peter Thomas and other scholars, the notebooks should be considered as drafts, or works in progress, but not a complete edited work. This caveat is not given with any intent of diminishing the work, but rather as an explanation of both the wide ranging nature of the work and some of the inconsistencies which have been noted between the notebooks. (Thomas 43-44)

Finally, as Peter Thomas has stressed in his recent work, it is important to recall that Gramsci was a militant political activist. He was imprisoned and died because of his political activities. Despite the fact that his theoretical work, and his expansion of hegemony in particular, have been adopted and championed by a wide range of social theorists (Laclau, Mouffe, Hall, Williams), Gramsci's hegemonic theory is fundamentally a theory of class struggle. However, the theory as Gramsci develops it is so encompassing it is not surprising that it has been widely adopted within other discrete frames of social analysis. Once we become aware of the process it becomes all too easy see it mirrored in the minutiae of everyday social relations, and thus if we are not careful we may limit it to simply that arena.

With the aforementioned in mind, it seems appropriate and necessary at this point

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<sup>23</sup> For further details of Gramsci's life and work see <http://www.marxists.org/archive/gramsci/intro.htm>, last accessed Dec 2011.

to place this Gramscian analysis of the public performance right within the context of political class struggle. As was noted in the introductory chapter, this thesis is in essence a discussion of copyright and its implications for society. While the detailed analysis focuses on a single aspect of copyright as a whole, it is essential to remember that copyright as a process controls the flow, distribution, use and reuse of information throughout society. Within that context copyright can and has been used as tool of Capital within the context of business and publishing dimensions, to deny or limit the use of information by society as a whole, and in particular the largest members of society who make up the working class/users of the information. The successful imposition of this owner's right created the precedent for the establishment of further owners' rights across a spectrum of information and not merely the public performance of musical works.

### **2.3 Gramsci's Theoretical Conceptions of Hegemony**

Gramsci's concept of hegemony is situated within a political economic view of society, and is formulated in relation to some fundamental Marxist positions. Key amongst these is the Marxian concept of economic determinism. Within orthodox Marxist formulations, economic relations form the bedrock upon which other hierarchical spheres of culture depend. Economic relations are the base in a base-superstructure hierarchy and within the historical processes delineated by Marx, determine derivative structures which form the superstructure (the realms of the political, the social, and the intellectual). The base level is composed from the elements of material production: money, things, the relations of production, as well as the stage of development of productive forces which can be thought of more simply as the physical world plus the

forces of economic relations that capital creates. Located within the superstructure, are political and ideological institutions, social relations, and cultures.

An orthodox interpretation holds that the movements and goals of the independent units of society are a result of established and inherited property structures, and within these units of organization, cultural activity is an expression of a controlling economic content: “The mode of production in material life determines the general character of the social, political and spiritual processes of life. It is not the consciousness of men that determines their existence, but, on the contrary, their social existence determines their consciousness” (Marx, *Critique* 11-12). According to this orthodox Marxist reading, individuals are born into a process which they are unable to control. The historical process of material relations (which Marx calls the mode of production) determines an individual’s relationship to the rest of the world. If one is born into a working-class family, one lives within a particular set of economic circumstances, and one’s understanding of the world, as well as one’s relation to it will be determined by this fundamental experience. The frames of reference will determine an individual’s understanding of world relations, and within various class divisions these understandings will manifest as fundamentally different.

While the concepts of base and superstructure are critical to an orthodox Marxist reading, much of the scholarly writings of the late 1960s and throughout the 1970s and 80s reflected a post Marxist interpretation which no longer depended upon the economic as the fundamental arbiter. These new cultural theorists posited the concept that culture, as a sociological process as well as an aesthetic process, has a significant impact on the creation of society. Raymond Williams argued that culture is part of a constitutive social

process and thus should not have been relegated to the subservient role of superstructure, but rather seen as a determining part of the process. Williams noted the tendency to reduce Marxism to simple determinism, and warned that if one follows this path too closely it increases the “ways in which some connections may be lost to consciousness” (Williams 79). Stuart Hall made significant use of Gramsci’s hegemonic conceptualization in his work. While Hall recognized the hegemonic process as a site of struggle, he interprets it as a struggle not only between capital and class but also between gender, race and other social identifiers. Laclau and Mouffe would take the concept even further and claim in the opening paragraph of their seminal *Hegemony, Culture and Socialist Strategy* that “Hegemony will allude to an absent totality”(7). For Laclau and Mouffe hegemony becomes a form of discursive analysis for the deconstruction of a social order that has no recognizable narrative into increasingly smaller fragments.

Certainly, within a Gramscian reading, the cultural impacts bear significantly upon the social order and its relations however, despite his later interpreters, Gramsci was abundantly clear that even within the constitutive process of hegemony there was a dominant ideology leading the process, and that ideology had to be in place even before the group could lead, “.. for though hegemony is ethical-political, it must also be economic, must necessarily be based on the decisive function exercised by the by the leading group in the decisive nucleus of economic activity” (*Prison 161*).

For Gramsci, a society is the sum of all its cultural and ideological parts and therefore the dialectic nature of the social order, with its varying influences and exchanges, can and does have political outcomes regardless of class status. In his analysis of the French revolution, Gramsci makes it clear that the upheaval was not simply

determined by economic inequalities:

In any case, the rupture of the equilibrium of forces did not occur as the result of direct mechanical causes, i.e., the impoverishment of the social group which had an interest in breaking the equilibrium, and which did in fact break it. It occurred in the context of conflicts on a higher plane than the immediate world of the economy; conflicts related to class “prestige” (future economic interests), and to an inflammation of sentiments of independence, autonomy and power. (Gramsci, *Prison* 184)

Thus in his analysis of the French revolution, Gramsci rejects a rigid base-superstructure model because it relies too heavily upon class status, and does not sufficiently appreciate the intellectual and philosophical impact of the culture and individuals within it. Gramsci believes that class struggle necessarily involves ideas and ideologies. These ideas have the potential of not only causing revolution, but also reversing it. This reading of Marx stresses the interdependence of classes and rule by consent. Within Gramsci’s view of society as a hegemonic order, the subordinate class participates in and consents to the historical processes of change. The subordinate members of society are empowered through a participatory process and because of this, they experience a sense of agency and involvement when changes take place. While the system is participatory, it is not equal, and the very nature of the hegemonic order insures that the values of the dominant order will perpetually be inculcated into the culture as a whole.

Gramsci sees social progression as more “dialectic” than “deterministic” and attempts to formulate a theory that recognizes the independence and importance of culture and ideology: “Man is to be conceived as an historical bloc of purely individual

and subjective elements and of mass and objective or material elements with which the individual is in an active relationship” (Gramsci, *Prison* 360). In Gramsci’s model of society, each member is an individual capable of personal growth, within and beyond whatever economic circumstance he or she has been born into. The individual is capable of bringing “into being new modes of thought” (9), which is to say he or she is capable of choosing a personal moral path or developing an entirely new strain of thought that may or may not reflect the common values of his/her class status. However, this new mode of thinking may also lead to a new discourse that explicitly questions the foundations of the dominant order and questions an understanding of the situation which views that hegemonic process as critical and inevitable.

This dialectic behaviour from within the class structure is in direct contrast to the orthodox Marxian frame which views the economic sphere as base determining superstructure, the realm that includes culture, ideology, and class struggles. Within a hegemonic framework the dominant class relies not only upon coercion and naked power to subvert the subordinate class to their goals, but also manufactures consent through the creation of cross-class alliances. The theory assumes a consent given by the majority in a particular direction as suggested by those in power. This consent is not always peaceful and may also be induced by means of coercion through physical, legal or cultural processes. The consent is taken to be common sense, but is in reality an ideology of dominance that has become so widespread, powerful and increasingly unnoticeable that over time society’s members no longer question it:

The “spontaneous” consent given by the great masses of population to the general direction imposed on social life by the dominant fundamental

group; this consent is “historically” caused by the prestige (and consequent confidence) which the dominant group enjoys because of its position and function in the world of production. (Gramsci, *Prison* 12)

This notion of consent is congruent with the notion of the outcomes as common sense.

In attempting to formulate a public justification of copyright, Katie Sykes has noted that the validity of public justifications are dependent upon a notion of public reason and “public reason is therefore barred from appealing to any particular comprehensive doctrine, and from using elaborate, obscure or contentious theories. It is restricted to accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of sciences where these are not controversial” (21). Thus, according to Sykes and similar theorists, we should judge the justification of a legal regime, copyright, based on common sense. However as Gramsci has pointed out, our cultural notion of *common sense* is inculcated by our institutions of learning and authority within our culture, including our omnipresent legal system. Therefore, we determine the fairness of the legal system on the basis of common sense. However, this same system has been responsible, in large part, for inculcating this notion of common sense within society.

Such natural common sense outcomes are particularly prevalent in discussions of copyright generally and yet, there is nothing particularly natural about copyright regimes. As will be discussed in chapter four, copyright laws are a statutory response that create artificial scarcities where none exist for the purpose of achieving a particular policy objective. With respect to “common sense,” it bears repeating that the economic literature indicates the copyright process is not successful in achieving these objectives.

## 2.4 Gramsci's Intellectuals

Gramsci's hegemonic order is differs markedly from the orthodox Marxist conception of the intellectual and his/her role. Within the historical process of capital delineated in classical Marxist thought, the intellectuals have largely derived from feudal times—the doctors, lawyers, priests, nobility and governing agents. The impact of these intellectuals is seen as essentially unidirectional, moving from the dominant classes down to those being governed. Gramsci's conception of the intellectual however, is a great deal more inclusive. It is the intellectual operating within "Civil Society" as delineated in Gramsci's framework, which is an essential binding element in the process. Both the expanded nature of intellectuals themselves and the dialectic nature of their roles in society differentiates Gramsci's concept of the intellectual so markedly from Marx's notion which contains the element of false consciousness. Gramsci's intellectuals arise organically from within their own class; they are not simply limited to historically authoritative figures as suggested by Marx, but also include class members who have achieved positions of authority within their own class structures. While these persons may act on behalf of the dominant class (through employment, for example), they nevertheless have the ability to represent both the interests of the dominant class, and effect changes in the interests of their own class. Ultimately, in their larger roles as intellectuals participating in the dialectic that is Gramscian civil society, they have the possibility of changing the direction of the dominant order through the exchange and infusion of ideas.

Unlike previous proponents of Marxism, Gramsci posits a fundamental split between the organs of the political state (or as he called it "political society") and all



other cultural and social institutions which he referred to as “civil society.” Gramsci saw political society and civil society as two intertwined yet separate elements of the superstructure: “What we can do for the moment, is to fix two major superstructural ‘levels’: the one that can be called ‘civil society,’ that is the ensemble of organisms commonly called ‘private’, and that of ‘political society’ or ‘the state’” (*Prison 12*). This definition is somewhat misleading however; for with respect to the State, Gramsci notes elsewhere that “State= political society + civil society, in other words hegemony protected by the armor of coercion” (262-263).

While Gramsci conceptualizes the state as the combination of political society and civil society, he also recognizes that what was in reality the political aspect of the state is commonly thought of as the state itself. The role of civil society is to inculcate consent of the masses, but the political society is also able to provide the coercion necessary if consent is not given. Civil society forms a buffer between the proletariat and the political society. Civil society is comprised of all non-government aspects of society, the church (particularly true for Gramsci in early twentieth century Italy), schools, media outlets, cultural groups and institutions (including political parties). All of these, by virtue of the respect and deference given them (either as historical process or as a result of current circumstance) play significant roles within the culture. Further, intellectuals associated with these roles, and who have direct ties to the masses, tend to be given great respect and therefore can exert substantial influence on society. Within Gramsci’s framework of hegemony, this middle ground allows for a dialectical process between the governing and subordinate classes.

It is important to bear in mind that while all classes may have intellectuals,

historically, opportunities for means, freedom and the development of the intellect have been unique to the ruling class. Simply put, it is far easier to achieve intellectual goals when one has the money and time to do so and is not burdened with the necessity of making a living. As a result it has historically been the dominant classes which have set an intellectual agenda, and have led and ruled the subordinate class. According to Gramsci, “The class factor leads to a fundamental difference: a class which has to work fixed hours every day cannot have permanent and specialized assault organizations- as can a class which has ample financial resources and all of whose members are not tied down by fixed work” (*Prison* 232).

To effectively lobby the state and create a campaign of support requires time and money, both of which are in short supply when the basic essentials of supporting life occupy one’s daily existence. However, the dialectic relationship proposed by Gramsci would be a result of the actions of all the intellectuals within the particular social order including those of the subordinate group. According to Gramsci, all men have the possibility of becoming intellectuals since existence within society requires some level of intellectual abstraction:

[E]ach man finally outside his professional activity, carries on some form of intellectual activity, that is, he is a ‘philosopher’, an artist, a man of taste, he participates in a particular conception of the world, has a conscious line of moral conduct, and therefore contributes to sustain a conception of the world or to modify it, that is, to bring into being new modes of thought. (*Prison* 9).

Gramsci is keenly aware that the continuing process of industrialization had

resulted in a new breed of intellectual, a process characterized by the need for a fundamentally more highly educated (and thus more trainable) workforce. These “organic” intellectuals rise from the ranks of the masses to act as leaders within the various divisions from which they sprang. Gramsci likens this process to “promoting from within the ranks” as is common within military organizations. These organic intellectuals “emerge as a historic bloc ascends to power and begins to assert its hegemony over a social formation” (Raber 44). While the vast majority of the officer corps may be drawn from within a particular class, there is also an element that can be recognized by their proletariat roots, and such a group would have an impact on the larger group. The idea of an intellectual is determined by the ability of an actor to organize, administer, or lead the construction of knowledge. Thus, while high school and elementary teachers may be considered to be intellectuals within this definition, so too are business leaders, union organizers, spiritual leaders, professional class members and cultural icons.

## **2.5 The Expanding Sphere of the Intellectual**

The contemporary copyright environment in particular is demonstrative of the extent to which the role of the intellectual has broadened. Simple searches of online engines with respect to copyright issues increasingly result in academic and legal articles authored by non-lawyers. The popular online internet encyclopaedia *Wikipedia* lists a separate category for copyright scholars. At the time of this writing, this category had twenty-seven individuals listed, most still living. Interestingly, of those twenty-seven, six were not lawyers.

Librarianship has always had a significant interest in copyright issues, which is

hardly surprising given the impact that copyright can have on libraries. The American Library Association and the Canadian Library Association devote significant resources to the interpretation and distribution of legal issues surrounding copyright, as well as lobbying on behalf of member interests in the copyright arenas. Each group also maintains standing committees on copyright for purposes of tracking the copyright discourse and keeping their members informed on issues which may impact them individually and institutionally. However, as Douglas Raber points out, librarians (and perhaps a case can be made for other professions) may suffer from their own immersion in the dominant hegemony:

Librarians, as intellectuals, and librarianship, as a practice, are immersed in a culture determined by the hegemony of a capitalist historic bloc.

Indeed, they serve a positive function in the production and reproduction of this bloc and its hegemony. Under these circumstances, it is unlikely that librarians will raise questions that critically interrogate the relations of power and knowledge that sustain capitalist hegemony. To do this would not only challenge the authority of the historic bloc, it could also lead to sanctions against those posing the questions. (45)

This is not to suggest that librarians and their associations are incapable of opposing the hegemonic order; on the contrary, there are a number of librarians who have and may continue to do so. However, Raber's point is a valid one, that many of the organic intellectuals birthed through the process of hegemony are in fact bound professionally, or historically to the dominant order and to break from that connection, or even be aware of it, can be difficult.

As an example, the Supreme Court of Canada's decision in *CCH Canadian Ltd. v. the Law Society of Upper Canada* noted that the exceptions to copyright listed under sections 29 and 30 of the Copyright Act were “perhaps more properly understood as users’ rights.” This was an extremely significant statement; these were not just exceptions or loopholes, but were, in fact, rights. The Supreme Court was specific: there are owners’ rights and users’ rights. This statement taken in conjunction with section 30.2 of the Copyright Act—which states, “It is not an infringement of copyright for a library, archive or museum or a person acting under its authority to do anything on behalf of any person that the person may do personally under section 29 or 29.1”—would seem to have given libraries a much stronger position in their dealings with collective licensing groups such as Access Copyright. However, despite this establishment of “users’ rights” by the court, there has been very little overt reaction on the part of libraries or librarians perhaps in part due to hegemonic inculcation as Raber has noted.

The epitome of the organic intellectual for Gramsci was demonstrated by those members of the bourgeoisie who had combined their own class interests with those of the peasants to achieve a hegemonic order capable of opposing the aristocracy. Gramsci notes that these organic intellectuals pushed the “bourgeoisie forward with kicks in the backside” (*Prison 77*) to oppose any compromise that would have been contrary to the interests of their own class. These organic intellectuals had arisen from within the ranks of their own class to reflect and advance its interests.

Within the frame of the music industry generally and the public performance right in particular a number of intellectuals can be seen to evolve over the course of the hegemony. At the outset it is the publishers themselves that must contrive to educate and

lead with their own ranks so as to create the historic bloc. In turn the composers will take up the role as they attempt to gain more control over their circumstances which ultimately leads to the first cross-class alliance. As the industry surrounding them develops and changes so will the intellectual roles within it. The lawyers who will specialize in music and media, and with the introduction of recording technology, the scientists, recording engineers and producers. Each will play a leading role within their group in efforts to expand and entrench their interests. Without question the Rome convention, which will be discussed in more detail in chapter 8 is a reflection of the success of the producer's role as intellectual within the performance right sphere.

Within the contemporary discourse surrounding copyright issues in general, Siva Vaidyanathan is a particularly representative example of an organic intellectual. Although not a lawyer, he has become a well-known expert in the area of copyright issues. Vaidyanathan's interest grew out of his association with urban music in the 1980s and the efforts of industry interests to license and dominate a practice that many perceived to be justified under the fair use doctrine, specifically sampling.

As evidenced by the growing number of blogs, websites and articles devoted to copyright or aspects thereof, copyright in general is being debated by a growing segment of society, which is increasingly aware of the impacts of these regimes upon them. The hegemonic process however is not generally taken into account.

## **2.6 The Hegemonic Process**

The hegemonic process occurs almost imperceptibly given that it is so deeply connected with a society's ideas of "common sense." Hegemony is inherently unstable and is in a constant process of renegotiation that should never be taken for granted. "A

lived hegemony is always a process. It is not, except analytically, a system or structure. It is a realized complex of experiences, relationships, and activities, with specific and changing pressures and limits” (Williams 112). Thus hegemony is a dialectic process, the “push and pull” of relationships and cultures within the social structure which impact, and are impacted by, the processes surrounding it cultural, social, legal and political. Hegemony is the sum of its parts, constantly shifting changing and negotiating yet fundamentally driven by the ideology of the dominant group. The process can generally only be known by its results, at which time the impacts and roles of the varying players can be gauged, or perhaps even known. Gramsci points out that “[a] social group can, indeed must, already exercise ‘leadership’ before winning governmental power (this is indeed one of the principal conditions for the winning of such power); the group subsequently becomes dominant when it exercises power, but even as it holds it firmly in its grasp, it must continue to ‘lead’ as well” (Gramsci, *Prison* 57). Again, this speaks to the fundamental difference between Gramsci and his interpreters; for Gramsci this is not merely a discursive process in social democracy, but rather indicative of the fact that ideology precedes the dialectic.

By means of the utilization of the institutions of society (for example, church, schools, government) the dominant class is able to implant its vision and lead society to accept the goals of the dominant class as a natural evolution of the social process. In order to do this, Gramsci asserts that hegemony is dependent upon those intellectuals who will lead the subordinate classes in their understanding of the process. It is imperative to stress the import of the “natural outcome”, the “common sense,” with which the direction is perceived.

## 2.7 The Historic Bloc

Key to the establishment of the hegemonic process is the first cross-class alliance referred to as the historic bloc. This necessary first alliance established for pure economic advantage sets the stage for the larger hegemonic process. “A second moment is that in which consciousness is reached of the solidarity of all members of a social class—but still in the purely economic field” (Gramsci, *Prison* 181). It is the perceived success or failure of the initial contact that determines the possibility of moving to a next level. “A third moment is that in which one becomes aware that one’s own corporate interests, in their present and future development, transcend the corporate limits of the purely economic class, and can and must become the interests of other subordinate groups too” (181). Thus, the dominant group recognizes that their leadership, their goals and values, “can and must” become the interests of subordinate groups. Note that Gramsci does not simply say that these interests must be imposed on the subordinate group, but rather that the dominant group’s interests must become the interests of the subordinate group. This is the notion of consent that is at the heart of hegemony.

Within the hegemonic process, we must recognize that negotiation between the parties is ongoing, which is not to say that it is an equal partnership, for as Gramsci notes, there is usually an imbalance between the parties (as well there may be in all human relations) but each party has something of value to offer the other and to achieve a successful outcome both will have to negotiate. Strangely, at this point, the hegemonic process may be seen to reflect simple capitalist economic negotiation. In much the same way that a more powerful player (more intelligent, wealthier, or more highly connected for example) may dominate a negotiation and, given the proper circumstances, ultimately



dominate and influence an overall process beyond a simple event, the dominant class in the hegemonic relation can also influence and engender support from the subordinate class in the process.

Gramsci notes that hegemonies pass through three levels of maturation before achieving the ideal of universalizing their own goals in a type of “harmony” with the entire society. At the first stage, the alliances are purely between the economic actors concerned, and do not extend into the larger society. At stage two, the connections between class levels grow more intense but are still primarily economic. Ultimately, at the third stage the dominant class recognizes its need for power beyond the simply economic and thus fosters a hegemonic process to encompass the broader society.

Throughout these three stages, the dominant class relies on the widening support base of intellectuals to entrench the regime. Hegemony requires that the ruling class, wherever possible, incorporate the goals of the subordinate class while at the same time maintaining the necessity of “naturalizing” the dominant class’ goals within the larger society to the point where they are seen as the normative evolution of the society as a whole.

Gramsci realized that some elements of society would resist assimilation under all circumstances. Such opposition would as a matter of course need to be removed and thus hegemony would rely upon the coercion of the state (via military or legal influence and dominance) where accommodations could not be made. “The first necessity was to annihilate the enemy forces, or at least to reduce them to impotence in order to make a counter-revolution impossible” (Gramsci, *Prison* 78). Indeed the unstable nature of hegemony is in part due to this realization:

In every country the process is different, although the content is the same. And the content is the crisis of the ruling class's hegemony, which occurs either because the ruling class has failed in some major political undertaking for which it has requested, or forcibly extracted the consent of the broad masses (war, for example), or because huge masses (especially of peasants and petit-bourgeois intellectuals) have passed suddenly from a state of political passivity to a certain activity, and put forward demands which taken together, albeit not organically formulated, add up to a revolution. A "crisis of authority" is spoken of: this is precisely the crisis of hegemony, or general crisis of the State (Gramsci, *Prison* 210).

Gramsci recognizes that at various times with society, crises develop, and while some are insignificant, others are symbolic of deep pockets of discontent within society. Such crises create the opportunity for new classes to overthrow the established order. "If the ruling class has lost its consensus, i.e. is no longer 'leading' but only 'dominant', exercising coercive force alone, this means precisely that the great masses have become detached from their traditional ideologies, and no longer believe what they used to believe previously, etc." (*Prison* 275). If unsuccessful, the class attempting to wrest control would simply fade back into the social frame until such time as another opportunity arose.

The fundamental disconnect of the masses from the ruling ideologies is characterized as an organic crisis which could lead to an overthrow of the dominant order. "The problem is the following: can a rift between popular masses and ruling ideologies as serious as that which emerged after the war be 'cured' by the simple

exercise of force, preventing the new ideologies from imposing themselves?” (*Prison* 276). Gramsci proposes that the most effective response that the subordinate class can make to a destabilizing hegemonic order is via political activity, specifically two different forms of political strategy that address a hegemonic order and create a socialist society. Gramsci’s two proposed forms of strategic response were the “war of manoeuvre” and the “war of position.”

The war of manoeuvre is the strategy recommended for societies where a centralized and dominant state has failed to create a dominant hegemony within the civil society. It consists of a frontal attack on the dominant powers and its primary goal is the achievement of a speedy victory. Of course, success is as dependent upon the failure of the class attempting to rule as it is upon the ability of the group attacking. An example of this might be a non-confidence vote initiated by the opposition in a minority government; the success is not only dependent upon the minority motion, but also the inability of the sitting government to successfully defend against it either through legal means or cross-party alliances. The war of position is fundamentally different. It is not an obvious assault, but a far more subtle approach. As opposed to a frontal assault, it is an attempt to win the hearts and minds of the participants. It is therefore (by its nature) a long struggle over years, not days or months. Unlike a direct assault on the governing powers, this struggle is spread out across the institutions of civil society. Thus, the more extensive and intricate the civil society, the greater the need for a longer and more complex strategy. Ultimately, the socialist forces gain control through cultural and ideological struggle, instead of only a political and economic contest.

If key to the war of position is the control gained through the cultural and

ideological struggle, then for the sake of clarity, definitions must be offered for both “culture” and “ideology”: “Culture: the customary beliefs, social forms, and material traits of a racial, religious, or social group; *also* : the characteristic features of everyday existence (as diversions or a way of life) shared by people in a place or time.” (Merriam Webster online). Thus, culture is the whole social process in which men and women define and shape their lives. The Merriam Webster online definition for the term ideology is: “a : a systematic body of concepts especially about human life or culture; b : a manner or the content of thinking characteristic of an individual, group, or culture; c : the integrated assertions, theories and aims that constitute a sociopolitical program.” Therefore, ideology can be thought of as a system of meanings and values, but *must also* be the expression of a particular system of values representative of a particular class interest.

While hegemony relates to culture in terms of its process, it goes beyond culture as it is defined. Hegemony recognizes that the entire social process encompasses distributions of power and influence, and that these distributions are not equal between or even amongst individual classes. “To say that ‘men’ define and shape their whole lives is true only in abstraction. In any actual society there are specific inequalities in means and therefore in capacity to realize this process. In a class society these are primarily inequalities between classes. Gramsci therefore introduces the necessary recognition of dominance and subordination in what has still, however, to be recognized as a whole process” (Williams 108). Therefore, a class builds a specific ideology which is based upon its specific and concrete interests, and which in turn will dominate the rest of society because of the unavoidable influence of capitalist relations. “As the class that

determines the conditions of labour and property, the ruling class airs its ideas as the most plausible and, because of their access to means of dissemination, these are the ideas that are adopted even though they are by definition inappropriate to the situation of those who labour” (Kalekin-Fishman 537).

This set of ideas reveals and constitutes the hegemony expressed as the nucleus of culture. If these assumptions are correct, than we will expect that the media will be the dominant instruments used to express the ideology as an integral part of the cultural environment. As Williams noted, “. . . any ruling class devotes a significant part of material production to establishing a political order . . . from weapons of war to a controlled press: any ruling class, in variable ways though always materially, produces a social and political order” (Williams 93). From a historic perspective, one of the primary reasons for the establishment of a copyright system was the necessity of producing a social and political order. Under common law, copyright was historically established as a means to censor and control the press, subsequent to the advances in printing which had allowed a simpler and larger distribution (Fox 15-21). It is this control of media that has allowed for the inculcation of ideas into the social process such that over time they have become “common sense.”

As the overarching discussion in this work will prove, economic interests are what motivated not only the creation of copyright in general, but the public performance right in particular; however, it is the ongoing process which occurs around those interests that provides the basis for the argument in favour of a hegemonic process outlined in this thesis.

### Chapter 3: Literature Review

When undertaking research in the area of the public performance right, one quickly realizes that while there may be a wealth of information in respect of copyright generally, there is very little that deals specifically with the issue of the public performance right. There are several works chronicling the performance rights organizations directly, but they are primarily internally produced publications focused on the success of the organizations. As has been noted by a number of authors (McCann, Geist, DeWhitt, Ryan) one recurring theme with virtually all performing rights organizations (PROs) is the lack of transparency due to the fact that they are private organizations. In general, the histories of such collectives, if available at all, have been created by their own members and are largely public relations exercises.

In addition to the issue of objective source information in regard to PROs there is the problem that the larger concept of the public performance right itself has been largely ignored outside of the legal literature, and even there it is only minimally covered. Nonetheless there are a few works which deal significantly with the PROs themselves (James, Ehrlich, McFarlane) and others which have indirect impacts upon the issue (McCann, Ryan).

This literature review will consider five primary streams: government documents, legal literature, economic analysis, industry publications and socio-historical approaches. A brief discussion of some of the more significant works in the five areas follows.

#### 3.1 Government Documents

Government documents include not only the various primary legal sources (e.g. Copyright Act, Competition Act, caselaw) but also Royal Commissions and studies

commissioned by various government agencies such as the Task Force on Broadcasting Policy, and the Economic Council of Canada. The Economic Council of Canada in particular was responsible for the commissioning of a series of studies into copyright related issues throughout the late 1960s and into the 70s. Significant among these was Bruce McDonald's *Copyright in Context: the Challenge of Change*. In the report McDonald went beyond simple historical data in his discussion of the performance right, suggesting that the performance right doctrine might be of use in dealing with the expanding area of computer-based materials and that it might be applied to the loaning of books,<sup>24</sup> such as was done in Sweden at this time. McDonald also suggested the idea of a collective such as used in the administration of the music performance right (in fact CAPAC, a SOCAN precursor, is specifically mentioned) as one possible method that might be used to collect revenues on behalf of literary authors and computer programmers.

The *Report on Intellectual and Industrial Property* was even more enthusiastic in its support of an increased role for collective administration. As the report expressed it: "continuing technological change appears to make inevitable a greater use in the future of copyright 'collectives' such as the performing rights societies." This language seems to echo that found in many of the post-industrial theorists such as Daniel Bell, who posited a view of society where the evolution of technology led to inevitable outcomes, without the explicit realization that such outcomes were dependent upon specific policy choices.

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<sup>24</sup> In fact the Public Lending Right Program was ultimately established in 1986 by the federal government to compensate writers for the use of their works through Canadian libraries. Originally known as the Payment for Public Use (PPU) Program, the program is intended "to increase the revenues and improve the financial situation of Canadian writers and to give public recognition to their contribution to protecting Canada's cultural identity."  
Source: [http://www.canadianheritage.gc.ca/progs/em-cr/eval/2003/2003\\_03/3\\_e.cfm](http://www.canadianheritage.gc.ca/progs/em-cr/eval/2003/2003_03/3_e.cfm)

Such ideology promotes the fatalistic vision that such outcomes are determined by “natural laws” of the common market, or in this case inevitable technological change. These ideologies are expounded consistently in the media and are used to explain how a dominant class’s systems operate and the principles (values) of that class. However the referral to inevitable outcomes is merely “a rhetorical device used for persuasive ideological reasons” (Birdsall 6).

The Royal Commissions also offer significant information about some of the cultural issues surrounding the public performance right. The Parker and Ewing Commissions provided the basis for serious questions in regards to the nature of the performance rights collectives in Canada. Both Commissions were called specifically to investigate the infant Canadian performing rights collective, and while both noted serious misgivings, the Parker Commission in particular raised a number of questions in regard to not only ownership and activities, but also the nature of the organizations themselves and in particular the inordinate influence of the American Society (ASCAP) upon the Canadian operations.

More recent reports commissioned by Industry Canada have, not surprisingly, focused on copyright reform from an economic perspective. The works of Towse, Hollander and Gervais all seek to express the issue of copyright reform within the context of its economic impact. Towse is interested in assessing the possible impact of copyright reforms that may be necessary as a result of obligations under the World Intellectual Property Organization (WIPO) Internet treaties. But, Towse comments that she was directed to focus on the interests of producers: “Defining stakeholders in term of producers ignores the impact of changes to copyright law on consumers” (Towse,



*Assessing the Economic Impacts* sec. 1.2). Towse's observation notes the limitations of such an analysis, as it does not take into account the economic concerns and activities of intermediate users and consumers.

Similarly Abraham Hollander's *Assessing Economic Impact of Copyright Reform on Selected Users and Consumers* was also prepared for Industry Canada as part of their attempt to track the economic impacts of copyright reform. Specifically Hollander's assessment is concerned with the effect of a possible copyright extension. The study limits itself to a review of the legal and economic literature surrounding the *Sonny Bono Copyright Term Extension Act*, including interviews with stakeholders and materials submitted to the U.S. Congress in relation to copyright extension. Given that the U.S. has been the driving force in the expansion of intellectual property rights for the last thirty years it is hardly surprising that their influence should be felt in such a study, however it is disturbing that they would be taken as the predominant source of information to guide Canadian policy. It is also unfortunate that though Hollander notes the interviewing of stakeholders is done in addition to the analysis of the U.S. documentary record, he does not note the number or nature of stakeholders interviewed. Given the instructions given to Towse, such lack of clarity leads to further questions as to whether or not consumers were considered.

The study of the British Performing Right Society, *Performing Rights*, was created by the U.K. Monopolies and Mergers Commission as a result of their mandate to investigate any business interests that control more than 25% of the market share. *Performing Rights* is the only fully public study of a performance right collective. Cited frequently in the literature, the study undertook to determine the full extent of not only

financial relations within the organization, but also the relations of power inherent within the structure of the organization. Specifically the study considered the relationships and constitutive power within the Performing Right Society between the normally oppositional constituents of publisher and creator.

While the government documents provide a rich data source, particularly with respect to an external view of the performing rights collectives, few are as objective and transparent as the Monopolies and Mergers Commission report. The nature of the agencies commissioning the work, as well as the makeup of the stakeholders canvassed and the operational frame of the individuals writing the report must be taken into account when viewing the materials. For example the comment made previously in relation to the Towse study illustrates exactly this issue. Given Industry Canada's mission to "to foster a growing, competitive, knowledge-based Canadian economy" (Industry Canada homepage: About Us, 2012), it is hardly surprising that the focus of her commissioned research was centered on producers interests.

### 3.2 Legal Literature

These are sources that describe legislation, the legal system, and the institutional supports for copyright and performing rights within what is understood as the *music industry*. They often provide practical guidelines for those who wish to gain a working knowledge of the industry. *Billboard* magazine's annual publication *This Business of Music* (Krasilovsky and Shemel) is an excellent example of such a text. While this area is certainly dominated by American trade and practice, the Canadian experience is well represented in *Musicians and the Law in Canada: A Guide to the Law, Contracts and Practice in the Canadian Music Business* (Sanderson). In both texts the practices of the

“music industry” are suffused with the basic assumptions of intellectual property and copyright, assumptions which have generally been created by and in support of the industry which lies at its heart.

David Laing’s article “Copyright as a Component of the Music Industry” while legalistic in its approach actually appears in the area of popular music studies and culture. As such, his work in some ways has a larger impact and is directed to a very different audience than might normally be reviewing intellectual property policy. Adopting an industry-centric approach that justifies copyright as a necessity for the creation and ongoing well-being of a popular music industry, Laing posits standard industry justifications such as incentive for authors and protection of creators. Significantly, Laing does warn against approaching the issue simplistically and thus creating the standard “us and them” binary oppositions that are so common to the pop music genre.

Nigel Parker’s *Music Business: Infrastructure, Practice and Law* takes a nakedly capitalistic approach to the industry. Parker makes no attempt to justify anything through an appeal to the romantic notion of authorship, and almost immediately notes that:

Record and music publishing companies exist not to sell records, but to acquire copyrights. At least 50% of record company profits and 85% of publishers' profits, come not from sales of products to consumers, but from business to business licenses; to venue owners, TV and Radio broadcasters, film-makers, and (for publishers) to record companies. (2)

Copyright is not an incentive to create. . . . Creators do not create for the joy or prestige of owning a copyright - or even for the money which that copyright may earn. Copyright does not itself generate creativity. It

awards prizes to those who have created works with Commercial appeal.

(3)

Parker answers his own unspoken question as to what copyright is in the following paragraph:

[I]t is an incentive to invest. The music business has grown up based on long-tail income from established copyrights. Accumulations of copyrights spread risks and generates funds to finance new music. Without long term profits from the most successful creators, investment in new music would be almost non-existent. (3)

This direct approach flies in the face of most of the standard justifications of copyright: the incentive to create. Parker is one of the most successful entertainment lawyers in the United Kingdom, so he is perhaps less concerned with the theoretical constructs of his craft than its ultimate outcomes. In any case, his discussion of the legalities of the music industry, though focused on the United Kingdom, is still valuable to the larger discussion in the Canadian context. In general the approaches noted to this point can be seen to posit standard legal practice as the operational norm.

As opposed to the standard legal practice approach, the critical legal approach is more inclined to question established practice than to simply accept it at face value. This subgroup within the legal literature would include authors such as Lawrence Lessig, Katy Bowrey, Matthew Rimmer, and Pamela Samuelson. Many of these individuals raise concerns about expansionary copyright policy and are advocates of alternative copyright practices such as the *creative commons*, or *copyleft*. Regardless of their promotion of direct alternatives, they all can be seen to question the standard practices of intellectual

property and its appropriateness within an increasingly networked society.

In *Free Culture*, Lessig considers the ways in which the contemporary intellectual policy frameworks have impacted upon the creative and cultural aspects of modern life. Concentrating in part upon his failed attempt to challenge the constitutionality of copyright term extension in the United States,<sup>25</sup> Lessig considers the influence that multinational corporations have had upon the development and enactment of intellectual property law. Lessig concludes that such organizations are concerned far more with the best means for accumulating capital than they are with the free exchange of ideas. However, in Lessig's view, the two need not be mutually exclusive, and he points to the success of the Red Hat linux software, and the creative commons licensing as examples of commercially successful enterprises which still allow the free flow of information and creativity. Lessig's work has become for many a rallying cry to reconsider the current regimes particularly in light of their enclosure of contemporary and future cultural artefacts.

Bowrey and Rimmer are similarly occupied with the cultural aspects of IP regimes. They consider the peer-to-peer debate from the prospective of the highly politicized rhetoric flowing from both sides. While the work is sympathetic to the position of those challenging the established copyright regimes, it questions the value of framing the argument as binary opposites. In so doing, those wishing to challenge orthodox assumptions about the nature and role of contemporary copyright policy invite representations from their opposition (piracy, theft, commons) that do not normally sit well with the court. Bowrey and Rimmer acknowledge that when arguments are developed for court they are usually in the “terms of a closed and flattened jurisprudence”

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<sup>25</sup> See *Eldred v. Ashcroft*.

(n. pag.). However if change is to be achieved, they suggest that such arguments need to move beyond the politics of government and culture, and instead couch themselves in a discourse that will “more firmly direct attention to the chosen jurisprudence of the courts” (n. pag.).

Samuelson raises what can be seen as a parallel issue when she questions, “Should Economics Play a Role in Copyright Law and Policy?” Samuelson questions why economics has played such an insignificant role in copyright decisions. Noting that the larger IP framework has seen contributions from the economics literature in respect of patent law and *sui generis* legislation, Samuelson attributes its failure in the copyright arena for several reasons. First and foremost, she notes that the language of economics is not approachable for most of the general population, lawyers included. Indeed, given the romantic notions of authorship and creativity which form the mythic fabric of copyright, such a group may be the least susceptible to the mathematics and statistics of economics. Secondly, and significantly for this study, Samuelson notes that historically copyright issues have been considered by government committees which rely heavily on witnesses, most of which come from the industry under investigation. Hence, the industry groups tend to craft legislation. Additionally copyright experts tend to move from government to law firms to industry associations, all of which contributes to insularity in the policy analysis. Samuelson’s article forms an excellent bridge to the economic literature much of which has considered various issues relative to copyright generally and the performance right particularly, but little of which seems to have found its way into policy.

### 3.3 Economics Literature

The works in this area focus on the economic structures and practices of the music industries. While this section generally surveys material of the industries such as found in Eric Rothenbuhler, Wendy Gordon, and Harold Vogel, it also includes some subject specific analysis of greater pertinence to the performing rights issue.

Birgitte Andersen, Richard Kozul-Wright, and Zeljka Kozul-Wright's article "The Social and Economic Effects of Copyrights in the Music Industry" interrogates many of the stereotypes existing relative to copyright in the music industry. They contend that the distribution of incomes is due as much to "strategic interaction and bargaining power of individuals and firms, and the governance structures of copyrights, as to the presence of musical talent or market forces" (26). They note areas of conflict within the copyright regimes which are fruitful economically for those in superior bargaining positions but do not necessarily benefit either creators or cultural expression. Examples of such conflict can be seen in the imbalance of power between actors in contract negotiations at the individual level and in the policy decisions made in collective societies and the overall dominance of the market by a few vertically integrated oligarchies.<sup>26</sup> While unwilling to reject the copyright system in its entirety, Andersen et al. do note, "[W]hereas the copyright system in its current form is good in facilitating income and rent creation from musical ideas, we must recognize the problem that it is enormously bad in creating a 'fair' income distribution, acknowledging creativity throughout the industry, and also somewhat unsuccessful in generating cultural expansion" (27).

Michele Boldrin and David K. Levine take the step beyond Andersen et al. and make the case for the rejection of intellectual property in its entirety. They review the

<sup>26</sup> See also Steve Albin, Martin L. Friedman, and Ariel Katz.

history of intellectual property and unequivocally state that it has not achieved its objectives. As they note, "In the final analysis, the only justification for 'intellectual property' is that it increases- de facto and substantially - innovation and creation" (*Against Intellectual Monopoly* 11). The two economists then take an historical journey through intellectual property regimes and demonstrate rather convincingly the failure of these regimes to incent creation. Ultimately, they suggest that many of the protections offered under copyright systems could be equally and simply achieved via contract. With respect to simple property rights being proffered as opposed to intellectual property systems and competition that might result from the loss of long term monopolies, they comment:

Do the innovators lose because of this? Probably, although there are circumstances in which not even this is true. The good news is that, in most circumstances, everybody gains a lot more than the innovators lose. Good economic laws and institutions are designed not to make a few lucky people super wealthy, but to make the average consumer better off.

(*Against Intellectual Monopoly* 125)

Raymond Shih Ray Ku, Jiayang Sun and Yiying Fan also investigate the effectiveness of copyright regimes as a policy tool for the purpose of incenting innovation. In an effort to determine empirically the outcomes of the policy tool they examine the records of the Library of Congress to quantify the actual number of works registered for copyright. They hypothesized that if intellectual property was in fact an effective economic tool for the enhancement of creativity, proportionally more works should have been registered in the United States as intellectual property protection



increased. Their conclusions however did not support their contention. Their findings indicated that although intellectual property regimes were strengthened over time (longer copyright terms, inclusion of new materials eligible for copyright, increased penalties for violation) the registration of copyright as a percentage of population did not increase. Ultimately they concluded that not only did the expansion of intellectual property regimes not encourage creation, if anything there might in fact be a causal relationship indicating that increasing intellectual property protection resulted in decreased creative output.

Harvard economist Felix Oberholzer-Gee in conjunction with his colleague Koleman Strumpf offer economic research directly related to the issues of downloading and copyright. Their 2004 paper sought to establish empirical evidence of the negative impact of file downloading from the Internet in the last quarter of 2002. The research was done in part as a response to the overwhelming outcry from the recording industry that file sharing was decimating sales. Their findings indicated that despite the recording industry outcry file downloading had no statistical impact on the market. “Even in the most pessimistic specification, five thousand downloads are needed to displace a single album sale. We also find that file sharing has a differential impact across sales categories. For example, high selling albums actually benefit from file sharing”(*The Effect of File Sharing 4*).

A similar study was done by Brigitte Andersen and Marion Frenz for Industry Canada in May of 2007. The findings of these economists were similar to those of Oberholzer-Gee and Strumpf, specifically: “In the aggregate, we are unable to discover any direct relationship between P2P file-sharing and CD purchases in Canada. The

analysis of the entire Canadian population does not uncover either a positive or negative relationship between the number of files downloaded from P2P networks and CDs purchased. (33).

In 2010 Oberholzer-Gee and Strumpf did a follow-up study but this time focused on the impact of file-sharing on the incentive to create. In their most recent work they looked at the content industries in general to see what the impact of rampant file sharing has been. Their work was premised on two general assumptions: first, that the economic incentives which result from copyright are necessary for creation to occur; and, second, that the overall effect of the internet has been a tremendous rise in file sharing with a resultant loss in the effectiveness of copyright. Their contention was if those premises held true then the loss of incentives due to rampant file-sharing should correlate to similar diminution in creative output. In fact just the opposite has occurred:

The publication of new books rose by 66% over the 2002-2007 period.

Since 2000, the annual release of new music albums has more than doubled, and worldwide feature film production is up by more than 30% since 2003. At the same time, empirical research in file sharing documents that consumer welfare increased substantially due to the new technology. (*File Sharing and Copyright 2*)

Martin Kretschmer's article "Artists' Earnings and Copyright" considers the author-driven rhetoric of the copyright regimes within the music industry seeking empirical evidence of their effect. Kretschmer is particularly interested in the impact of digitization on the culture of the industry and wonders if the immediacy of contact now possible between creator and user has changed the dynamic. While he notes that the

distinctions between composer, performer and producer have become increasingly blurry in a digital world, nonetheless the standard industry practice still seems to prevail. In an echo of N. Parker he concludes that the culture of copyright is in fact structured to benefit investors not creators, with the exception of those artists who have become so large that they are in essence corporate entities (e.g. Springsteen, U2, Dylan). Ultimately Kretschmer concludes:

Our study reveals that orthodox assumptions about the function of copyright in creator's lives are largely invalid. Copyright neither appears to support the creative basis of society nor does it make cultural materials available in a legal form that legitimizes creative digital re-use. Future Copyright policy must be based on a much clearer empirical picture of the role of Copyright in creative production. (13)

Ruth Towse's study of artists' income in *Copyright and the Cultural Industries: Incentives and Earnings* interrogates some of the same data as Kretschmer, including the Monopolies and Mergers Commission report noted earlier within the government documents section. Towse is interested in assessing the economic benefits and costs of copyright in the cultural industries and this report is but one aspect focusing upon creators. Assessing the issue from the view of an economic incentive to creators, Towse draws together as much data as possible to determine what income is derived from copyright sources by artists. She concludes that despite high aggregate earnings from copyright "the large sums of royalty income that copyright law enables to be collected goes mainly to the publishers (music publishers and record companies) and to a small minority of high earning performers" (16). The conclusion of the work is even more

damning:

But the tentative conclusion is that the economic power of firms in the cultural industries, which are for the most part vertically integrated oligopolies, strengthened as they are by copyright law, is such that conceivable changes to that law could not vastly improve the earnings of artists. At a time in which the future of copyright law is being considered in the light of technological upheaval, we must also ask if it has anyway served the public well. (17)

Given such findings, Samuelson's suggestion that economics is in part unwelcome in the copyright discussion due to the logic it may bring seems well founded.

### 3.4 Industry Publications

It has been noted already that industry publications are often exercises in public relations and as such do not necessarily provide the most reliable sources for study. Nevertheless, they can provide rich sources of data if one is prepared to sift through the rhetoric.

Intuitively it had seemed that *The International Musician*, the official publication of the American Federation of Musicians of the United States and Canada (AFM) would have been involved in the issue of performing rights. In fact, there was almost no interest in this area until the 1980s, just prior to changes in copyright. The simple reason is that during the majority of their history, the AFM was primarily a union of performing musicians who did not receive the benefit of a public performance right.<sup>27</sup>

Understandably, the nature of the publication changed quite a bit over the almost five

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<sup>27</sup> Although scanning the full record of *The International Musician* was not possible (*IM* is not indexed), print copies were available back as far as 1957.

decades scanned. Of consequence to this research was the fact that the end of the 1960s saw a concerted effort on the part of the union to enroll “pop” musicians into its ranks. The nature of popular music with the combined performer/composer role would ultimately dictate a change in the concerns of the rank and file AFM membership. The growth in the composer segment of the membership ranks, and thus their possible eligibility for performance right revenue, explains the interest expressed in the 1980s.

Conversely it is the early issues of *The Canadian Composer* (the official publication of the Canadian Association of Publishers, Authors and Composers [CAPAC], precursor to SOCAN), which regularly focus on copyright and public performance right issues. This early emphasis is primarily attributable to the fact that in this period of publication their General Counsel, John V. Mills, contributed a regular column. Given Mills’ role as counsel, his interest in copyright issues and desire to share the importance of the regime with the organization’s members is understandable. Similar to the AFM, the membership changed substantially over the course of publication (1965-1989) as CAPAC also welcomed “pop” composers with open arms at the end of the 1960s. While the copyright issues always remained a strong concern, they were not as regular in later years. As a source on the public performance right, *The Canadian Composer* is understandably quite significant, since CAPAC was the original public performance right collective in Canada (although under the name The Canadian Performing Right Society) and continued to be instrumental in the area throughout its history.

Included in this stream are three publications by public performance right collectives and/or their senior staff such as their yearly reports, as well as those in relation

to the history and establishment of their organizations. Jan Matejcek's *History of BMI Canada Ltd. and PROCAN: Their Role in Canadian Music and in the Formation of SOCAN (1940-1990)* is written from a view within the collective. Matejcek was a lifelong employee of BMI, seeing it through its merger with CAPAC and the subsequent establishment of a single Canadian monopoly, SOCAN. Matejcek's work, while largely a vanity publication, does give insights into the creation of the monopoly and the surprising pressure from the Canadian government in that direction. Similarly, the year-end financial reports of SOCAN, as well as some of the major industry players (Warner Music Group, Universal Vivendi, Sony and EMI) also provide insight into industry trends and income. The SOCAN reports are of course of particular interest given the focus of this thesis.

A standard history of the growth and increasing importance of the public performance right during the twentieth century in Britain can be found in the works of Cyril Ehrlich, Gavin McFarlane and Charles F. James. These studies are generally simple narratives drawn from the archives of the organization and personal recollection. They rarely deal critically with any issues, and certainly never question the concept of their operational premise, the public performance right. Primarily, they consider the impact of social changes and technological advances in the lives of their members. They are of specific value for their coverage of the establishment and expansion of the Performing Right Society (PRS) in the United Kingdom in 1914. The PRS was one of the parents of the Canadian Society when it was formed in 1925, and as such its history is of value to the discussion. These works must also be seen as public relations exercises in the justification of what has become (by the time of their publication) entrenched practice.

Nevertheless, they do give insight, albeit biased, into the formative period of public performance right collectives in the Anglo-American tradition. For a more balanced approach one must look beyond the industry.

### **3.5 Socio-Historical Approaches**

A socio-historical approach views copyright through a historic frame and attempts to relate it to concepts beyond simply intellectual property. Primarily of interest here are those works that orbit the discipline of music. The lack of socio-historical literature within the field of music and copyright mirrors a similar shortage in intellectual property scholarship generally (Sherman and Strowel) and as McCann notes, “Continued absences in this regard place limitations on the horizons of history and our ability to challenge dominant historical narratives” (n.p.).

Three socio-historical contributions to the “music and copyright” field are particularly important to the study of performing rights collectives. *Noise: The Political Economy of Music* was written by economist Jacques Attali. The work is massive in its scope attempting to incorporate virtually the entire history of western music. Relying on a Marxist political economy framework, Attali attempts to address the major movements of western music (from church, to court, to concert hall) as it moves increasingly towards public consumption. Attali is concerned with the growing commercialization of music and its movement from its origins as a communal human activity to a commodity which has become the domain of the specialist. Viewing the history of music over a four hundred year period, Attali considers the impact of technological, social and political forces upon music, and music upon them. Of interest to the present study are his comments in regards to the Société des Auteurs, Compositeurs, et Editeurs de Musique

(SACEM). SACEM is the original performing rights collective, formed in France in 1851. Attali, views the agency as a liberating force for creators, though he says little about the impact of capital, in the form of publishers, within that frame. Attali's work is intriguing if only for its attempt to reconceptualize western music within a Marxist political economic frame.

The second socio-historical contribution is James Coover's *Music Publishing, Copyright and Piracy in Victorian England*. Coover's work is significant in a field greatly lacking detailed historical source material. He presents a collection of reports from the British musical trade papers published in the late nineteenth and early twentieth century, largely bereft of commentary. His intent is to document the long-term battle between the industry, represented by the Music Publishers' Association (MPA) and "pirates." Covering the period just prior to the Berne Convention and leading up to the British Copyright Act of 1906 the work offers historical coverage of a largely unknown period of intense turmoil in the music industry. The collection provides detailed information surrounding the debates on music and copyright during a period in which Britain was arguably the dominant industrial musical force. The coverage of the infant MPA's battles with the established French collective (SACEM) are ironic given that subsequently the MPA will become the founding resource for the Performing Right Society in the United Kingdom.

John Ryan's *The Production of Culture in the Music Industry - the ASCAP-BMI Controversy* tells the story of the American Society of Composers, Authors and Publishers (ASCAP), its precarious establishment and pursuit of public performance right royalties. As is indicated in his title, Ryan is interested in the confrontation between



ASCAP and its rival organization Broadcast Music International (BMI). Set up in opposition to ASCAP, BMI was owned and operated by the broadcast industry. The confrontation led to charges and investigations by the U.S. Department of Justice, ultimately resulting in a consent decree in 1941, which stands (with minor revisions) to this day.

In addition to the three aforementioned works, the lesser-known studies by Bonnie DeWhitt and William McKinley Randle also contribute significantly to study of the performing right collectives. DeWhitt's *The American Society of Composers, Authors, and Publishers 1914-1938*, is a historical narrative done as a Master's thesis in 1977. The work traces the creation and establishment of ASCAP and interrogates the notion of the founding myth of the downtrodden composer, which became central to the public persona of the organization. Similarly Randle's treatise, *History of Radio Broadcasting and Its Social and Economic Effect on the Entertainment Industry 1920-1930*, reconsiders many of the myths surrounding the establishment of a performance right in broadcasting. The economic rationales, as well as the successful establishment of lobby groups, are focused upon to create a narrative which calls into question the history broadcast by the organizations themselves.

More recently, Anthony McCann's doctoral thesis *Beyond the Commons*, arises out of the discipline of ethnomusicology, but crosses many scholarly borders in pursuit of understanding the establishment and growth of the Irish Music Rights Organization (IMRO) and its efforts to enclose the traditional Irish music session. Given the structure of the Irish musical session (at which newcomers would learn and practitioners sharpen their craft and share their knowledge) and the historically oral nature of much of Irish

culture generally, the enclosure of an historic cultural practice in such a manner seems particularly heinous. McCann chronicles the establishment of a performing right organization in Ireland, but within a fraction of the time in which such groups established themselves in the U.K. and North America.

As opposed to the seventy-plus years covered by Ryan, the expansion of IMRO chronicled by McCann takes place within the remarkably brief period of only five years. The sheer speed (relatively) of the establishment of the organization and its intuitively inappropriate fit with a largely communal and oral tradition as typified by Irish traditional music, provide for a somewhat horrifying view of a cultural juggernaut. In the process McCann derives a successful image defining the nature of the PROs which, in this author's opinion, can be seen to parallel the expansionary nature of capital itself. It can best be described as an endless vortex, with IMRO at its centre. Each revolution around the centre expands outward, targeting a new frontier for collections, followed by a successful court challenge and ultimately culminating in the eventual acquiescence of the targeted group. While McCann devised it in relation to the IMRO experience, the model fits perfectly with the establishment of virtually any PRO, or any collective management regime for that matter.

Simon Doyle's *Prey to Thievery*, is a critical historical case study of the lobbying efforts leading up to the tabling of the 1997 Canadian copyright amendments. Doyle is interested in the impact the Canadian Recording Industry Association (CRIA) has on the lobbying process. CRIA is the Canadian representative of the big four multinationals (now reduced to three) that controlled most of the world's music and were closely allied with SOCAN's position and interests. As Doyle notes, CRIA in fact controls 95% of all

the music manufactured and distributed in Canada (2). Doyle's examination of CRIA's influence on Canadian public policy is enlightening given their continuing presence and influence in the current round of copyright reform in Canada.

While the preceding works were of specific relevance to the study of the performing rights collectives, the remaining works in this area still make significant contributions to the larger issue of music and copyright. Notably, the works of Siva Vaidyanathan and Kembrew McLeod attempt to focus attention upon the destructive nature of expansive intellectual property regimes in respect of creation.

The original impetus behind Vaidyanathan's work was his dismay at the successful imposition of the licensing of samples for use in the creation of new musical works within the hip-hop idiom. In his estimation, such practice seemed to fall clearly within the fair use provisions of the U.S. copyright act, and yet as had been noted by many before and after him the chilling effect of litigation was effectively enclosing the public domain. In a similar vein, McLeod's *Owning Culture* also sounded a warning bell at the creeping expansion of IP rights into the cultural arena and its implications for contemporary western society. Such works are pertinent when viewed in conjunction with many of the commodification frameworks offered in the socio-historical music analyses (Frith, Attali, Laing, Marshall). Within the context of the *culture industry* and its need to create markets for its product, the production of culture becomes a symbiotic process between industry and audience and as such the culture created can be seen as communal as opposed to author-centric, thus again imperilling one of the central tenets of copyright.

The oft-cited article by Simon Frith, "Copyright and the Music Business," can be

seen as a seminal work in the field of popular music studies and copyright. The increasing expansion of intellectual property regimes into society has been driven in part by the multinational conglomerate music industry, and Frith was one of the first to note this trend and its implications for cultural studies. Frith is also very aware of the fact that the legal frameworks of the industry, largely copyright, also define what the industry, and hence what the culture can be. “The history of copyright law is the history of the steady extension of legal clauses on what *can't* be done, and by and large . . . the law has worked to preserve copyright owners' monopoly rights whatever the changes in the means of reproduction” (“Copyright and the Music Business” 71).

Frith's article did succeed in opening debate in the field, and indeed was immediately answered by Laing in “On Simon Frith's ‘Copyright and the Music Business.’” While Laing applauded Frith for bringing the issue into the discussion, he chided him for what he felt was a “simplistic” approach of binary opposition. As both Laing and Frith have noted, the history of the music industry is rife with instances of rebellion against authority, and indeed that romanticized notion of rebellion continues to be a requirement of authenticity, even if it comes from the likes of David Bowie.<sup>28</sup> Nevertheless, as Laing points out, to attempt to limit the discussion to that simple platitude does no one a service. Ultimately the debate between Laing and Frith did succeed in creating a discourse within popular music studies which continues to the present day. In fact, the discourse grew significantly enough to warrant the publication of a monograph devoted to it, *Music and Copyright*, edited by Frith and Lee Marshall, and

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<sup>28</sup> In 1997 David Bowie reached a new high (low?) in the era of the commodified rock star when he became the first singer to issue bonds using future royalties as security. Such practices have now become known as issuing “Bowie Bonds” within the music industry. For further information see <http://bonds.about.com/od/buyingbonds/a/BowieBond.htm>, Jan. 2012.

presently in its second edition.

R. Wallis and K. Malm's, *Big Sounds from Small Peoples* provided a seminal work in the area of music, copyright, and social relations. *Big Sounds from Small Peoples* examines the impact of transnational capital in the form of the music industry as it expands into twelve "small countries."<sup>29</sup> The chapter entitled "Copyright: Where Does All the Money Go?" offers a thorough analysis of the practices of performance right collectives at that time. Continuing a theme of institutional protectionism, Wallis and Malm note that "many collecting societies, run by professional administrators on behalf of copyright holders, prefer to be as tight as a limpet when asked to express opinions about publishers, or divulge details of internal conflicts" (170). This dovetails nicely with the protectionist stance noted by McCann though their recognition of it is certainly earlier.

If the literature is considered from an all-encompassing perspective, there is a significant gap with respect to the public performance right. While works do exist explicitly devoted to public performance right organizations, they are publications either by internal interested parties or by those connected to them through other channels. There is little critical analysis of the regimes. Additionally, while a significant number of works approach the area through economic studies, legal treaties and policy rationales none attempt to chronicle the actual establishment and expansion within an overarching theoretical frame. Most treatments focus on specific areas, usually in a specific historical context, most often the contemporary moment. Through a synthesis of all the different streams noted in this literature review a critical-historical case study of the public

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<sup>29</sup> Specifically: Jamaica, Trinidad, Tanzania, Kenya, Sri Lanka, Finland, Sweden, Denmark, Norway, Chile, and Wales.

performance right regimes will be created, that considers the issue not only from the legal or economic viewpoints, but also within the context of the political and social realms that helped to define and inculcate it. Ultimately by viewing the historical process through a Gramscian frame of analysis this thesis will demonstrate that the establishment of copyright collectives generally, and public performance right collectives specifically, can be seen not to be a natural common sense outcome, but rather a gradual process of inculcation directed by the dominant industrial forces of society.

## Chapter 4: Justifying Intellectual Property

The overarching objective of this research is to discern how the concept of the public performance right came to be naturalized within contemporary society and form a cornerstone of Canadian public policy. The public performance right is a specific right within copyright, and as such it is difficult to discuss the public performance right without at least a basic understanding of rights and concepts set out in the Copyright Act, and the rationales that are used to justify copyright. As will be made clear, these rationales are not mutually compatible. Indeed much of the debate surrounding copyright in general reflects this seminal issue. Is copyright justified as a “natural” law, the extension of the person of the author, or is it primarily a social policy tool designed to provide economic incentives to creators to release their works for public use?

### 4.1 Copyright

Canadian Copyright can be divided into two specific sets of rights: moral rights and economic rights. Moral rights are non-assignable, though they may be waived, and attach directly to the creator. They are the rights of attribution (the right to be acknowledged as the author or remain anonymous) and integrity (the right to insure that downstream uses of one’s creation are not prejudicial to one’s honour or reputation without permission). These moral rights are largely attributable to the natural rights justification for IP, which had a significant impact on European law (with the exception of British) and to a lesser extent on the Anglo-American tradition.<sup>30</sup>

Economic rights are delineated in section 3 paragraph 1 of the Copyright Act,

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<sup>30</sup> Moral rights were part of the first International copyright agreement, the Berne Convention of 1896 and are included in British and Canadian law. The United States did not sign Berne until 1996, in part because it feared the recognition of moral rights. Currently the United States recognizes moral rights in only a limited fashion with respect to visual works of art, see *The Visual Artists Rights Act of 1990* (VARA), 17 U.S.C. § 106A.

specifically the “sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, . . . .”<sup>31</sup> Unlike moral rights, economic rights (usually, though not always, vested in the author at creation) are assignable and thus provide the means for economic compensation.

With respect to this thesis, the right under examination is the right to perform the work in public. The public performance right is literally the right to perform a work in public, be it spoken text, a dramatic text or a musical work. Note that this is an additional economic right given beyond what would normally be the case with other goods. The economic rights assigned by virtue of the “right to produce or reproduce” includes the right of sale or rental of the work. Thus, either directly or as a function of their contracts with their publishers, creators are recompensed through this right via their sales in the market or rental of their works. The performance right however is an economic right in addition to their rights of sale and rental (Katz 10). As a result the copyright owners are in fact recompensed for both the sale, and the use of the work. Note also, and this will be discussed later in depth, that while the rhetoric surrounding copyright in general and the performance right in particular, is that of supporting and protecting the creator, public performance right payments as allocated by performance right collectives in Canada and the United States are distributed 50% to author (composer and or lyricist) and 50% to publisher unless contractually stipulated otherwise.<sup>32</sup> While for the purposes of

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<sup>31</sup> *Copyright Act*, S 3 (1).

<sup>32</sup> This has been the standard since the creation of a performance rights organization in Canada. It will be discussed in more detail in Chapter 7. Note that in the United Kingdom the breakdown is equal thirds to publisher, composer and writer (lyricist).



discussion we refer to the creator receiving payment for the public performance, it is important to bear in mind that even if the creator has maintained ownership of the copyrights (has not assigned it to a publisher, or assigned the public performance right) unless he has also self published, at best any income derived from a public performance right will be shared between the creator and publisher.

#### **4.2 The Public Performance Right**

The first mention of a public performance right in the Anglo-American tradition was the Dramatic Licensing Act of 1833 in Great Britain.<sup>33</sup> Within the context of the Act there would likely have been an intuitive rationale for the right, given that dramatic works would be periodically mounted and performed, and the only way in which composers and dramatists could be assured of receiving recompense from the producers would be from such a right. As will be outlined in chapter five, the British publishing industry was not in the least interested in supporting such a right, but when the public performance right finally was established it was clearly intended for collection on public performances for profit such as those by orchestras or bands in concert venues. What constitutes a public performance today is quite staggering. The radio playing in a restaurant or in a doctor's waiting room,<sup>34</sup> church fundraisers,<sup>35</sup> the music heard while on hold on the telephone,<sup>36</sup> even the ringtones on a cell phone<sup>37</sup>--are all potentially within the scope of usage.

#### **4.3 Justifications of the Public Performance Right**

There are no explicit justifications of the public performance right within the

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<sup>33</sup> The Dramatic Licensing Act of 1833, also known as the Bulwer Lytton act, established a public performance right under common-law for the first time, but only in respect to dramatic works such as plays, dramatic-musical works such as operas or oratorios.

<sup>34</sup> See SOCAN Tariff 15A, at <http://www.socan.ca>, under tariffs.

<sup>35</sup> Tariff 21.

<sup>36</sup> Tariff 15B.

<sup>37</sup> Tariff 24.

common-law tradition. Any discussion is usually justified in an oblique way by one of the standard intellectual property rationales. There is an anecdotal mention in the work of David Laing with regard to some French artists and the birth of the Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM), but nothing explicit about justifying this right. The official SACEM website noted in 2009 that:

One man, Ernest Bourget, was alone and took on everyone. In 1847 he succeeded in having payment made for his work which was being played in the most fashionable café-concert at the time, Les Ambassadeurs. He had the courts recognize these legitimate rights founded in revolutionary laws. The provisional union of authors, composers and publishers of music was thus established in 1850, and one year later, the professional union became a society [société civile] comprised of members – authors, composers and publishers who divided the author’s rights collected amongst the members in an equitable way, and this rule has been maintained to the present day. And so SACEM was founded.<sup>38</sup>

While in search of legal citations that would document the background for the establishment of the French society, the author contacted the society directly. Eventually an agent of SACEM responded and cited the legal background for the establishment of the case. The agent however was quick to note that French law was statute-based, and thus very different from the common-law tradition within England, Canada and the United States:

You shall keep in mind that French cases are usually quite short because

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<sup>38</sup> From the history section of SACEM Website [www.sacem.fr](http://www.sacem.fr), accessed July 2009. As of June 2011, they no longer had any reference to Bourget or the history on the website.

they rely on statutes, in contrary to Common law systems where cases are an important legal source. However, author's right law is special in this perspective since it was based for a long time on very short revolutionary texts from 1791 and 1793; therefore the judges have been implicated in the process of creation of this law, but their decision[s] were mostly as cursory as usual.<sup>39</sup>

As the agent noted, the ruling was brief and with almost no discussion; the statute was clear, the author owned all rights including that of public performance.<sup>40</sup>

Subsequent to the original decision the café owner appealed, the original ruling was not only upheld but the café was ordered to pay damages as well.<sup>41</sup> Thus, it would seem that a French revolutionary ruling has become the basis for all subsequent public performance legislation in both the common-law and civil traditions.

#### **4.4 Intellectual Property Theory and Justification**

The stream of legal practice known as Intellectual Property (IP) is traditionally made up of copyright, trademark and patent.<sup>42</sup> Trademark and patent are sometimes referred to as industrial property since their area of concern is primarily of a technical or industrial nature. Copyright is distinguished from the preceding by the simple fact that it concerns itself with works of an artistic nature. The word artistic is used here in its broadest sense, and does not simply refer to works of fine art. The Copyright Act of Canada states that copyright shall subsist in every “original literary, dramatic, musical

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<sup>39</sup> Correspondence between author and the Director of Relations of the Société des Auteurs, Compositeurs et Editeurs de Musique, October 20th, 2009.

<sup>40</sup> *Tribunal de Commerce de la Seine*, 03/08/1848.

<sup>41</sup> *Cour d'Appel de Paris*, 26/04/1849.

<sup>42</sup> Though secret information is also sometimes cited within IP, only copyright, patent and trademark are based on statute.

and artistic work” (sec. 5.1). Thus, the design for a new type of chair could be a subject for patent, not copyright.<sup>43</sup> The other striking difference about copyright with respect to the larger IP realm is its term of protection. While copyright is not infinitely maintainable such as is the case with trademark, neither is it confined to what is a genuinely “limited” term of twenty years such as is the case with patent. Canada presently guarantees a term of life (of the creator) plus fifty years, but the concerns of international trade have increased pressure to harmonize with the United States and Europe.<sup>44</sup> Current copyright practice in the United States and the European Union is for the copyright term to run seventy years beyond the death of the author.<sup>45</sup>

While the current debates within the popular media and academic arenas generally revolve around copyright, most justification theories support the entire gamut of IP. There are two primary streams of justification most often cited in the defence of IP, a natural right theory and one based on economic efficiency or utilitarianism. The latter is the one most commonly associated with the Anglo-American common-law tradition, and indeed the World Intellectual Property Organization statement of mission clearly reflects that dominant justification, “dedicated to the use of intellectual property (patents, copyright, trademarks, designs, etc.) as a means of stimulating innovation and creativity”.<sup>46</sup> Thus, according to the organization dedicated to the expansion of

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<sup>43</sup> Some works that might normally be considered commonplace or industrial, such as furniture, have in some cases become viewed as works of art, and are treated as such. Therefore the distinction is not always so simple, yet for the larger purpose of this thesis the general divisions are manageable.

<sup>44</sup> See Hollander, Abraham, *Assessing the Economic Impact of Copyright Reform on Selected Users and Consumers*, 2005.

<sup>45</sup> The U.S. Copyright Act of 1976 set a copyright term of life plus fifty years. The Copyright Term Extension Act of 1998 (the Sonny Bono Act) subsequently extended that term by twenty years, thus giving a combined term of seventy years. The Directorate of the European Union (93/98/EEC) set the term of copyright to life plus seventy years.

<sup>46</sup> See WIPO statement of mission at <http://www.wipo.int/about-wipo/en/>, last accessed April 2012.

intellectual property rights worldwide, IP rewards creativity, which is to say the act of creation. However, copyright systems are designed to advance the interests of copyright owners, and the owners (for various reasons) are not necessarily the creators. With respect to the idea that copyright “stimulates innovation and contributes to economic development,” the economic literature surrounding copyright and the performance right will be considered later in this chapter. As will be shown, notions of economic development and stimulation of creativity as a quantifiable result of copyright are also questionable. There are however two fundamental myths that are continuously propagated in copyright discussions and they must be addressed before proceeding further with the analysis.

#### **4.5 Myth # 1: Copyright is Designed to Protect Authors (Creators)**

While one tends to think of copyright in respect of the creator, and certainly the rhetoric surrounding any copyright dispute will always couch itself in terms of the “creator”, with respect to economic rights; copyright does not in fact protect the creator, but rather the owner. Creator and copyright owner are not always one and the same. While the creator is usually the first owner of the copyright,<sup>47</sup> under normal circumstances (at least historically in the case of music and the book trade) the copyright owner has always been the publisher, as the assignation of copyright to the publishing house is normally a condition of publication. (Albini, Bettig, Katz, Gordon) This assignation may be for a limited time or may be permanent, but rights guaranteed under the Copyright Act protect the owner of the copyright, not the creator. As David Vaver

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<sup>47</sup> The *Act* (S 13 (1)) states the general rule in Canada, however there are exceptions to this, for example work done in the employ of others may be owned by the corporate employer unless contractually stipulated otherwise. Similarly, photographs or works of fine art done in return for recompense are owned by the commissioner, unless an agreement to the contrary is made (*Act*, S 10 (2)).

points out, the first myth of copyright law is that it “is designed to protect authors. In locating itself around the central character of the author . . . copyright law is politically astute” (*Agnostic Observations* 129). Nor should the relationship between publisher and creator be seen as equal. As the noted American composer Tom Waits pointed out in a 1999 interview:

I think you should fight for your freedom and independence at all costs. I mean, it’s a plantation system. All a record company is, is a bank, and they loan you a little money to make a record and then they own you for the rest of your life. You don’t even own your own work. Most people are so happy to be recording, which I was- you like the way your name looks on the contract, so you start signing. I got myself tied up in a lot of knots when I was a kid. (Montadon 308)

The history of popular music is littered with stories of artists signing over their rights to their music in the hopes of achieving stardom. Indeed, given that the major labels controlled the avenues of broadcasting, distribution, retail and marketing, unless they were already a substantially proven success the artists held little power in any negotiation relative to the industry labels.

#### **4.6 Myth # 2: Intellectual Property is *Property***

Despite the nomenclature, Intellectual Property is not in fact property. Property is by its nature rivalrous in consumption, which is to say that ownership and use of a piece of physical property denies anyone else the use of it at the same time. The ownership of a piece of property by one individual can (at the discretion of the owner) limit the use of the property by others regardless of whether or not it is in use by the owner. Likewise, at

the discretion of the owner, uses may be made of the property which make it unusable for any other purpose in the future.

By contrast, works of the intellect may be inherently used by many people without diminishing the ability of anyone else to use them. In many instances the more use that is made of the work the greater its value becomes (for example books, music, fine art). As Vaver has noted, intellectual property is very definitely not property in the strict sense, but is treated that way because we do not know what else to do with it: "In short we talk of intellectual property as we talk about military intelligence: as useful shorthand for a phenomenon, but with no implication that its components—intellectual or property—do or should exist" (*Intellectual Property Law* 5). Vaver also notes that "A 1985 parliamentary sub-committee report on copyright reform took as its lodestar the assertion that 'ownership is ownership is ownership' the copyright owner owns intellectual works in the same sense as the landowner owns land. . . . This notion is fatuous at best. . ." (3-4). In fact the legal definition of real property notes the fact that it is immovable, and objects attached to the land such as buildings would also fall within this category of real property. These are separate from chattels, or personal property possessions which can be moved from place to place.

At first blush this distinction between intellectual property and real property might seem to be simply semantics, but it is vitally important to this issue and should always be seen as a subtext of any discussion involving copyright and other forms of IP. The fundamental reason we perceive and treat works of the intellect as property is because we have been taught to do so. As a society we have been inculcated with this position by the media (copyright *piracy* and *theft* receive inordinate amounts of coverage in the

mainstream media), by the courts, by the multinational entertainment oligarchies (one cannot see a movie or video without seeing the FBI warning at the outset on the screen), and by our education systems (who must face the demands of Access Copyright, periodicals licensing agreements and litigation as a result of any students or educators who may put the institution in a position of liability). This inculcation is very much an effort to manufacture the consent needed within the hegemonic order as noted by Gramsci. As Vaver points out, “Capitalists want to ‘own’ whatever their enterprise produces . . . tangible or intangible. . . . Those who imitate or appropriate such assets can then be called thieves and pirates. . . .” (*Intellectual Property Law* 3+). Thus, authority figures throughout society regularly profess that works of the intellect are property, but they are not property in the true sense and that must always be kept in mind whenever intellectual *property* is discussed.

#### **4.7 A House Divided**

While these two myths are essential to keep in mind when attempting any understanding of contemporary copyright discourse, so too is the nature of Canadian copyright law. The Canadian experience of copyright is unique, because in Canada copyright is derived from two different traditions, and so to some extent the Canadian system is a hybrid. The two traditions were the British copyright system justified on the basis of economic incentive or utilitarian concerns, and the French civil tradition, which was justified as the natural right of the author. The difference is apparent by the very titles of the *Acts* which created the rights. In the Anglo-American system we refer to it as copyright, while in the Civil tradition it is known as *droit d’auteur*, literally translated as the right of the author. In Canada, the legal system is based on the Anglo-American



tradition, except in Quebec where the Civil Code is used. However, since we are an officially bilingual country the English title for our statute is the Copyright Act, and the French title for the statute is *Droit d'auteur*.

Again this is not simply an issue of semantics; Myra Tawfik considered this very fundamental difference in approaches when she noted that the Supreme Court of Canada had split along legal traditions when it rendered its decision in the case of *Théberge v. Galerie d'Art du Petit Champlain Inc.*

Galerie d'Art du Petit Champlain bought a limited number of paper copies of Théberge's paintings from a publisher to whom the artist had assigned the right to make copies. Through a chemical process the gallery was able to lift the ink off the paper and put it onto a canvas, leaving the paper blank. Théberge claimed infringement, since he had sold the rights to a publisher to make paper copies, not canvas prints. The gallery had in effect turned the posters into works of art on canvas. The majority of the court, schooled in the common law tradition, found in favour of the gallery. The justices of the court schooled in the civil tradition, with its emphasis on the right of the author, found in favour of the artist, Théberge.

Justice Binnie, speaking for the majority, noted:

“Generally speaking, Canadian copyright law has traditionally been more concerned with economic than moral rights. Our original Act, which came into force in 1924, substantially tracked the English *Copyright Act, 1911* (U.K.), 1 & 2 Geo.5, c.46. The principal economic benefit to the artist or author was (and is) the “sole right to produce or reproduce the work or any substantial part thereof in any material form whatever” (s. 3(1)) for his or

her life plus fifty years (s. 6). *The 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 Ann., c. 21, was passed to assuage the concerns of printers, not authors). (emphasis added) (Théberge v. Galerie d'Art du Petit Champlain Inc.)*

Justice Binnie's remarks clearly recognize the economic basis of copyright within the common-law tradition. In fact, he very purposefully comments that the basis of copyright in the Anglo-American tradition, the Statute of Anne, was passed in response to concerns of printers, not authors and perhaps even more pointedly notes that artistic and literary works are essentially articles of commerce. Justice Binnie's comments indicate that within the Anglo-American common-law tradition at least, works under copyright may be artistic in the broad sense but are nonetheless essentially commodities to be bought and sold within the marketplace.

Later, Justice Binnie makes the following two comments:

1. The Copyright Act is usually presented as 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 (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated).
2. The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it

would be self-defeating to undercompensate them. *Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it.*(emphasis added).

These remarks are reflective not of natural-rights justifications, but rather of the utilitarian justifications of copyright, maximizing benefit to the greatest number of people, hence the notion of balance. The second quotation, in particular, blends the impact of utilitarianism in terms of balance with concerns about the economic aspects.

Finally, with respect to the “dual” nature of the Canadian copyright environment Justice Binnie makes the following comment:

It is not altogether helpful that in the French and English versions of the 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* (emphasis added).

Justice Binnie’s comments seem to imply that the court does not consider the more author centric nature of the civiliste tradition to be self evident in the Copyright Act. This is particularly significant given that any rational justification for a performance right must be seen as arising primarily from an “authors right” basis.

#### **4.8 The Natural Right of the Creator**

The continental vision of copyright law, particularly in France, derived from the notion of a natural right of an author to his work. This tradition can be seen to primarily

have evolved from the work of Georg Wilhelm Friedrich Hegel, in particular his notion of personhood. According to Margaret Radin the premise which underlies it is that “to achieve proper self-development—to be a *person*—an individual needs some control over resources in the external environment” (957). Radin notes, “Because the person in Hegel’s conception is merely an abstract unit of free will or autonomy, it has no concrete existence until that will acts on the world” (972). In so doing, the abstract self unites with its physical self and infuses its will into the objects of the world.

In his *Philosophy of Right*, Hegel laid out his reasoning for this justification of property:

Since my will, as the will of a person, and so as a single will, becomes objective to me in property, property acquires the character of private property; and common property of such a nature that it may be owned by separate persons acquires the character of an inherently dissoluble partnership in which the retention of my share is explicitly a matter of my arbitrary preference. (sec. 46)

So, not only does the will of the individual form the justification for private property, but it also forms a connection with it that is broken only by the choice of the self.

Hegel notes in section 51, “Since property is the *embodiment* of personality, my inward idea and will that something is to be mine is not enough to make it my property; to secure this end occupancy is requisite.” Finally in section 66 he makes the connection between the infusion of will into the object and what would be, within the French understanding, the lifelong association of the author with it; “Therefore those goods, or rather substantive characteristics, which constitute my own private personality and the

universal essence of my self-consciousness are inalienable and my right to them is imprescriptable.” This inalienable right has been the foundation of the French regimes.

#### **4.9 Lockean-Based Natural Rights Reasoning**

The labour-based justifications for IP are generally attributed to the work of John Locke. Locke posited that while all the products of the earth were a gift from God, man could lay claim to these goods by virtue of his labour. Therefore, by the act of tilling the soil for crops or caring for and managing livestock, or similar acts, man mixed his sweat with that upon which he laboured, and thus earned the right to appropriate it, or own it: “[The] ‘labour’ of his body and the ‘work’ of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labor with it and joined to it something that is his own and thereby makes it his property”. ( sec. 26)

However, Locke’s theory did have two important provisos: a man could not take more than he could use, and his use must leave as much and as good for all who came after him. “Nor was this *appropriation* of any parcel of *land*, by improving it, any prejudice to any other man, since there was still enough and as good left; and more than the yet unprovided could use” (sec. 32). The Lockean provisos clearly create tension with our current economic systems, which depend not simply upon fulfilling our necessities, but in fact consuming and acquiring much more than we actually need. The fundamental premise underlying the global economic system has been perpetual growth.

#### **4.10 Counter-Arguments to the Natural Right Theory**

The personhood theory posits that intellectual works are the product of the “self” and lie at the core of what it means to be human, our ability to think and reason. To deny

one the right to control the creations of his intellect would be in effect to deny his personhood. This position proved very popular during the late nineteenth century. The notion of romantic genius was seen to be an extension of the divine spark within humanity and became a rallying point for authorial existence and rights ascribed to it. The natural-right theory however does not take into account the prior historical practice of simply borrowing works from other creators, nor does it recognize that virtually all intellectual products are the by-products of the material that has been infused and digested. To suggest that new works have sprung “a priori” from the void is romantic indeed. Artistic works are often based on pre-existing works, inspired by other works and virtually always reflect and reference other works albeit not necessarily in an obvious fashion. As Sir Isaac Newton said, “If I have seen further than others it is because I was standing on the shoulders of giants,”<sup>48</sup> which is simply to say that all intellectual growth depends upon both the great and minor works which have preceded it to inspire and provoke.

The natural right theory strikes a strong resonance particularly in North American culture where the notion of the individual ‘self made’ man still reigns supreme. It is hardly surprising then that the United States has been the strongest champion of increasing Intellectual Property protection for decades (Perelman 4).

#### **4.11 The Economic Efficiency Model**

Within the economic efficiency model, intellectual property is seen as a necessary response given that the nature of intellectual works makes downstream use difficult to control. Without an intellectual property regime, downstream users could make use of

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<sup>48</sup> Sir Isaac Newton in a letter to a fellow scientist, Robert Hooke, Feb 5, 1675. Source [http://www.quotationspage.com/quotes/Isaac\\_Newton/](http://www.quotationspage.com/quotes/Isaac_Newton/), last accessed Jan 2010.

works freely without any of the costs normally associated with creation and development, and thus bring goods to the market at a significantly reduced cost than could the originator. Ultimately, this free riding would result in market failure as creators would have no incentive to invest in creation given that the costs of research and development would be far less likely to be recovered. Within this framework, IP is a matter of public policy, utilizing a statutorily created limited monopoly to ensure sufficient return to incent creation. Within this framework of economic efficiency, copyright is seen as a balance between the rights of the creator and the rights of the user, in which needs of the user (access to works) are balanced against those of the creator (incentive to create). Thus the copyright monopoly, while limiting access, is justified by virtue of the fact that works are created and disseminated and will eventually become available within the public domain.<sup>49</sup>

#### 4.12 Limitations on the Economic Model

While the economic efficiency model may seem a reasonable approach there are nonetheless a number of issues which can be raised to contest it. First and foremost, not all works are created purely for monetary gain. This is of course particularly true of works of an artistic nature. Artists (of any medium) create because they feel a need to do so regardless of economic incentive.<sup>50</sup> This is not to suggest that they should not be rewarded for contributing to the culture of our societies, rather it is simply to note that they would likely do so regardless. Thus, incentive as a *necessity* for creation becomes suspect.

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<sup>49</sup> However, as noted by such legal luminaries as Lawrence Lessig, James Boyle and Michael Geist amongst others, the public domain as a source of creative material (building blocks if you will) for future creativity is seriously under threat given the expansionary nature of IP regimes.

<sup>50</sup> See Albini, Landes, Katz.

It is also important to bear in mind that monopoly rights are not the only means by which market dominance is captured. Price differentiation, first mover status, network effects and product quality impact market share significantly. More importantly with respect to monopoly rights, the length of term has a significant impact on the market. A number of economic studies have noted that the vast majority of the value of a copyright occurs within the first five years of its term.<sup>51</sup> Furthermore, the extension of copyright terms has also led to a loss of materials entering the public domain. The significance of this loss has been discussed at length by Lessig and Boyle amongst others. As Lessig comments in *Free Culture*:

As one researcher calculated for American culture, 94 percent of the films, books, and music produced between 1923 and 1946 is not commercially available. However much you love the commercial market, if access is a value, then 6 percent is a failure to provide that value (Lessig 228).

Philosophical discussions in regard to property rights regularly introduce the scarcity argument as a rationale for their existence. It is the naturally existing state of scarcity that is most often used to justify property rights in general (land being a finite resource). However in terms of copyright, the converse is true: “Property rights are introduced to sustain scarcity for the benefit of the owners, or perhaps (by providing incentives to others) for the long run aggregate welfare. Thus, it is scarcity-by-artifice that needs justification, if justification is to be satisfied” (Becker 616).

#### **4.13 Economic Myths versus Reality in the Copyright Debate**

There is a significant body of current research which indicates that at least in the

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<sup>51</sup> See Rufus Pollock. Forever Minus a Day? Calculating Optimal Copyright Term, at [http://www.rufuspollock.org/economics/papers/optimal\\_copyright\\_term.pdf](http://www.rufuspollock.org/economics/papers/optimal_copyright_term.pdf), last accessed January 2011.



area of copyright, the incentive argument simply does not stand up. Curiously this position does not come only from those who might be considered opponents of copyright, but also from some unexpected sources. Nigel Parker, one of the most prominent entertainment lawyers in the United Kingdom makes the point very clearly in the introduction to his 2004 monograph *Music Business, Infrastructure, Practice and Law*:

Copyright is not an incentive to create. . . . Creators do not create for the joy or prestige of owning a copyright- or even for the money which that copyright may earn. Copyright itself does not generate creativity. It awards prizes to those who have created works with Commercial appeal. . . . It is an incentive to invest. The music business has grown up based on long-tail income from established copyrights (Parker 3).

Andersen, R. Kozul-Wright, and Z. Kozul Wright's "The Social and Economic Effects of Copyrights in the Music Industry" interrogates many of the stereotypes existing relative to copyright in the music industry. Within the study, Andersen et al. comment on the fact that the distribution of incomes is due as much to "strategic interaction and bargaining power of individuals and firms, and the governance structures of copyrights, as to the presence of musical talent or market forces" (26). Andersen et al. also note areas of conflict within the copyright regimes which, while perhaps fruitful economically for those in superior bargaining positions, do not necessarily benefit either creators or cultural expression. While unwilling to reject the copyright system in its entirety, Andersen et al. do remark, "Whereas the copyright system in its current form is good in facilitating income and rent creation from musical ideas, we must recognize the problem that it is *enormously bad in creating a 'fair' income distribution*, acknowledging

creativity throughout the industry, and also somewhat unsuccessful in generating cultural expansion [emphasis added]" (27).

Martin Kretschmer, in the article "Artists' Earnings and Copyright," considers the author-driven rhetoric of the copyright regimes within the music industry, seeking empirical evidence of their effect. Kretschmer is particularly interested in the impact of digitization on the culture of the industry and wonders if the immediacy of contact now possible between creator and user has changed the dynamic. While he notes that the distinctions between composer, performer and producer have become increasingly blurry in a digital world, nonetheless the hoped for changes have not yet taken place. In an echo of Parker, he concludes that the culture of copyright is in fact structured to benefit investors not creators, with the exception of those artists who have become so large that they are in essence corporate entities (e.g. Springsteen, U2, Dylan). Ultimately Kretschmer concludes:

*[O]ur study reveals that orthodox assumptions about the function of copyright in creator's lives are largely invalid. Copyright neither appears to support the creative basis of society nor does it make cultural materials available in a legal form that legitimizes creative digital re-use. Future Copyright policy must be based on a much clearer empirical picture of the role of Copyright in creative production [emphasis added]. (13)*

Like Andersen et al., Kretschmer sees the need for clarity in the roles of policy instruments such as copyright. As long as they are couched in author-centric rhetoric, confusion as to their operation will remain. If the purpose of copyright is to reward and benefit creators, which is what the rhetoric being proffered would have us believe, then

the policies are not working given the economic outcomes that Andersen and Kretschmer are seeing.

In the wake of the 2001 Napster ruling<sup>52</sup> Harvard economist Oberholzer-Gee in conjunction with his colleague Strumpf constructed an empirical analysis of the impacts of music file downloading on commercial sales in response to claims of the Recording Industry Association of America that file sharing was responsible for a 15% drop in music sales.(1) Sampling 1.75 million downloads over a 17 week period in the last quarter of 2002, they compared the material downloaded against sales statistics provided through Nielsen Soundscan (the same group providing data for the billboard chart sales) (*Effect of File Sharing* 8-10). Their findings indicated that despite the hyperbole of the music industry, the actual effect of file sharing was insignificant. “This estimated effect is statistically indistinguishable from zero despite a narrow standard error. The economic effect is also small. Even in the most pessimistic specification, five thousand downloads are needed to displace a single album sale” (3).

In a subsequent research paper published in 2010, they did find downloading practices were affecting music industry sales; however, not to the extent claimed by the industry. Oberholzer-Gee and Strumpf noted that downloading accounted for roughly 20% of the losses claimed by the industry. In part this change in findings was attributable to the fact that sales of individual tracks online in a digital format had become widespread since the original study. Of greater interest however was their contention that despite the fact that file sharing had “considerably weakened copyright protection” (*File Sharing and Copyright* 25), there was evidence to indicate that the greater access of users had resulted in increasing amounts of creative outputs.

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<sup>52</sup> *A&M Records, Inc. v. Napster, Inc.* 239 F.3d 1004.

Overall production figures for the creative industries appear to be consistent with this view that file sharing has not discouraged artists and publishers. While album sales have generally fallen since 2000, the number of albums being created has exploded. In 2000, 35,516 albums were released. Seven years later, 79,695 albums (including 25,159 digital albums) were published (Nielsen SoundScan, 2008). (24)

Nor was this increase limited to the music industry, Oberholzer-Gee and Strumpf continued on to note a similar increases in the film and publishing industries (24). Such a conclusion is a direct contradiction of the fundamental copyright justification that incentive is required for creation.

Towse's study of artists' income in *Copyright and the Cultural Industries: Incentives and Earnings* reflects her interest in assessing the economic benefits and costs of copyright in the cultural industries and this report is but one aspect focusing upon creators. Assessing the issue from the view of an economic incentive to creators, Towse draws together as much data as possible to determine what income is derived from copyright sources by artists. She found that despite high aggregate earnings from copyright "the large sums of royalty income that copyright law enables to be collected goes mainly to the publishers (music publishers and record companies) and to a small minority of high earning performers" (16). The final conclusion of the work is even more damning:

But the tentative conclusion is that the economic power of firms in the cultural industries, which are for the most part vertically integrated oligopolies, strengthened as they are by copyright law, is such that

conceivable changes to that law could not vastly improve the earnings of artists. *At a time in which the future of copyright law is being considered in the light of technological upheaval, we must also ask if it has anyway served the public well* [emphasis added]. (17).

More recently, an empirical analysis of data was made by Ku, Sun, and Fan, two statisticians and a lawyer researching in the area of copyright law. They investigated whether an empirical link existed between the changes to copyright law and the number of works being registered for protection. Their hypothesis was that if copyright was indeed an incentive for creation, then greater copyright protection should result in more works being registered for copyright protection.<sup>53</sup> Their findings contradicted that premise and they noted that the data indicated that:

In contrast, lawmakers are more likely to find a relationship between an increase in the number of new works and the laws that reduce, or otherwise limit copyright protection, and even then the relationship is far from guaranteed. (36)

American copyright scholar Samuelson has also been interested in the economic frame of the copyright debate, and believes that economics must be a fundamental part of the copyright debate given that, “The principle justification for intellectual property laws in the Anglo-American tradition is economic” (1). Despite economics being the principle justification, very little attention is paid to economic research with respect to IP policy. As a specific example, Samuelson comments that the then current debate about copyright

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<sup>53</sup> This refers explicitly to the American copyright environment prior to the 1976 changes to the copyright act. Prior to 1976, American law required that copyright in a work must be registered, unlike Canadian law (and other Berne compliant countries of the period) where copyright was agreed to exist upon creation. The registration requirement of the American regime made it possible to track registrations historically with respect to the changing IP environment.

term extension in the United States, *Eldred v. Ashcroft*,<sup>54</sup> had no economic basis. (6).

With respect to this landmark case, Samuelson states, “Given how often the court has emphasized the economic rationale for the existence of copyright law, it is striking how little attention was paid to economics in *Eldred*” (11).

Seventeen economists (five of whom were Nobel prize winners) signed a friend of the court brief in support of *Eldred*. The brief noted that the *Copyright Term Extension Act* (CTEA) could not encourage the creation of works already in existence. It also considered the deadweight loss that a longer term of above-cost pricing would bring, as well as the substantial transaction costs the CTEA imposed on subsequent users. Despite the preponderance of information from some of the finest scholars in the world supporting Eldred’s position, the court ruled against Eldred’s challenge.

Samuelson believed that due to a lack of economic expertise in the relevant policy-making community many copyright professionals are inclined to embrace a more “romantic” view of art and literature. She also noted that copyright issues have historically been studied by government committees. These committees rely heavily on witnesses, most of which come from the industries under scrutiny. As a result, industry groups tend to craft the legislation. Copyright experts tend to move from government to law firms to industry associations, all of which contributes to the insularity within the policy analysis (7). A further extension of this insularity has also been noticed by Bowrey and Rimmer, the fact that the majority of participants in the copyright debates are lawyers. Indeed, the area of intellectual property has been the fastest growing component of law studies for a number of years now (Boldrin and Levine *Against Intellectual*

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<sup>54</sup> *Eldred v. Ashcroft*, was a court case in the United States challenging the constitutionality of the 1998 Sonny Bono Copyright Term Extension Act (CTEA). Oral argument was heard on October 9, 2002, and on January 15, 2003, the court held the CTEA constitutional by a 7-2 decision.

*Monopoly* 92).

Doris Nadine McDonnell has noted in her work that the insular nature of the legal profession and its inability to accept those not within the “priesthood” of law interferes with the ability of the public to actually participate in the process. Thus the policy process is not particularly conducive to entertaining end user concerns or suggestions, and as Samuelson notes, in a rather blunt assessment, “Collective action problems make it difficult for parties that will be negatively affected by higher protection rules to organize effective resistance to copyright industry lobbying. This mix of concentrated benefits and distributed costs is likely to yield the best laws money can buy” (9).

When we consider that the most common justifications for copyright are economic, it is ironic that the preponderance of economic literature points to a lack of justification for copyright, much less for extension of the term and scope. Given that this foundational premise of copyright is fundamentally flawed one is left to wonder how it is that the system has continued and expanded. To paraphrase Boldrin and Levine, its success is perhaps due far less to its ability to benefit the largest proportion of people than its ability to benefit a small group of people to a very large extent. Concurrent with that catalyst has been the role of the hegemony in assuring the success, value and common sense of the system as a whole.

#### **4.14 Copyright, Creativity and Social Construction**

The preceding section has demonstrated the failure of economic rationales to justify expansionary copyright regimes. Another area neglected by both natural right and economic justifications is the socially constructed aspects of copyright and creativity. Specifically, while there are broad-based justifications for owners’ rights little mention is

made of how the creation of rights for an owner creates duties for users, and while a right may have a singular benefactor (owner) the corresponding duty will be imposed broadly throughout the society.

Vaver comments that while it is usually overlooked in contemporary discourse, historically copyright imposed not only rights, but duties. Our recent debates tend to dwell on the expansion of protections within copyright legislation and across international borders, but rarely is there a discussion of duties other than those owed to the owner of the copyright. However as Vaver points out with respect to the Statute of Anne, the first Anglo-American copyright legislation, “[T]he statute was not called a copyright act: it was called ‘an act for the encouragement of learning’” (*Intellectual Property: State of the Art* 8). The act was a means to an end, the guarantee of certain rights so as to aid in the encouragement of learning throughout society: along with the rights bestowed upon publishers by the statute, there were also duties imposed upon the publishers to ensure learning was encouraged. As part of their duties publishers were required to make free copies of the best quality available to the centres of learning. Penalties were prescribed for failure to do so. They were also required to keep prices reasonable. Again failure to do so could lead to financial penalties as well as the price of the book being reduced.<sup>55</sup> “Publishers owed legal duties of fair price and free access when the copyright term was only 28 years long, when their exploitation right was to prevent outright copying of all or most of a work. They then had no power to stop translations, fair abridgements, even stage adaptations or performances” (9). However the history of copyright has been one of the extension of owners’ rights at the expense of the public and over the course of that history the notion of a duty owed to the public seems to

<sup>55</sup> Statute of Anne 1710, s. 4.



have been lost:

But now that publishers have got copyright terms that run four or five times longer, now that they can control almost every way a work can be exploited, perhaps they should look into their souls and ask whether they do not continue to owe the public, morally at least, those same duties of fair price, fair access and fair contract. (9)

Jeremy Waldron has also looked at the copyright issue from within this context of rights and duties. The premise underlying Waldron's work is that each right conferred on the right's owner imposes a corollary duty on others. The three primary rights are:

- Right 1: The right to use.
- Right 2: The right to exclude others from use.
- Right 3: The power to transfer these rights to others.

With the correlative duties being

- Duty 1: There is a duty not to use.<sup>56</sup>
- Duty 2: Others have a duty not to use without permission.
- Duty 3: Others have a duty not to interfere.

It is Right 2 with its correlative duty that becomes the focus of Waldron's analysis.

It is tempting to approach the IP debate from the position of the protection for the rights owner (or as it is often misrepresented due to the prevalence of Myth #1, the creator) to "[S]how what a marvelous thing it is for him to have all these rights. They protect and promote his personality. They vindicate his right to the labor of his body.

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<sup>56</sup> Waldron notes that the first duty is a negative one, but nonetheless it is implied in the analysis. It simply refers to the duty not to interfere with the rights owners' use. As Waldron comments at this first level the rights conferred could be simply in respect of an individual's use of a public park; it is right 2 that changes the situation to one of ownership.

They reward his desert. They allow him to make plans, and to exercise his autonomy” (Waldron 844). Waldron approaches the issue through an oppositional analysis, which entails that to accept that Right 2 is a good sort of right that we want in our society, then we must also accept that the duty it imposes is also desirable in our society. It is this tension between Right 2 and Duty 2 that lies at the core of his analysis.

Waldron’s most intriguing concept however comes to bear on the very notion of autonomy with respect to freedom of expression, which he holds as being fundamental to our being. According to Aristotle, “Man is a speaking being, and self-expression is part of our essence” (qtd. in Waldron 876). However, the autonomy of self-expression is a double-edged sword, working on behalf of both author and copiers, and thus we reach a stalemate. This stalemate is most often addressed by the notion that if the original creation had not come into being, the downstream user would not be harmed, hence the first creator’s rights should dominate. Waldron however notes that cultural objects have a very different impact on society than mechanical inventions and it becomes far less certain to say there is “no harm” done when downstream uses are disallowed. Particularly given our current media-intense cultural environment, to deny the use of contemporary cultural artifacts is to in effect deny the expression of the self (Waldron 885):

In a world dominated by television, in a physical environment over-borne by advertising, in conversation increasingly loaded with, like, catch-phrases, it is the idea of *the totally new* that should surprise us. That an author’s work should be completely original rather than derivative, so far from being a moral or legal requirement, would strike most sensible observers as supererogatory. (Waldron 881)

The notion of anything being truly original in music, without reference to or influence by any predecessor is almost unthinkable. All Western music is based on the twelve-tone scale. These twelve tones may appear in different octaves, they may appear in an infinite number of rhythmic patterns and with varying forms of harmonic support (or absence), but the music will be made from those twelve tones. This is the reason we, as listeners, will so often comment that “this song X reminds me of (song) Y,” or “I can really hear the influence of (artist) X in their music”. All these musical constructs are formed with the same fundamental building blocks, and we are hearing their recombination over and over, on radio, television, movies, cell phones, muzak and in live experiences. Thus as Waldron points out the idea that there is something “truly original” is the concept that should really be questioned, not whether or not creators make use of pre-existent materials, because they do. They have to--it is a reflection of world in which they live.

McLeod’s *Owning Culture* echoes Waldron’s concern about the omnipresence of cultural artifacts in our daily life and also sounds a warning bell as to the creeping expansion of Intellectual Property rights into the cultural arena and its implications for contemporary Western society. Such artifacts are particularly pertinent when viewed in conjunction with many of the commodification frameworks offered in the socio-historical music analyses (Frith, Attali, Laing, Marshall). Within the context of the *culture industry* and its need to create markets for its product, the production of culture becomes a symbiotic process between industry and audience and as such the culture created can be seen as communal as opposed to author-centric, thus again imperiling one of the central tenets of copyright. Given the omnipresent nature of modern media and the contemporary

culture upon which it depends, how can we reasonably suggest that the iconic language of a society is not available for its own use as a means of expression?

With respect to the current debates surrounding downloading issues, in *Rip, Mix, Burn* Bowrey and Rimmer have noticed that the choices of language used in the debate almost always referred to non-compliant users in emotionally charged language such as “Pirates” and “Thieves”. They consider the peer-to-peer debate from the perspective of the highly politicized rhetoric flowing from both sides. While they are sympathetic to the position of those challenging the established copyright regimes, they question the value of framing the argument as binary opposites. In so doing, the challengers invite representations (piracy, theft, commons) that do not normally sit well with the court. Gramsci’s theoretical work in respect of social evolution warns of a similar danger with respect to debate: framing the issue in the language of the oppressor: “Another point to be kept in mind is that in a political struggle one should not ape the methods of the ruling classes, or one will fall into easy ambushes” (*Prison* 232).

Beyond simply the choice of language, the issues for debate almost always depend upon the laws being seen as a frozen instant in time without reference to their underlying philosophy or justification. Bowrey and Rimmer posit that this viewpoint is simply the nature of the adversarial process: “History and Principle are on my side. This suggests that any position contrary to mine is subjective and destabilizing” (5). However, they also comment that the closed nature of law and lawyers is such that IP lawyers are a reflection of the organic intellectuals noted by Gramsci and their advancement of their class position is instinctive: “law seems to passively ‘reflect’ the social order it helps construct” (7). Similarly, Vaver states:

It is easy for specialists to get complacent, and that's true of IP. We have worked long and hard to understand the system. It is now all more or less logical to us, as were Heath Robinson's contraptions to him. True, there may be the odd quirk or two but these can be sorted out. We have committees, researchers, consultants, and whole departments of state devoted to that task. We may even get a little testy when challenged on the coherence of the system: we think it is easy for fools to criticize what they don't understand, and it is easy to equate all critics with fools. (*Publishers and Copyright 2*)

Vaver's entire paper, *Publishers and Copyright*, was an attempt to discern if the Intellectual Property system that currently exists is in fact generally understood by both practitioners and the general public. His conclusion was that it was not:

At a minimum, the IP system should tell the public it serves, and the lawyers and judges who administer it, simply and clearly what qualifies for protection and how far protection reaches, i.e., what people can or cannot do. The system should do that for both specialist and non-specialist lawyers alike. It does not. (4)

Arguably one of the main reasons such cultural issues have not played a larger role in the copyright discourse thus far is the simple fact that the dominant rationale for copyright has been one of economic efficiency. Thus, as reflected in Bowrey and Rimmer and Gramsci, by setting the terms of the discourse the dominant group is able to limit the terms of opposition to itself.

Having considered the justificatory theories which underlie copyright, and the

economic myths and realities associated with it, we can now consider the public performance right itself and where that right fits in the larger framework of copyright.

#### **4.15 Justifying the Public Performance Right**

What seems to be entirely lacking in the public performance right discussion is *why* (beyond simply the fact that the statute says it is the law) the composer and/or publisher should receive an additional right beyond that of sale or rental. As noted in chapter 1 we do not pay additional fees to the engineer who designed our cars every time we take a drive. Surely the conception, realization and designs that have been borne out in our vehicles are unique, creative and original contributions. Arguably our lives are enriched in significant ways by the results of these efforts, and yet there is no payment made to these creators every time we start the engine and drive them down our roads. If we wish to dismiss the automobile as simply a mechanical contrivance, then consider the work of architects. The architect who designed our homes does not receive a royalty for each night we spend in them, each party we hold. Even if the building were commercial and not a private home, nevertheless, royalties are not paid. When the portrait artist paints his work and sells it to a buyer, his economic interest in it ends there. The portrait artist receives no royalty when the work is hung. Nor are the visitors to the home where it hangs counted so that a royalty might be returned to recompense for their viewing. We have struck our economic bargain between artist (be it automotive designer, architect, or a portrait artist) and end user when we purchased or rented his creation. No further rents are paid. I note again Justice Binnie's comments in *Théberge*: "Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it" (*Théberge v. Galerie d'Art du Petit Champlain*

*Inc.*).

Nonetheless, it has somehow become accepted that it is reasonable for an author/composer/publisher, or more specifically the copyright owner (who is often not even the original creator), to enjoy an ongoing and accumulative right to compensation for each subsequent use. The idea may have come from our acceptance of the romantic conception of authorship and may be sustained by the general public sympathy for creative artists. However it would seem the ability of owners to continue to extract rents on an ongoing basis has much more to do with the influence of the economic industries created around this form of accumulation.

Perhaps even more intriguing is the fact that the only purpose for the creation of music is performance. Any textual or manuscript manifestations serve only as guideposts in the creation or re-creation of a performance. Indeed, if performance were not the intent, the composer would not have released the work to the world. However, having done so, that work of art becomes part of the cultural fabric of society. To then maintain that it is unjust for members of that society to express themselves with the “language” their culture has given them is in effect to deny them their right to self expression as human beings.

The fundamental point upon which this issue turns is the lack of logic for an additional economic right to be collected for performances in an ongoing manner. The standard economic arguments proffered such as incentive for creation would not apply, as the creator/publisher would have been paid when they sold or rented the container in which the work was held. Such arguments are questionable in any case when applied to artistic creation. And though large scale uses such as broadcasting may not appear on the

surface to adequately recompense the creator given their broad use of the work, such uses have always been necessary for the creation of market by the music industry, as evidenced by the long historic practice of payola in the industry.<sup>57</sup> Ultimately, as Boldrin and Levine have pointed out, “In the final analysis, the only justification for ‘intellectual property’ is that it increases--de facto and substantially-- innovation and creation” (11). Sadly, given that there is no indication of increased production as a result of incentive, and limiting the use of cultural products also limits their ability to be used in new manners, neither outcome seems present in this discussion.

In this chapter I have briefly sketched the fundamental justificatory theories underpinning intellectual property regimes. The two primary theories are based on a “natural right” of the author and “economic efficiency.” While the natural right arguments appeal to our romantic notions of authorship and creation, it is in fact the economic efficiency model which forms the statutory basis of Intellectual Property legislation in general, and copyright in particular, within the Anglo-American legal tradition. Counter-arguments to both theories have also been presented. In particular the economic counter-claims are quite numerous. Finally within the larger context of copyright as a whole the narrow sphere of the public performance right itself has been reviewed, and again justification has been found wanting. In each instance, from the larger IP frame to the smaller PR frame, there has been a lack of any justification which could not be countered with an equally strong claim to deny it. Of course this is the essence of the copyright debate, as Rimmer and Bowrey have stated.

Catherine Seville comments, “Ideally, individual claims for copyright protection

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<sup>57</sup> See Sony settlement with State of New York,  
[http://www.ag.ny.gov/media\\_center/2005/jul/jul25a\\_05.html](http://www.ag.ny.gov/media_center/2005/jul/jul25a_05.html), last accessed January 2011.



should be screened for their compatibility with the scheme of copyright. Without an agreed upon theoretical basis for copyright, this is not possible. Claims are inevitably judged in a piecemeal fashion. Much may depend on lobbying strength, which may well not take account of, say wider educational interests” (217+). Indeed, it has been educational interests, as well as those of the general public, that have increasingly provided the counterpoint in the expansionary discourse of copyright within the last two decades. In the following chapters I will present an historical case study of the public performance right and a theoretical analysis which can explain both its original imposition and expansionary character.

## Chapter 5: A Brief History of the Music Industry

This chapter will begin the historic analysis of the performance right collectives as a subset of the music industry. Additionally, using the theoretical framework discussed in chapter two (highlighting the important moments, figures and organizations in the hegemonic process), it will begin the process of connecting the various participants in the Gramscian hegemonic order. In terms of the historical analysis, it is useful to break down the history of the music industry into three periods encompassed in two chapters. This chapter deals with the period from the invention of the printing press (1454) until the end of the nineteenth century, primarily focusing on the emergence and establishment of a commercial industry, particularly within the booming culture of Victorian Britain. This period is remarkable for the creation and entrenchment of the various enterprises surrounding the publication of music, and the imposition of the performance right. The following chapter will continue to establish the historical framework which defines the music industrial complex from the cusp of the twentieth century up to the present day.

### 5.1 The Beginnings of the Music Industry

While it is impossible to give a birth date for the “industry,” it is useful to adopt the mid-fifteenth century as the start date for this discussion. The invention of the printing press by Johannes Gutenberg proved to be an event of lasting significance for the Western world. Elizabeth Eisenstein points out that for the first time the mass production of literature allowed the dissemination of knowledge beyond geographical borders to a significant extent. This dissemination would have a dramatic effect upon the knowledge base of succeeding generations (Eisenstein 44). Unlike previous methods of wood block printing, or hand scribing, Gutenberg invented a system of moveable upper and lower

case type, which could be placed together in combination to create whatever text was desired. In addition, the creation of a screw press allowed an even, efficient and quality print to be made from the type quickly. For the first time a consistent quality of product could be produced and disseminated in large quantities.

Gutenberg's invention created a revolution in printing and the transmission of knowledge. Though printing presses quickly began to flourish throughout the continent, the printing of music did not enjoy similar success. Although Gutenberg printed his first bible in 1454, the first appearance of printed music (also in Germany) was not until 1473 (Grout 172). However, the 'father' of music printing is considered to be Ottaviano dei Petrucci, who in 1501 printed a collection of popular songs *Harmonice musices odhecaton A*. Petrucci continued printing music publications until about 1520.<sup>58</sup>

The delay in responding to the new technology was due to the problematic nature of music with respect to the technical process of printing. Music is a unique language with a codified structure. The symbolic nature of the musical language requires that each symbol represent at a minimum both pitch and rhythm. In addition, at this time in history, music was not yet fully established in a "common practice" and as such several differing practices existed (Bernstein 20). A printer wishing to publish in the field would need to create several variant forms of type to meet these needs. Additionally, while there might have been a great deal of interest in the performances of musical works, there were at best only a small percentage of the population who were actually capable of reading music. As such, the market for any of these works was extremely limited.

It is important to make a distinction between the publication of printed music such

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<sup>58</sup> J. M. Thomson , John Wagstaff "Petrucci, Ottaviano (dei)" The Oxford Companion to Music. Ed. Alison Latham. Oxford University Press, 2002. Oxford Reference Online. Oxford University Press. Last accessed January 2012.

as part books for ensembles, and the publication of books about music, such as a theoretical treatise. Indeed even within the publishing houses that would come to specialize in music, there was a distinction between the two. A treatise or primer would be largely comprised of textual information. Musical examples would be inserted into the books to illustrate the issues being discussed. How these examples would make their way into the books varied with the date and houses of production. In the early stages the examples would be woodcut and used in addition to the moveable type used for the text. In some cases the entire print run of the book would contain blank pages (or sections of pages) where the musical examples would be inserted later by hand (Grout 172).

The printing of music in the sixteenth century required multiple impressions. Usually the staff was printed first, then the notes and finally the text including any musical direction. Aligning all these separate printings was a major difficulty and in some music incunabula it is somewhat of a challenge to actually make sense of the music (Duggan 11). Obviously the additional cost and production time resulted in significantly greater costs to produce a book of music as opposed to a book of text and for an even more limited market (Duggan 14).

## 5.2 The Market

Literacy at this time was not widespread and as a result the market was quite small for books in general. Books of any kind were expensive and music books were particularly so due to the increased cost of production and the inherent damage resulting from their ordinary use.<sup>59</sup> At this early stage of the industry the primary markets for music sales were the church and the various aristocratic courts, many of which

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<sup>59</sup> As a former orchestra librarian and practicing musician the author can attest to the fact that even conscientious use of instrumental parts still results in an inordinate amount of wear and tear.

maintained their own musical ensembles. Bernstein notes that over half of the surviving music incunabula are of Venetian origin, and the vast majority of those are missals for liturgical use (20). While it is almost impossible to overstate the importance of the church to the history of western music particularly during the middle ages, the Renaissance brought with it an expansion of the markets for both books and music that would go beyond the church.

By the sixteenth century, there was an established secular repertoire, particularly in the predominantly Roman Catholic countries of France, Italy and Spain. Records of the Venetian printing houses of the mid-sixteenth century indicate that they were shipping roughly equal amounts of secular and sacred works to market (Fenlon 60 -62). Similarly the output of the Dutch printing house of Waelrant and Laet at this time indicates a pattern of publication intended for private use (Weaver 129-130).<sup>60</sup> This pattern seems indicative of a growing interest in music as a secular pursuit and not merely the province of the practitioner as many of these printings consisted of method books, primers and collections for the amateur. These primers would have been the “how to play” books of the day.

### **5.3 Early Issues in the Print Industry**

The infant print industry was a lightning rod for censorship due to concerns over the spread and consumption of seditious material. Concerns in regard to sedition were common throughout Europe, but are particularly well documented in the records of the Stationers Company in England, and the associated Star Chamber decrees. Though

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<sup>60</sup> Given the time period under discussion extensive records are in short supply. Waelrant and Laet was a successful publishing house in Antwerp that also dealt with music. Fortunately for scholars such as Weaver, they also kept extensive records so their sales and shipments of the period can be tracked giving some basis for the conclusion that there was a significant secular market, at least in the major centres.

copyright might possibly have flourished without censorship, the use of copyright as a tool to control and censor the publication of materials was immense (Patterson 21). Indeed as Mark Rose noted with respect to the monopoly granted the Stationers Company in 1557, “The primary interest of the state in granting this monopoly was not, however, the securing of the stationer’s property rights but the establishment of a more effective system for governmental surveillance of the press” (Rose 12). Nevertheless, illegal presses flourished despite efforts to control them in a fashion not dissimilar to modern attempts to control music distribution on the Internet. Bearing in mind the limited scope of the sixteenth century market, the extent of some of the illegal printing was truly staggering. A bill filed in the Star Chamber in 1585 by members of the Stationers Company alleged that some 20,000 copies of John Day’s ABC primer had been printed, illegally, by an unauthorized press (Patterson 104).

#### **5.4 Economic Conditions of the Composer**

Throughout the fifteenth to nineteenth century, composers were simultaneously performers, and they depended upon three primary sources for their livelihood; the church, the state and/or a wealthy patron (Grout 83). If not so gainfully employed there was very little prospect of sufficient income to allow time for composition. Thus the publication of works was an important marketing tool for composers of the time. It is interesting to note that unlike their contemporaries in the book trade, many composers were in fact paid for their compositions, though more in the sense of an honorarium than in any expectation of an income stream that might sustain life. However the prevailing attitude was very different than today where the industry gears up to saturate the market

and maximize the profit from a potential “hit” composition.<sup>61</sup>

One outcome of the control of the print industry was that an author or composer had no legal right to publish his own work. Publication was only permitted by Royal privilege and with rare exception the creator was not the recipient of the privilege. In England, such privileges were issued in respect of specific books but, as Rose has pointed out, as the sixteenth century wore on more often a *patent* was issued. In this instance the patent is simply a privilege for an entire class of books, such as legal texts (Rose 11-12). Thus the exclusivity of the printing right would extend beyond an individual work and encompass an entire discipline. An example of such an instance is the patent granted to composers Thomas Tallis and William Byrd. By virtue of the Queen’s pleasure Tallis and Byrd had the exclusive right to print any music whatsoever in England for the period of their patent (Smith 28).

As a result of these limitations, publication was of limited monetary value to the composer- musician of this period. The benefit of publication was the fame associated with the publication and dissemination (Weaver 286). The vast majority of musicians and composers both currently and in the past made their living from teaching and performing, or supplemented their musical incomes doing work outside the music industries.<sup>62</sup> In a manner analogous to the independent bands of today (who sell their self-produced compact discs from the stage, in the lobby following a performance, or downloaded from

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<sup>61</sup> Garofalo noted that the phenomenal success of Michael Jackson's 1983 album *Thriller*, resulted in an era of blockbuster recordings featuring a small roster of superstar performers worldwide (343-344). As opposed to having 80 artists sell a half million records apiece, the industry modeled single artists selling 40 million records apiece, like Jackson.

<sup>62</sup> Oberholzer-Gee and Strumpf for example make significant note of the fact that the vast majority of musicians do not in fact make a living from music. In the contemporary environment this has led some economists to posit that those engaging in the music industry are in fact behaving in a manner comparable to playing the lottery, relentless participation in the hope that it will be their song that will become the next big hit, or they will become the next American Idol.

their website), the composers of this period benefited primarily from the wider dissemination of their works. This enhanced dissemination resulted in more performance requests, better (or hopefully wealthier) students and perhaps the grand prize, a wealthy patron. This self-marketing approach has always been a normal practice in the music industry and continued into the twentieth century.

### **5.5 The Eighteenth Century and the Growth of Music Publishing**

The eighteenth century was a period of immense growth for music publishing particularly in Britain, however of even greater importance is the fact that there was immense growth in the commercial market for printed music. Joncus notes that "[p]ublishers had by 1730 virtually ceased publishing volumes dedicated to high style song"(531). The practice of combining art songs with more popular works can be seen in the patterns of early English commercial publishers such as Walsh and Playford. This combination was indicative of a more widespread market for the materials, and has often been interpreted as an indication of a growing middle class in Britain. This would also seem to be supported by the growth of "music meetings" from the 1690s onward coupled with the printing of both music collections and single folios (Price, Milhous and Hume 531).

While there is an obvious growth in both the volume and types of music being published, Price et al. pose serious questions as to the validity of such measures as a marker of evidence for an expanding middle class. As they point out the greatest difficulty in doing historical economic analyses is to create a meaningful system of comparison: ". . . we need to know what money was *worth* at any particular date" (Price et al. 490). Given that various commodities and services fluctuate in terms of their costs



at variable rates and times, it is not a simple thing to make a statement such “a dollar in 1787 would be worth 100 dollars in today's market,” there are simply too many variables to make such an equation. As an example they posit the issue of theatrical salaries, noting that in 1700 the minimum rate for a theatrical performer in London was 30 pounds a year. Using the economic history website price comparator “How Much Is That?”, they arrive at the sum of 3,337 pounds in the calendar year 2002 (Price et al. 491). Clearly that is not a sum that anyone could live on in London England in 2002.

Thus, for example, when Price et al. note the catalog prices of some of the major English publishers of the early eighteenth century, “Walsh's price range ran from 6d. to 9s. with an average around 3s.-4s.”(Price et al. 531), the notion of an average price of 3 shillings does not seem extraordinary, and would seem within the reach of the average member of the burgeoning middle class. But, they also note that while sixpence (6d) may seem negligible, “it is not negligible to anyone who earns 12d. for a day's labor, and may be significant to someone who earns 100 (pounds) per annum”(Price et al. 532). Indeed, given the example that the low scale theatrical performer would earn only 30 pounds per year, sixpence was significant.

The vast majority of this growth and expansion was located around London itself. As Rohr notes in her study of British musicians between 1750-1850, 56% were located in the city of London. The next heaviest concentration outside of London was in the “north” of England and was a paltry 8.6% by comparison (Rohr 30, table 5). Thus London provided a unique set of circumstances in which this new form of publishing might begin to flourish. So while the published research in regard to the London market of this period clearly indicates a growing amateur segment, we must recognize that the London market

was unique and thus trends specific to that market may not necessarily be expanded beyond its borders. Indeed given the relatively high cost of music when compared to the general level of income, it is not surprising that an amateur market could only gain a significant foothold in a market as large as London.

### **5.6 The Nineteenth Century and Romanticism**

The last quarter of the eighteenth century was a period of immense political and philosophical change for Europe and the Americas.<sup>63</sup> Following this period, the Western world settled into a long period of political stability and economic prosperity throughout the nineteenth century. The steam engine, which had been invented in 1769, would now provide the power for the Industrial Revolution.

In the print trade, the addition of the steam engine meant quicker and more dependable presses made of iron. The cost of producing print materials, including music, diminished and the amount of stock warehoused increased. The concurrent growth of the railway systems further enhanced the business environments by allowing greater distribution at a cheaper price. Also, for the first time some of the more problematic issues of music print production began to find solutions. The invention and widespread adoption of lithography made the printing of music far simpler, and this period marked the establishment of some of the most significant publishing houses in music, as associated artisans within the book trade saw the inherent possibilities for growth in the music industries. Art house engraver and dealers (Breitkopf), copper engravers (Schott), and others who had previously dealt exclusively in books turned their eyes to the

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<sup>63</sup> 1776 saw the Declaration of Independence and the onset of the American Revolution to be closely followed by the French Revolution and the storming of the Bastille in 1789. The beginning of the nineteenth century (1799-1815) would encompass the Napoleonic wars and their ravages on the political and social fabric of Europe. See for example *The Routledge Companion to European History Since 1763*, Chris Cook and John Stevenson.

burgeoning market for music sales (Hortschansky 207-211).

The arrival of the industrial age afforded both the disposable wealth and the available time for the cultivation of the arts and the introspection necessary for the development of the “romantic soul” (Aide 218). The Victorian sensibility required purpose, and one of the few activities a woman of good social standing could engage in was to become a patron of the arts or provide a “salon,” thereby expanding the potential sources of both financial and social support for musicians and composers. Although it still was an era of class distinction, there was an emerging middle class. There was also an increasing focus on the individual and in the midst of this growing democratic sensibility, the mysticism of the monarchy was being replaced with a cult of individualism, contributing to the growing star status of performers and composers (Grout 554).

As the second half of the nineteenth century arrived a number of issues began to crystallize in regard to copyright that had a significant impact on the music industry. First and foremost, the world was getting smaller. The relative ease of travel by train and steamship in addition to the proliferation of printed materials resulted in an international dissemination of materials and copying of those materials. Although the originating publishers cried foul, there were in fact few international agreements concerning intellectual property and as such unauthorized copying was perfectly legal in most of these cases. Towards the end of the nineteenth century, European publishers and British publishers in particular began to resent the loss of revenue, particularly in the North American market, and this is where the conflicts began in earnest (Coover 13, 15, 17). Perhaps the greatest singular indication of this growing tension is the first international

agreement regarding copyright. The *Berne Convention for the Protection of Literary and Artistic Works* (Berne Convention) of 1886 was specifically called for the purpose of creating an international agreement respecting copyright. This first international copyright agreement can be viewed historically as an international marker delineating the shift of the twentieth century towards a more rights-based as opposed to production-based industry. Thus, despite its adoption in the nineteenth century, the Berne Convention will be discussed in the next chapter chronicling the twentieth century, when its implications were truly felt.

### **5.7 Music and Victorian England**

The remainder of this chapter focuses on England for a number of reasons. Historically Britain has always had a large and extremely well organized book trade as evidenced by the existence and records of the Stationers Company. England was the birthplace of common law which, while important in this time frame, will become even more so in the twentieth century as the United States becomes the dominant force in the music industry. It was also the birthplace of the Industrial Revolution and during this time England was at the height of its power and had a tremendous amount of influence in the world markets. Within the context of this historical research it is also particularly important that there was a fledgling music publishers' association in place, and trade literature to document the period and issues.

The explosion of musical performance during the reign of Queen Victoria is nothing short of phenomenal. In the period of 1840-1890 the population of London doubled in size, but the number of musical performances (as evidenced by listing in the local presses) increased five-fold, and this reckoning does not begin to take into account

those amateur productions without sufficient funding to support advertising (Jacobs 3). Also reflective of this growth is the fact that as of 1878 there were 374 *licensed* music halls in London alone (Pearsall 14). While, as previously noted, there had been some amateur music making which had been targeted by the music publishing industries, the availability of leisure time afforded non-professional musicians the opportunity of realizing a significant standard of ability in their mastery of an instrument. This birth of a mass “amateur” market meant that sheet music and instruments, in particular pianos, were being sold in unprecedented numbers for home use. These hardware and software<sup>64</sup> sales were matched with a concurrent increase in the number of music teachers (Gillet 321). One singular indication of this general growth is the number of compositions registered for copyright each year with Stationers Hall. In 1800 only 159 pieces were registered, however by 1857 that number had risen significantly to 2,581, and by 1901 there were 8,063 new compositions registered for copyright (Parkinson x).

### **5.8 The Music Publishers Association (MPA)**

The MPA was established in July 1881, and listed its objectives: “to protect the interests of the music publishing trade, especially in the proposed new Copyright Act and in the matter of performing rights” (Coover 9). When the MPA noted it wished to protect the interests of the publishers in respect of “performing rights,” they were referring to the possible expansion of that right which was being sought by European interests such as the Société des Auteurs, Composers et Editeurs de Musique (SACEM). While there had been a public performance right extended to music in the United Kingdom in the *Dramatic*

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<sup>64</sup> We can view these past practices of the emerging music industry to be synonymous with the contemporary computer/electronic media industries which rely generally on a periodic large ‘hardware’ purchase (piano/computer/home theatre) followed by numerous ‘software’ purchases (sheet music, piano roll, CD, Blu-ray disc etcetera).

*Licensing Act* of 1833, this was only in association with musical-dramatic works such as opera. The public performance right was extended to purely musical works in the UK *Copyright Act* of 1842; however, composers were not sufficiently well organized to collect it without the support of the publishers and the MPA was in fact opposed to any such process (Coover 12 -13).

The MPA incorporated the luminaries of the Victorian music publishing industry including Boosey, Chappell and Novello. And while the performance right was on their radar, the single most important issue facing the industry at this time concerned the reproduction right, specifically the explosion of pirated materials, as they were referred to in the trades. In 1884, the secretary of the MPA corresponded with the British Postmaster General in hopes of stopping all music from America so that “pirated” British editions could not be smuggled into the country (Coover 17-18). Trade literature of the period regularly noted the loss of revenues in the expanding North American market due to “pirates,” though as previously noted, since no trade agreements were in place, this was not technically an unlawful practice. However, these laments were particularly ironic in light of the fact that the British publishers were engaging in identical practices with regard to the works of continental publishers. The possibility that they would be required to pay royalties on such pieces was one of their major concerns in regard to the proposed governmental acceptance of the Berne agreement (Coover 28).

Some publishers, including Boosey, had called for matters to be taken into their own hands and, in 1902, another trade association, the “Copyright Association” was formed. Private detectives charged as “agents” for the publishers began systematic physical and mental harassment of the pirates and their retailer customers. Numerous

cases of assault as well as trespass landed before the courts as a result, but unless the plaintiffs were willing to give up the source of their pirated materials the cases were dismissed (Coover 88). The Copyright Association justified its actions by proclaiming, “The group [Copyright Association] wants ‘to go quietly and kindly about the business’, breaking no laws, but without proper legislation, ‘our people may... get out of bounds’” (Coover 87).

This early gathering of the publishers into a concerted interest group marks the first stage of the hegemonic order. At this initial stage, as Gramsci had posited with respect to the various phases of development of the hegemonic order, the purpose is purely economic. The publishing interests, normally competitors, and as in this discussion, particularly fierce and sometimes violent competitors, nevertheless managed to put their differences aside to form an association the purpose of which was, “to protect the interests of the music publishing trade” (Coover 9). The publishers see the interests of proposed copyright changes, and the public performance right in particular, as being inimical to their interests, “to protect the interests of the music publishing trade, especially in the matter of the proposed new Copyright Act and in the matter of performing rights” (Coover 9). Despite the fact that a public performance right had existed in France since 1851, and that the collective established in respect of that right, SACEM, had operated in the United Kingdom since 1881 (Coover 11), the MPA did not accept the right as valid, nor did they respect it since it was not in their economic interests to do so. As will be discussed in chapter seven, even following the imposition of the Berne convention the MPA as a group completely ignored this legally established right, until they saw an economic interest in championing it. Indeed, one of the leading figures

of the MPA, William Boosey noted to his colleagues in a trade review following the adoption of Berne that with respect to foreign collectives now seeking royalties in England they represented “vexatious rights of performance that have never been, and never will be, understood here” (Coover 38). As early as 1890, attempts were made to establish a British Performing Right Society, modeled on the French example. However, without the support of some of the leading British publishers (Boosey and J.B. Cramer) it would wither away (Coover 43). Coover’s collection also notes the intention of the British agent of SACEM, a Mr. Moul, to start a British society, noting that in 1901 SACEM had collected 100,000 pounds in performance fees. Moul comments that “not a single piece of music by a French composer is allowed to be performed without paying toll” (Coover 97).

As the issue of a public performance right expanded within the industry circles of the late nineteenth century, the issue of piracy still consumed a great deal of the industry’s time and money. Though it was depicted as a simple issue of right and wrong it was more honestly a reflection of problems within the national marketplace than any international malfeasance. Despite the fact that industrialization and increased production efficiency had dramatically reduced the associated costs of publishing, the prices of print music had remained artificially high. Within the print music industry, retailers frequently complained that the publishers were too greedy and refused to recognize the reality of the marketplace. As noted in the February 1904 *Musical Opinion and Music Trade Review*, “Letters continue to pour in from dealers voicing discontent with the trade practices of publishers” (Coover 108-109). Even the press was seen to offer support to the downtrodden retailer in his use of pirated material. As one paper commented, “The



composer's remuneration and publishers' profit are often at odds" (Coover 89). The situation is analogous with the current public response in regard to illicit downloading. It has been suggested that the music industry's exorbitant prices for music on compact disc (as opposed to their production costs) had a significant impact on the public willingness to make their own copies as the technology became available.

There is no question, however, that the piracy issue was significant. Documents of the time indicate that in 1905, 287,790 copies were seized and destroyed from a single warehouse (Coover 123). The piracy issue continued to spiral as publishers steadfastly refused to compromise on price. The trade literature was filled with denunciations of the government and its failure to stem the piracy. The crisis reached a peak when the music publishers refused to publish any more music as they felt the government was not taking adequate steps to protect their interests, or as they charged in the May 1905 *Musical Opinion and Music Trade Review*, "parliament does not stir" (Coover 120).

This chapter has traced the development and establishment of the music industry primarily through the channels of publication and performance. As noted in the analysis, the development of the industry has shifted from an artisan based practice to a larger professional community with a concurrent growth of an amateur market towards the end of the nineteenth century. This in turn would lead to more highly commercialized and commodified forms of music, where the previously participatory forms of music making, such as live performances be they in a home, pub or commercial venue, would to a large extent be replaced. Instead of venturing out to see performances, or creating them in their own home/community, to a greater and greater extent the public would become the recipients of a product. Delivered via mechanical reproduction formats such as player

pianos, radio, television, film, records, the previously participatory forms of music making were to a large extent replaced with a process of music reception. These events will be considered in chapter six.

## Chapter 6: Berne and the Increasingly Technological Marketplace

Chapter six will continue to establish the historical framework that defined the music industry and encompasses the period from the turn of the twentieth century up to the present day. It reflects the massive technological change which took place at the outset of the twentieth-century, such as radio broadcasting, machine-based reproduction, and reproductive sound technologies. Additionally, it also considers the changing sociological nature of the musical experience which accompanied those technological changes. The chapter then looks at the industry from approximately 1970 to present day with an emphasis on the impacts of the digital and reproductive technologies which became commonplace during this period. Ultimately the goal of this chapter, in conjunction with chapter five, is to place the public performance right within the context of the larger industrial interests both at the birth of the industry and its development through the contemporary period.

### 6.1 The Berne Convention of 1886

As indicated in the previous chapter, one of the major issues facing the music industries up to the end of the nineteenth century was the lack of an international agreement respecting copyright. To a great extent, that issue was addressed by the *Berne Convention for the Protection of Literary and Artistic Works* of 1886. The main effect of this Convention was a multi-lateral agreement, which tied the length of copyright to the life of the author and the establishment of reciprocal treatment regarding copyright for all member states. The technological changes wrought by the innovations of the twentieth century, such as recording and player pianos, as well as the changing intellectual property environment, forced the need for revision and, as a result, Berne went through a series of

amendments in 1908 (Berlin), 1928 (Rome), 1948 (Brussels), 1967 (Stockholm) and 1971 (Paris).

Berne was significant for a number of reasons. First and foremost, the nature of continental law generally regarding copyright, and French law specifically, was fundamentally different from the common-law origins of the British system, and the French interests were the driving force behind the Berne Convention.

The Association Litteraire et Artistique Internationale (ALAI), chaired by Victor Hugo, was formed in 1878 with the goal of “the creation of an international agreement aimed at protecting literary and artistic copyright.”<sup>65</sup> ALAI participated in every round of revision with regard to Berne and, as they comment upon in their history, formed “privileged” relationships with international authorities with respect to copyright. For economic reasons generally, piracy of course being the dominant English concern, all parties wanted an international agreement. Copyright in France is literally translated as “the right of the author” or “droit d’auteur.” With the European interests at the forefront of a movement seeking an international agreement, it is not surprising that the conception of the agreement was far more author-centric than might have occurred in purely common law negotiations.

The Music Publishers Association had serious concerns in regard to the Berne Convention, specifically with respect to two articles; Articles 4 and 11. Article 4 stated:

Authors who are subjects or citizens of any of the countries of the Union shall enjoy in countries other than the country of origin of the work, for their works, whether unpublished or first published in a country of the

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<sup>65</sup> ALAI, [http://www.alai.org/ history section](http://www.alai.org/history), last accessed January 2012.

Union, the rights which their respective laws do now or may hereafter grant to natives as well as the rights specially granted by the present Convention. (sic)

The impact of Article 4 was such that any works of foreign authors presently being published without authorization would now receive protection in signatory countries. Since, as noted in chapter five, it was common practice to publish foreign authors' works without payment, much listed in the catalogues of the various publishers would now have to be licensed, or publication would have to cease.

Article 11 stated, "The stipulations of the present Convention shall apply to the public representation of dramatic or dramatico-musical works and to the public performance of musical works, whether such works be published or not." The effect of Article 11 was the establishment of an international public performance right in purely musical works. The United Kingdom had legislated a public performance right in musical-dramatic works in 1833, and extended the right to purely musical works in 1842. However, that economic right had not been successfully exercised in the U.K., and was generally dismissed. The French however had been enforcing a public performance right since 1851. Since the public performance right would extend to all works already in existence, British publishers were concerned efforts might be made to establish a public performance right society in the U.K. They considered such a right to be a nuisance tax, or as Boosey referred to it, a "vexatious right" (Coover 38).

The 1908 Berlin revisions to Berne are of interest primarily for the fact that the establishment of copyright shifted from the moment of publication to the moment of creation. This shift was seen as a significant step for authors and creators as it helped to

establish a conception of copyright as a “creator’s” right (Seignette 21). Given the fact that copyright was now seen to originate with the moment of creation it moved the legal status of the copyright work away from dependence upon a publisher. While previously a publisher would judge a work to determine if it was valuable enough to warrant publication and hence copyright, now the decision of the creator to create the work was enough to insure its copyright status. With respect to the public performance right, the conception of copyright being a creator’s right would be vitally important, as will be discussed later. Of particular importance was the recognition of a mechanical right for the copyright owner due to the success of the mechanical music business (piano rolls, gramophones, melodeons) (Laing, *Copyright* 87). Increasingly throughout 20th century the mechanical reproductive technologies would play a significant role in the communication of music and the growth of its attendant industrial complex.

The 1928 Rome revision of Berne would further enhance the status of the author by the inclusion of “moral rights.”<sup>66</sup> Article 6*bis* states:

Independently of the author’s copyright and even after the transfer of the said copyright, the author shall have the right, during his lifetime, to claim authorship of the work and to object to any distortion, mutilation or other alteration thereof, or any other action in relation to the said work, which would be prejudicial to his honour or reputation.

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<sup>66</sup> The notion of a “moral right” is significant in respect of any Hegelian justifications for copyright. As noted in chapter 4, the idea of an *inalienable* right of personhood attached to a work throughout its life addresses much of Hegel’s concern with regard to the notion of personhood imbued into creation. While this chapter does not deal with this larger philosophical implication, there is a case to be made for the notion of moral rights being able to provide true control to the *creator* as opposed to a larger industry since those rights are inalienable. Indeed, this is likely the overwhelming reason the rights have received such opposition in industrialized nations.

The creation of article *6bis* (moral rights) had far reaching consequences on the international aspects of the copyright convention. Moral rights were by definition separate from the economic right, and although they might be waived, they could not be assigned. France and Germany had primarily championed the inclusion of the moral rights clause, and found support easily among those member states which operated under a Civil Code. For the common-law nations, notably England and other Commonwealth nations, and particularly the United States, moral rights were problematic. The United States did not become a signatory to Berne until 1989 in part due to its inability to reconcile the notion of copyright vesting in the moment of creation (as opposed to publication) and the moral rights clause, with its own legislation. Similarly, England (a founding member state of Berne in 1886) signed the original convention but would not explicitly enshrine moral rights in its own Copyright Act until the major revision of 1988 (Feather 209).

The initial industrialization of music had made possible for the first time the increased participation of a large segment of society in what had previously been a practitioner only experience. This initial stage, which roughly encompassed the period from 1500 to 1900, concerned itself primarily with the creation of infrastructure (instruments, ensembles, educational programs) and the exploitation of copyright. Even at this early stage an industry trend was becoming clear, specifically that the highest profits were to be found in the software of the industry (sheet music) as opposed to the hardware (instruments). Accordingly the focus was on the acquisition of copyright and the production of music for the domestic and international markets. In the future the music industry would be far more concerned with public performance rights than the strict

duplication right which had concerned its predecessors.

## 6.2 Technology's Increasing Expansion

The dawning of the twentieth century saw significant change in the music industry as a result of technological innovation, much of which had had been invented at the end of the nineteenth century, but flourished in the twentieth century. The nature of performance would change from a primarily public experience to a private one, in that people would no longer have to leave their homes to hear a performance. The popularity of the player piano was a prime example. A fully functioning piano could be set up to play automatically, by means of a paper roll inserted into the playing mechanism. The operator would simply pump the pedals to provide the necessary air power to run the machine. Individuals no longer had to spend years learning to play the piano, but could simply purchase the hardware (the piano) and then purchase the latest software (piano rolls) to run on it.

Several attempts had been made by publishers in both England and America to claim copyright infringement against the manufacturers of piano rolls, however none were successful, and in 1908 one such case reached the United States Supreme Court. The decision in *White-Smith Music Publishing Co. v. Apollo Co.* stated that the making and sale of a piano roll of a copyrighted musical composition did not constitute copying. The case involved the Apollo Company creating and distributing a piano roll version of a popular song, the copyright of which was owned by the White-Smith Publishing Company. Given the limitations of the piano roll (and of the piano itself) the process of creating a piano roll version of a popular piece usually involved some form of arrangement, or re-arrangement of the original, or as would be stated within the parlance



of copyright, a derivative work. The position of the court was that since the piece was being replicated by a machine, a mechanical contrivance, it was not derivative, and if Congress wished it to be thought of as such it would need to be more explicit.

Congress quickly responded to the court's decision, and as a result section 1(e) of the 1909 *Copyright Act of the United States* created a compulsory mechanical license rate royalty of 2 cents per copy.

*And provided further, and as a condition of extending the copyright control to such mechanical reproductions, That whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of two cents on each such part manufactured.(sic)*

While it required agreement of the copyright owner for a mechanical version to be made, once such a version was released, anyone could release their own mechanical version of the same work, even without the copyright owner's consent, so long as he registered the new work and remitted the compulsory license fee.

In exchange for pursuing the previously mentioned case all the way to the Supreme Court, the Aeolian Co., a piano roll manufacturer, had received numerous long-term license agreements from the Music Publishers Association (Copyright Society of the USA 881). Given these licenses, other piano roll manufacturers were concerned that the Aeolian Company would establish a monopoly in the field. It was this monopoly concern which prompted Congress to create the compulsory license (880). Once the work was

initially offered in a mechanical form, the compulsory license ensured other manufacturers could offer their versions, or direct copies. The desire to compensate the copyright holders in this circumstance was tempered by the fear of the establishment of a monopoly.

Previous to the 1909 U.S. amendment copyright had not had a specific mechanical reproduction right, only a reproduction right. Of course during most of the previous period, the value of the music was in the reproduction right, which is to say the production of copies of the sheet music. Even today the rights are treated separately under copyright. For example the *Copyright Act of Canada*, section 3, (1a) defines the reproduction right as the right “to produce, reproduce, perform or publish any translation of the work,” while the mechanical reproduction right is listed under section 3, (1d) specifically as an exclusive right “in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or *other contrivance* by means of which the work may be mechanically reproduced or performed” [emphasis added]. With the pace of technological advancement that had taken place from the end of the nineteenth century into the first part of the twentieth century, it was understandable that the *Copyright Act* would include language that would hopefully insure its application to any future changes, hence the inclusion of ‘other contrivance’ in the first Canadian *Copyright Act* of 1924.

With respect to the U.S. *Copyright Act* of 1909, the mechanical reproduction right and the compulsory license came to be applied not just to piano rolls, but also to all forms of mechanical reproduction including phonograph records. Even at the minimum two-cent royalty rate, the compulsory license would generate substantial earnings in the

decades ahead as the record industry achieved massive growth.

Gramophones and phonographs, which had been invented in the nineteenth century and marketed primarily as office equipment,<sup>67</sup> had in fact achieved a level of popularity as novelty devices for the playing of music. Early jukeboxes were placed in pubs and boardwalks where they provided amusement for a public eagerly seeking leisure time distraction (Garofalo 324). As the costs of the new technology dropped, home ownership and use of gramophones and phonographs became affordable. By the 1920s phonograph records had become commonplace, and an industry began to evolve around it. This marked the creation of a whole new aspect of the music industry: the recording and record industry.

Up to this point the industrial complex had consisted of music publishing, performance and instrument manufacture. As a result, the vast majority of those involved with the industry had a musical background, either as practitioners, or impresarios. The recording industry however was an outgrowth of the larger electronics industry and as such was populated primarily with individuals from the worlds of science and business. They were not by and large trained musicians, rather they were simply interested in selling their products and that meant creating the software to use with their hardware (Frith, *Industrialization of Popular Music* 58). They were however very effective in creating and manipulating a market for their products, and by 1927 sales of phonograph records topped \$104 million US (59). By 1999 sales reached \$14.6 billion [US].<sup>68</sup>

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<sup>67</sup> Garofalo relates that Thomas Edison viewed the reproduction of music as fourth on his list of possible uses for the new technology, and a mere novelty at best. See Garofalo, pages 323-324.

<sup>68</sup> Recording Industry Association of America, <http://www.riaa.com>, Piracy, accessed January 2012.

### 6.3 Radio Grows into a Commercial Force

Radio was also becoming common, and for those who could not afford a phonograph, a crystal radio set was within reach. Indeed, as Barnouw comments the social connection radio provided was staggering, and particularly apparent during the depression: “Destitute families that had to give up an icebox or furniture or bedding still clung to the radio as to a last link with humanity” (qtd. in Garofalo 32). Nor was this impact lost on those in power, for it was during this period that U.S. President Franklin Roosevelt began his “fireside” chats. Indeed Roosevelt’s comprehension of the ideological uses of radio was far-reaching, and during the Second World War he formed the Armed Forces Radio network in part to combat the propaganda machines of axis forces, but also to spread American values worldwide (Garofalo 32).

However, like other new technologies, radio was initially seen as a threat to the existing music industries. In 1925 the public performance right would be extended to broadcasting when it was determined to be synonymous with a performance regardless of the fact that it was taking place in a private home (*Jerome H. Remick & Co. v. American Automobile Accessories Co.*). Shortly thereafter the American Society of Composers, Authors and Publishers (ASCAP) began to also collect royalties on behalf of their members for performing rights from radio broadcasts (Shepherd 70-71).

Radio developed differently in the U.S. and England. In England, radio owners paid a licensing fee to the government, which in turn funded radio broadcasting via the British Broadcasting Service which was the only legal radio station until 1970. As a result the BBC was more inclined to program what they thought people should be listening to as opposed to what they might want to hear, which meant a preponderance of

classical programming (Shepherd 130). In fact it was only due to the pirate stations broadcasting pop music in the 1960s that the BBC reorganized their offerings to create BBC4, which featured popular music (132). The Canadian experience was a hybrid of the two, with a national network established (the CBC) in conjunction with the free market.

#### **6.4 Cinema and the Music Industry**

Although early films were silent by definition, musicians virtually always accompanied them. In smaller venues that might mean a lone pianist or organist, but larger theatres had orchestras on contract to supply music for their projections. While this of course meant additional sales of print music and new compositions and arrangements, both for the performers and the audience that might rush out to buy them following performances, the real impact of cinema arrived with the addition of sound to film in the 1920s.

Though there were a number of earlier experiments, the first “talkie” premiered in 1927 when Al Jolson, a noted vaudeville star of the time, performed in the title role of the “Jazz Singer.” The film industry responded quickly to the public interest in the new medium and by 1930 virtually all films were talkies (Gomery 5). As movie mogul Harry Warner noted, this innovation meant that every movie house could provide whatever community it serviced the experience of a 110-piece orchestra (Karlin 175). The new medium also allowed the studios the opportunity to “mix and match” the stars of the day in various combinations of film “shorts.” No live theatre of the day could possibly have afforded the salaries required to duplicate such a combination (Gomery 13). The major studios recognized the possibilities of the new medium and began investing heavily, including the creation of music divisions within each of the studios. In addition the

California-based studios began looking to New York to purchase established Tin Pan Alley publishing houses and their catalogues (Shepherd 83). This period of the 1930s and 40s became the era of the Hollywood musical.<sup>69</sup>

### **6.5 A Shift in the Industry Mentality**

The net effect of all these changes was the realization that the value of the music industry was now shifting from actual production and sales of goods (hardware in the form of instruments and software in the form of print music, or piano rolls to use with the hardware) into the collection of royalties. Public performance and mechanical (reproduction) rights, which had been of little value or interest in the previous century, would in the future provide the bulk of the industry revenues.

The broadcasting industry is a prime example of this phenomenon. By the 1930s, 85% of all American households had radios. The licensing agreements with ASCAP allowed for a fee of 5% of the total advertising revenues of the member stations. From 1931 to 1939 licensing revenues rose from \$960,000 to \$4.3 million. The broadcast industry, distressed to see so much of their profits moving away, formed their own licensing agency, Broadcast Music International (BMI), for “the specific purpose of resisting ASCAPs royalty demands” (Hugunin 9). ASCAPs rates had risen dramatically over the years, and when their new contract with the radio industry was tabled it sought

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<sup>69</sup> For example consider the following brief, and by no means exhaustive, list of some of the major successes of the period:

42<sup>nd</sup> Street, 1933  
 Gold Diggers of 1933, 1933  
 Top Hat, 1935  
 Swing Time, 1936  
 Shall We Dance, 1937  
 Yankee Doodle Dandy, 1942  
 Meet Me in St. Louis, 1944  
 On the Town, 1949  
 An American in Paris, 1951  
 Singin' in the Rain, 1952

the equivalent of 15% of radio revenues as payment (9). ASCAP represented primarily the classical composers and publishers, so BMI signed up the country, and rhythm and blues artists. When the ASCAP contract ran out in 1941, the vast majority of stations had signed with BMI, and thus effectively overnight the programming content of radio changed to a “pop” orientation. According to Hugunin, by 1952 BMI controlled as much as 80% of the radio market in some areas (11).

Later advances in technology allowed for radios in cars, and radio sets that could be carried on one’s person. Next, the development of the cassette tape and its rapid expansion allowed not only for personal mobility, but also the freedom to mix and match recordings to one’s personal taste. The digital experiences of our contemporary time frame are merely extensions of the same patterns. In many ways the history of popular music and its technological dependency is commensurate with a shift from collective to private pleasure in the twentieth century (Frith, *Popular Music Industry* 37).

It is also worthwhile to consider the shift in the nature of music itself throughout this period, and not merely in its consumption. Attali points to the change in the nature of music from eighteenth and nineteenth century to the twentieth century as being synonymous with a change in the force of music from it being one of representation to one of repetition. Within a political economic framework, Attali sees this as a material force of production in the creation of the consumer society which will dominate the twentieth century. Curiously, he also sees the microcosm of music as being prophetic of the changes in the larger society as whole. The fact that the public performance right in music lacks a traditional commodity form (in historical process) and a legitimate productive value within orthodox Marxian frames, only serves to draw greater attention

to its successful commodification. Certainly within the larger copyright frame the successful imposition of a public performance right was prophetic with regard to the notion of collective licensing generally as will be discussed later.

Another major development of the twentieth century was the emergence of the record industry as a vehicle of youth culture. The postwar years of the 1950s provided the right combination of social factors to create the breeding ground for rock 'n' roll and the dominance of the youth market. The convergence of a healthy economy, the shift from a classical to a popular radio culture, the proliferation of television, mass youth employment and considerable leisure time in urban environments ripe for the marketing of a youth culture, combined with a major policy shift, to create a new era for radio and popular music.

Prior to 1947 the Federal Communication Commission (FCC) of the United States had limited the number of radio stations to four or five in each market. In 1947 they shifted their policy in response to concerns over the coming innovation of television and effectively doubled market penetration overnight (Shuker 43). What had been essentially a single national market for the four major broadcasters became 100 autonomous local markets with eight to twelve stations competing in each. In the period from 1948 to 1958 the major broadcasters lost 75% of their market share to the independents (44). Unlike the majors, the independent stations needed to find alternative programming to compete for listeners in their market and the record industry was eager to fill that gap (43). The focus on youth had substantial results with the dollar value of record sales climbing from \$200 million to \$600 million between 1954 and 1959 (Frith, *Industrialization of Popular Music* 66). In 1967, U.S. domestic sales topped \$1 billion for the first time, and by 1978



they had reached sales of more than \$4 billion (67). As mentioned earlier, by 1999 sales reached \$14.6 billion yearly.<sup>70</sup>

The initial effect of the industrialization of music was a greater distribution and massive increase in the opportunity to listen to and perform music. However, the technological advancements of the twentieth century had a chilling effect on actual music making, and there was a shift to consumption. For example, the market for pianos throughout the nineteenth century was so vibrant that Canada at one time had two hundred and forty piano manufacturers. The last of these (Sherlock Manning) closed its doors in 1988. As author Wayne Kelly noted:

It wasn't the phonograph or the radio, the automobile, or the television that caused the downfall of this once proud industry. It was all of them. What once had been the centre of entertainment in the home, the item around which entire families lovingly gathered, was slowly replaced by other pastimes. Entertainment was now available at the turn of a crank, a knob, or a key. (138)

Indeed, by the 1970s the record industry had become so prolific and innovative in their marketing abilities that sales increases seemed limitless (Frith, *Industrialization of Popular Music* 68). Ultimately however, the dawning of the computer age and the emergence of home recording technology would once again enfranchise the user as an active participant in the process.

## 6.6 The Mature Industry

The late 1960s and early 1970s marked the beginning of a remarkable period of change for the music industry on a number of fronts. Chief among these were the changes

<sup>70</sup> Recording Industry Association of America, <http://www.riaa.com>, Piracy, accessed January 2012.

wrought by the use of magnetic tape within the recording industry. Magnetic tape had existed for years but had been primarily utilized by the broadcast industries. Record producers realized the benefit of using tape as a medium for recording so that editing (by means of splicing) could be done to create the best recording possible prior to transfer to the master disc. Tape also allowed producers the ability to actually “create” in the studio by means of experimentation with the technical possibilities of the medium, such as phase, echo, and speeds. Indeed, by the end of the 1960s and into the 70s the nature of recording would change dramatically. No longer would artists arrive at the studio with their material prepared and ready to run as quickly as possible for recording; instead the recording process would itself become an organic act of creation.

Music producers Phil Spector and George Martin are pre-eminent examples of this trend. Spector’s “wall of sound” production technique became synonymous with his work and could be distinctively heard on the recordings of all the artists he produced, regardless of the genre of music in which they performed. Similarly, Martin was often referred to as the fifth Beatle, given that he would arrange and choose the instruments for the orchestrations added to their recordings, as well as often play piano on the recordings themselves (Miles 205). Examples of his influence are far reaching within the Beatles catalog, but two prominent examples are the piccolo trumpet solo on *Penny Lane*, or the string-quartet accompaniment of *Eleanor Rigby*. These unique musical flourishes helped to define and shape the sound of the band and in turn the sound of the culture.

By the 1970s this process had reached its zenith with bands frequently spending months in the studio, at increasing cost, to create their latest offerings. The studio itself became a compositional tool and the recording process was forever changed (Théberge 8-

9). The expanding roles of the producer and studio also had far reaching implications for copyright. As the studio, engineer and producer began to play a larger role in the creation, and arguably success, of the record, there was an increasing movement to represent the implications of these roles within copyright law. The 1961 *Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations* tabled agreements entitling producers of sound recordings and artists whose performances are captured on sound recordings to receive royalty payments on public performances or broadcasts. It also established a rental right for such artists to be collected in the event that the copyright owner allowed such acts. These new rights were considered “neighbouring” rights to the existing ones. However, like Berne before it, the Rome agreement was only binding on signatory nations, and Canada would not enact legislation to address the Rome Convention until the 1988 Phase I revisions to the *Copyright Act*.

Arguably the biggest single change in the industry during this period, and the one with the greatest implications in terms of policy issues, was also the result of magnetic tape, specifically the introduction of the cassette tape. The cassette tape revolutionized the way in which music was heard in a number of ways. The durability and small size of the cassette structure lent itself particularly well to mobile music formats and car stereo producers were quick to see the benefit. The small size and excellent quality quickly established the cassette as the dominant format over the 8-track. The pre-recorded cassette became so popular, and the player so commonplace, that throughout the 1980s pre-recorded cassettes would outsell both LPs and CDs (Théberge 19).

The greatest impact of the cassette, however, was undoubtedly the ability of the

general public to record music of their choice, either from a live source or from a pre-existent medium (recording or broadcast). As demand rose, the audio industry continued to create higher quality machines in smaller sizes. As the 1980s arrived the Sony Walkman became the personal audio unit of choice with the youth market. The Walkman was particularly important, because not only could one play back the music that had been purchased or recorded on the cassette, but the higher priced models also allowed the consumer to record at source.<sup>71</sup>

The cassette also allowed the public the opportunity both to record and disseminate alternative music not readily available via mainstream media (Théberge 12). Once again the individual was empowered to choose what he/she wanted to hear regardless of a corporate agenda. The cassette “demo” became a mainstay of college radio stations throughout North America. With the increasing availability of affordable home recording equipment, the home studio became a reality for many musicians young and old from the 1980s on. As a result an independent band no longer needed a label to create and distribute recordings (Shuker 39). Throughout the 1980s it became common for bands to record their work independently and sell it from the stage at their performances. The phenomenon continues to this day, albeit now usually in the form of compact disc instead of cassette.

The ability of the individual to pick and choose what she wanted to hear, as opposed to what the record company wanted to sell them, or the radio station wanted to broadcast, became an empowering experience for a new generation. In the novel (and

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<sup>71</sup> As a student in the 1980s the author remembers only too well seeing Walkmans perched on desks recording lectures, and as a club musician of the same period can also recall them being used by audience members to “bootleg” recordings of live performances. In fact the recording quality became so good that it was quite common to find them in the rehearsal studios of classical musicians as well.

subsequent film) *High Fidelity*, by Nick Hornby, the main character Rob owns and manages an independent record store. Whenever Rob becomes smitten with a woman, he makes his first serious overture by “making” a tape for them. Hornby’s character is representative of an entire generation who for the first time in the history of popular music had the ability to individualize the media being marketed to them.<sup>72</sup>

The tape was not only a physical manifestation of the assembler’s tastes (as illustrated through the cultural artifacts collected on the magnetic tape), it was also another means of communication by which the person making the tape attempted to form a connection with another human being via the sharing of cultural media expressions. To return to the notions of personhood raised in chapter four, these shared cultural artifacts had become part of their language of self-expression. Indeed, perhaps more telling in Hornby's portrayal is that at the end of the story Rob has finally achieved an adult status within his relationship and that, in part, is expressed by his effort to make a tape for his partner. However, in this instance the tape will not reflect his tastes and personality, but rather what he thinks she will like. In this latter sense the expression has turned from “this is what I like, do you like it?” to “this is how I understand you to be relative to our shared culture.” Either way the shared cultural expressions that so inundate our contemporary lives mediate the communication.

## 6.7 Digital Days

In June of 1999, Shawn Fanning a student at Northeastern University created a file sharing system that would allow the easy transfer of MP3 music files over the

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<sup>72</sup> Certainly the current digital environment is an even greater facilitator of this. One need only browse any individual webpage--“Facebook” or “Myspace” or an online personals service--to see immediately that to a very great extent people define themselves by the music they listen to. Indeed, they may limit their possible relationships (on a personals site in any event) to those people who share similar tastes.

internet. The MP3 format had been developed in the early 1990s and was an effective means of compressing audio files into a space that was about one tenth the size of a standard compact disc format. As a result people began copying their music files into the MP3 format and sharing them online. In a sense this was an echo of the cassette culture of the 1970s. Fanning's system, which he christened Napster, allowed multiple users to search across the Internet to others users' hard drives and seek MP3s to share. While the actual MP3s resided on the users' hard drives, the system used central servers to maintain lists of connected users, thus it was not a true peer to peer service, since there was an intermediary server.

In December of 1999 A&M records (in conjunction with numerous others) filed a suit for copyright infringement against the online file sharing service Napster. In the suit A&M et al. alleged that Napster was knowingly participating in infringement by making their copyright works available online. In reply Napster claimed that it was merely providing a new technology and was not responsible for individual uses of the technology. Further, Napster claimed that the downloading of music cited by the plaintiffs was in fact justified under the "Fair Use" doctrine, and might also be justified under the "safe harbor" provisions of the *Digital Millennium Copyright Act*,<sup>73</sup> or the Audio Home Recording Act. Ultimately, primarily because its central servers negated the possibility of a "peer to peer" sharing defense, the court ruled against Napster (*A&M Records, Inc. v. Napster, Inc.*). As a result of the loss in court, Napster shut down in July

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<sup>73</sup> The Fair Use doctrine refers to the statutory exemptions to copyright allowed under U.S. law. Certain uses of copyrighted works are permitted if the use meets specified criteria defined under Fair Use. Safe Harbour within the context of copyright refers to On-Line Copyright Infringement Liability Limitation Act, passed by the U.S. Congress in 1998. The purpose of the OCILLA was to limit the liability of internet service providers in instances where their customer's conduct might place them in an actionable position. As long as the ISPs met the conditions of the Act they were deemed to be in a Safe Harbour and free from prosecution.

of 2001. New file sharing services sprang up quickly, Kazza, Gorkster, BitTorrent, etc., and perhaps most significantly, a commercially viable downloading format was developed by Apple, iTunes. Opening on April 28, 2003, the online iTunes store had sold over 10 billion music files as of February 2010.<sup>74</sup> However, the long term impact of Napster is perhaps more poignantly displayed in the Recording Industry Association of America's decision to target individual downloaders, which will be discussed in chapter nine.

A new twist to the digital download phenomenon can be seen in the online offerings by various independent and established performers. For example, Jane Siberry,<sup>75</sup> an influential Canadian artist who enjoyed significant mainstream popularity in the 1980s, has completely disbanded her distribution system. Siberry now self publishes all her own work which is exclusively available online. She continues to perform and record, but no longer deals with the larger industry. In fact Siberry makes her recordings available for download on a "pay what you feel it is worth" basis. While such an approach may seem fraught with peril, the bottom line for Siberry has been far less time spent managing the industrial aspects of her art, and more time to devote to the art itself, and, perhaps most surprising of all a higher profit margin.<sup>76</sup> Some may dismiss Siberry's success as simply a reflection of a deeply devoted fan base constituting a niche market, but the larger commercial market would seem to suggest otherwise.

The British band Radiohead stunned the industry of the day when they announced they would be releasing their newest album for free on their internet website in October

<sup>74</sup> See <http://www.apple.com/itunes/10-billion-song-countdown/>, last accessed January 2011.

<sup>75</sup> While the majority of her professional career was spent under the name Jane Siberry, she now refers to herself as "Issa," singular.

<sup>76</sup> Globe and Mail, September 30, 2006, p. R1.

of 2007. After a long period of free downloading the group made the album available for a substantially reduced fee (in comparison to commercially available outlets including those such as iTunes). Radiohead's move was particularly significant, as they were a well known popular band, with a track record of significant sales, and many industry awards. In other words they potentially had a lot to lose.<sup>77</sup>

Similarly, HBO comedian Louis CK released his comedy special *Live at the Beacon Theatre* as a streaming download from his website without DRM and for a \$5 dollar fee in December of 2011. On his website he noted that he had produced the special himself at great expense (at a cost of approximately \$250,000.00) and despite warnings against it had intentionally released it without DRM and set the price extremely low so as to allow fans the greatest possible use of the end product. He recognized that in so doing he had made it extremely easy to pirate but he asked that people not do so. Apparently his audience was listening because in twelve days he had collected over a million dollars in sales. (Callaham)

The recent work of economists Oberholzer-Gee and Strumpf has focused on the effect of widespread file sharing (in various formats and of various genres) with respect to ongoing creative output. Their operational premise was that if increased file sharing had, on the basis of industry reports of losses, significantly damaged the incentives created under copyright regimes there should be an quantifiable loss in creative output, since the fundamental justification for copyright regimes (in Anglo-American systems) is an incentive for creation. In fact, their findings indicated the exact opposite,

The publication of new books rose by 66% over the 2002-2007 period.

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<sup>77</sup>See: [http://www.zeropaid.com/news/9026/radiohead\\_shocks\\_record\\_industry\\_with\\_free\\_download\\_of\\_nw\\_album/](http://www.zeropaid.com/news/9026/radiohead_shocks_record_industry_with_free_download_of_nw_album/), last accessed January 2011.



Since 2000, the annual release of new music albums has more than doubled, and worldwide feature film production is up by more than 30% since 2003. At the same time, empirical research in file sharing documents that consumer welfare increased substantially due to the new technology. (2)

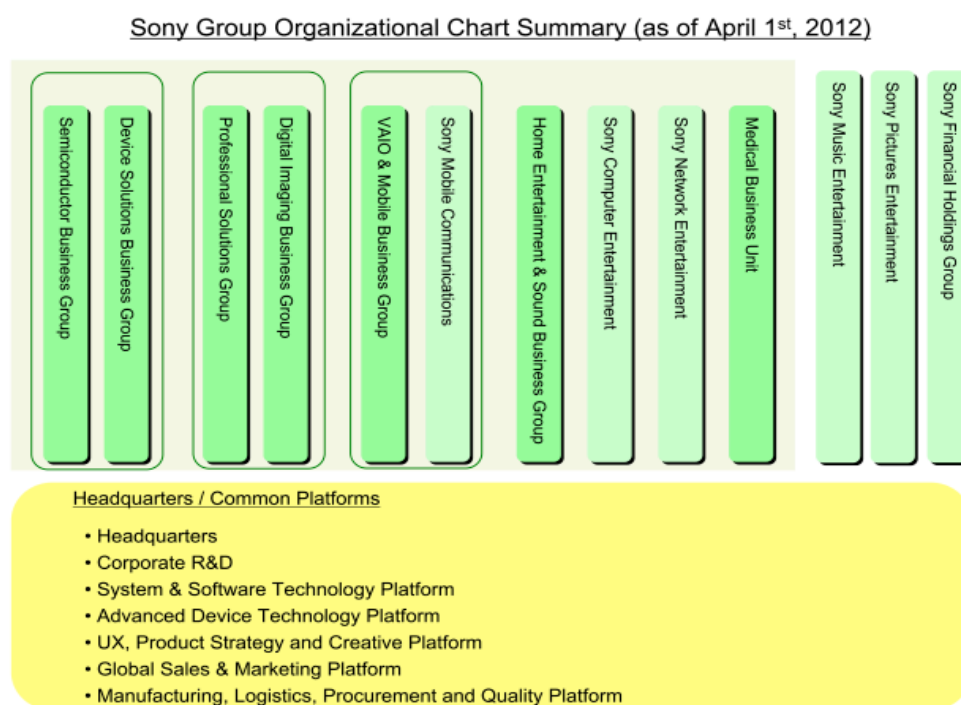
Thus despite reduced incentives and a significantly weakened copyright environment creativity and publication thrived. Such behaviour seems to echo the early musicians of the pre industrial-era, where other factors drove the communication of the work to the public, such as desire for patronage, public awareness, creation of new markets, etc. Or perhaps it is simply our desire to share those things which make us distinctly human.

As we consider the implications of this growth in creativity despite the diminution of public sympathy for intellectual property rights it is important that we also take into account the state of current music industries. The music industry of today was until recently dominated by four multinational firms: Sony, Universal, EMI and Warner. In November of 2011 EMI's recording division was sold to Universal and the publishing division was sold to Sony (Sabbagh). As an example of their vertical integration, we will consider some of the more significant (relevant to this analysis) interests of the Sony, Universal and Warner groups. Due to significant restructuring and legal issues the financial details for EMI were not readily available and given the subsequent outcomes already noted they are of less significance now; nevertheless some information is

available with respect to their operations.<sup>78</sup> Where financial data was available it was reviewed for the 2008 fiscal year. Given the worldwide economic crisis of 2008 the impact to these industry leviathans was of particular interest. While the more recent data was not included it can be viewed at the corporate websites.

## 6.8 Sony

A copy of the Sony organizational data chart follows.<sup>79</sup>



As displayed on their website “The Sony Group is primarily focused on the Electronics (such as AV/IT products & components), Game (such as PlayStation), Entertainment (such as motion pictures and music), and Financial Services (such

<sup>78</sup> In 2007 the European investment firm Terra Firma purchased EMI control from Citigroup in the United States. The subsequent economic meltdown of 2008 negatively impacted Terra Firma and EMI, resulting in major restructuring. Terra Firma would later launch a suit against Citigroup charging that they had been misled as to the value of the holdings and interest of other purchasers in the EMI sale. A New York state court would find in favour of Citigroup, but Terra Firma has given notice of intent to appeal. See associated press story at <http://online.wsj.com/article/AP9128fa21c3dc4c51850af6705c6f80d5.html>, last accessed January 2011.

<sup>79</sup> Source <http://www.sony.net/SonyInfo/CorporateInfo/Data/organization.html>, last accessed April 2012.

as insurance and banking) sectors”.<sup>80</sup> If one considers the impact of their divisions on the music industry, virtually every aspect of their corporation would intersect with the industry beyond the obvious music entertainment division. Their financial holdings would subsidize and support their ventures, their pictures division would utilize their copyrighted musical works (amongst others), their mobile communications would make their (and others’) copyrighted material available on their networks. Similar connections might be made throughout the entire organization chart.

### **6.9 The Universal Music Group**

Universal Music group is not only the leader in recorded music but also holds the largest catalog of music in the world in its publishing division. As part of the Vivendi Group, it includes among its organizational brethren Activision Blizzard, the world leader in video games. As previously noted in the section on Sony, video and music go together on many levels. The Activision Blizzard group was formed in 2008 as a result of a merger between Vivendi games in France and the American corporation Activision games. The new company controls some of the largest selling video games in history.<sup>81</sup> Nor is this the only video link in the Vivendi group.

Vivendi also has full ownership of the Canal group which is a major content provider of both film and video product both in Europe and worldwide. Again much like Sony, the larger umbrella group of Vivendi also includes SFR, the second largest telecommunications group in France, which provides both mobile and internet service. They also hold a twenty percent ownership share in NBC Universal, a major worldwide

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<sup>80</sup> From the Sony corporation website home page, About Sony, <http://www.sony.net/SonyInfo/>, last accessed April 2012.

<sup>81</sup> Some of their better known titles include: *Crash Bandicoot* series, *Guitar Hero* series, *Spider-Man* series, *Spyro the Dragon* series, *Warcraft* series, *StarCraft* series and *Diablo* series.

force in the production and distribution of film and television (Universal Vivendi Annual Report 14). All these endeavours depend upon content creation, distribution and management provided by the varying sectors of the overall group. Music can be sold through brick and mortar outlets, streamed online through a third party (e.g. iTunes), downloaded onto mobile devices supplied and serviced through SFR, streamed on the networks run by SFR, and included in the soundtracks created by the Canal group, NBC Universal or Activision Blizzard.

Despite the economic meltdown of 2008, Vivendi managed to increase their revenues by nearly 230 million euros over the 2007 fiscal year (Universal Vivendi Annual Report 138). With respect to the music group alone, there appears to have been a decline (from 4.99 billion in 2007 to 4.65 billion in 2008) as noted in their chart illustrating revenue. Despite the drop, the Vivendi report states, “The music industry competes for consumer discretionary spending with other entertainment products such as video games and motion pictures” which is to say that while the music division may have suffered, the content it provided to the video and film areas (with which it is in competition for consumer dollars/euros) undoubtedly contributed to the success in those areas which helped drive the overall organization profit margin upward.<sup>82</sup>

Vivendi Group: revenues in millions of euros	2006	2007	2008
Activision Blizzard (1)	804	1,018	2,091
Universal Music Group	4,995	4,870	4,650
SFR (2)	8,678	9,018	11,553
Maroc Teleco Group	2,053	2,459	2,601
Canal + Group	3,630	4,363	4,554
Including non-core operations and others, and eliminations of intersegment transactions	(76)	(68)	(57)
Total	20,044	21,657	25,392

<sup>82</sup> Vivendi Group Financial Statement 8.

## 6.10 The Warner Music Group

The January 2009 letter from Warner CEO Edgar Bronfman Jr. to shareholders which prefaced the Warner financial report succinctly stated their situation: “At a time of great upheaval both in the broader economy and in the recorded music industry, we implemented an innovative and disciplined management approach that sustained revenue and OIBDA<sup>83</sup> – no small achievement in this challenging environment,” later noting “As a result, our year-end cash balance grew to \$411 million in fiscal 2008 from \$333 million in fiscal 2007”.<sup>84</sup> It is interesting that despite the worldwide economic meltdown their year-end cash balance grew by a little less than 33%.

Warner Group Revenues in Millions of Dollars	30-Sep 2006	30-Sep 2007	30-Sep 2008
Revenues	3,516	3,383	3,491
Cash & Equivalents	367	333	411
Artist & repertoire costs	1,155	1,144	1,181
Product costs	603	597	574
Licensing costs	64	70	77
Total revenue costs	1,822	1,811	1,832
Music Publishing Revenue	538	570	623

However, unlike Sony and Vivendi, Warner operates exclusively within the traditional roles of the music industry, which is to say music publishing, recording, distribution, artist management and marketing. As a result the 2007 and 2008 revenues are both diminished from the 2006 level. Management of Warner attributes this almost entirely to online piracy, however it seems reasonable to suggest that some of the losses might be

<sup>83</sup> OIBDA is an acronym for Operating Income Before Depreciation and Amortization. A specific form of accounting analysis, it allows the reporting of the financial statements of a company within the context of the years earnings irrespective of any costs or depreciations that may have resulted from actions taken in a previous year such as the acquisition of Time Warner in 2004.

<sup>84</sup> Warner Financial Report 3.

the result of restructuring. The corporation undertook the single largest acquisition in the music industry when it formed the Warner Music Group in 2004. Time Warner was seeking to divest itself of some of its holdings to reduce its debt load and an investors group led by Bronfman purchased the music division. Despite the use of the Warner name, Time Warner does not own any portion of the Warner Music Group. Regardless of the current losses, it is interesting to note that music publishing revenues continue to grow throughout the periods cited. These increases are attributed to the increased revenue from performance and synchronization streams.

### **6.11 EMI**

The financial report for EMI was not available for the 2008 year being compared, however their 2007 report was. In general that report reflected the overall downturn in the industry, which was also noticeable in the Warner group figures comparing 2007 to 2006. In a manner similar to Warner, EMI had not engaged in horizontal or diagonal integration in the same manner that Universal and Sony had, but had continued to focus on traditional music industries, specifically music publishing, recording, distribution, artist management and marketing.

The 2007 report of EMI noted that performance rights were responsible for thirty percent of the publishing division's revenue, not including ringtones. (14) They also stated that as the industry continued to evolve along digital pathways, they would continue, "helping to reform the industry's infrastructure through licensing and rate setting initiatives" (22). Ultimately, as mentioned earlier EMI would be broken up and consumed by the remaining 3 major interests controlling the music industry.

While a desire to reform and set licenses and rates is normal in any business environment, we should recall that even as the recording (and publishing) interests of the music industry were bemoaning the illegal downloading taking place, the hardware manufacturing arms of these same interests were recording record sales numbers. The music industry, like all industrial forms is predicated on ever expanding markets. To a large extent they create these markets by offering existing materials in new formats. This in turn allows them to provide the public with latest “must have” commodities, such as iPods,<sup>85</sup> generic MP3 players, analog to digital conversion software, hardware and stand-alone machines. This creation of market is not a new practice.

From a historical perspective it has clearly been in the interests of the music industry to move through the various disc formats, and ultimately to kill off the 45rpm single (Dawson and Propes 122). In so doing they ensured that the public would have to purchase an entire album and not just their preferred tracks. This practice would continue until the advent of digital downloading and the iTunes business model.<sup>86</sup> Indeed, the continuing migration--from vinyl album, to 8-track, cassette, and CD—has been driven by the research and design interests of the music industry. As comedian Paul Reiser noted at the 1995 Grammy Awards, “A little message to the industry. I bought tapes to replace my records, then I bought CDs to replace my tapes. If you change one more time, I swear, we’re all gonna buy sheet music and hum!” (qtd. in Dawson and Propes 124)

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<sup>85</sup> In his keynote address to attendees at the 2010 Mac Expo, former Apple CEO Steve Jobs stated that since 2001, 250 million iPods had been sold. That was only iPods, not the similar products of any of their competitors.

<sup>86</sup> The iTunes music player began shipping as part of the Apple operating system in 2001. Shortly thereafter Apple opened the online iTunes music store, offering digital downloads of both singles cuts and full albums. Originally many music publishers refused to deal with iTunes, but ultimately in 2008 Apple signed a deal with major holdouts adding a price variant per track, which was at odds with its original ‘all tracks 99 cents’ format.

In 1993 Sony president Norio Ohga admitted to the press that Sony had pushed the CD format into the market to create sales, not as a result of any quality or convenience issues (Dawson and Propes124). Similarly, while the music industry was sampling pre-existing works as part of the explosion of urban music, it was the publishing interests of the same industry that were suing for copyright infringement. Such an action might seem counterintuitive, to litigate against one's own (or a close colleague's) recording interests, however the nature of contractual agreements within the industry generally guarantees that the artists, as opposed to publisher or industry, bear responsibility for any infringement. As such the industry interests were removed from any culpability. Thus it was not the industry interests that would end up footing the bill, but rather the artists themselves (Brabec and Brabec 393-399).

It is not within the scope of this thesis to examine these connections in great detail, however it is important to bear these relationships in mind as they provide context for the larger discussion of IP rights and justifications. In particular as the discussion begins to focus on the present-day it is critical to recall that three corporations control the majority of music heard worldwide. In fact, with respect to Canada specifically, Simon Doyle notes that the “big 4” control 95% of all music in Canada (Doyle 16).<sup>87</sup> Also noteworthy within the Canadian context is the lobbying impact of the Canadian Recording Industry Association (CRIA) which according to Doyle had almost unfettered access to government ministers during the 1996 copyright amendment efforts. While CRIA purports to represent the Canadian music industry as a whole, “CRIA primarily represents, however, the Canadian branches of the most powerful companies in the global sound recording industry” (Doyle 16). The “most powerful companies” Doyle refers to

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<sup>87</sup> Doyle's work was published in 2006, long before the loss of EMI.



were those recently discussed, Sony, EMI, Warner and Universal. Also interesting is the fact that the board of the “Canadian” Recording Industry Association consisted of representatives of the big four and the president of the Canadian lobby group, Graham Henderson (17).

Beyond the traditional music interests of publishing and recording, the larger integrated multinationals also interact with virtually every other entertainment form and have significantly affected the expense and availability of formats and devices. Thus as the discussion turns upon the concepts of legislation and policy it is important to note that the fact that three corporations control the worldwide music market ensures that they will have significant impact and voice at every policy discussion worldwide. And given the impact of CRIA on the Canadian policy environment, the impact will be deeply felt:

There is little doubt that the representatives of major corporations can and do have greater access to both politicians and public servants than do other individuals through trade associations, their own professional representatives and, perhaps most effectively, private conversations between corporate officers and those involved in the policy-making and legislative process. (Royal Commission on Corporate Concentration 338)

This chapter has traced the development and establishment of the music industry primarily through the channels of publication and performance. Throughout this process the focus has shifted from an artisan-based practice to a larger professional community. The late nineteenth and early twentieth centuries were noteworthy for the more highly commercialized and commodified forms of music consumption and production which arose: where previously more participatory forms of music making had been the norm,

they were to a large extent replaced by music reception. This period was also marked by an expansive technological component within the larger industrial framework. This later “industrialized” period had an increasing need for new market to accept product from the industry. In general, while the nineteenth century had established the infant music industry, confined primarily to sheet music publishing and reproduction, as well as the production of instruments and performances, the twentieth century saw the growth of the larger industrial complex as a byproduct of technological innovation. Though legally established in the nineteenth century, the public performance right began to significantly impact the industry in the early years of the twentieth century. Ultimately the public performance right would become a very significant factor in the industry as the next chapter will make clear.

## Chapter 7: The Establishment of the Public Performance Right

This chapter will review the history of the copyright owner's public performance right, from its inception in Continental law up to its appearance and acceptance in common law. Special attention will be paid to the establishment of the public performance right in North America.

This thesis concerns itself with the public performance right and its evolution as opposed to a performer's performance, which was briefly mentioned in the previous chapter in regard to the Rome Convention; the two can easily be confused. The public performance right is the exclusive right to "perform the work or any substantial part thereof in public" (*Copyright Act* sec. 3 (1)). In contrast a performer's performance is the exclusive right in respect of the performer of the work to do the following if it is not fixed in any form:

- (i) to communicate it to the public by telecommunication,
- (ii) to perform it in public, where it is communicated to the public by telecommunication otherwise than by communication signal, and
- (iii) to fix it in any material form., (*Copyright Act* sec. 15 (1))

If the performance has been fixed:

- (i) to reproduce any fixation that was made without the performer's authorization,
- (ii) where the performer authorized a fixation, to reproduce any reproduction of that fixation, if the reproduction being reproduced was made for a purpose other than that for which the performer's authorization was given, and

(iii) where a fixation was permitted under Part III or VIII, to reproduce any reproduction of that fixation, if the reproduction being reproduced was made for a purpose other than one permitted under Part III or VIII, and  
 (c) to rent out a sound recording of it, and to authorize any such acts  
 (*Copyright Act* sec. 15 (1)).

It is important to bear the distinction in mind. The public performance right was established in regard to the public performance of works, whereas the right in a performer's performance was established in regard to the performances given by a performer in any fixation or reproduction (including broadcast) of a work and is generally referred to as a neighbouring right. Given the similar contemporary usage of the terms it is important to maintain the distinction, particularly when considering the historical development, as they arise in different historical periods for different reasons. It is the public performance right which forms the locus of this work.

As noted in chapter four, the basic notion of a "droit d'auteur" (author's right) originated in the French evolution of copyright and was fundamentally different than the evolution of copyright in British common-law jurisdictions. However, by the nineteenth century British law had begun to focus more on the centrality of the author and in the 1814 *Copyright Act*, tied the term of copyright to the life of the author or twenty-eight years (whichever was longer) (Feather 124). Previous to the 1814 Act the term of copyright was set out by the legislation without regard to the author's existence. The passage of the 1814 *Act* marked a fundamental shift in the nature of copyright under British law.

Even with the shift towards the author or creator, the notion of a public

performance right in respect to music was nonexistent under British common law at this time. The first appearance of a specific public performance right under British law was in the *Dramatic Literary Property Act 1833*, which gave protection for a performance of a dramatic work as separate from its publication, thus allowing authors the ability to collect performance fees for each individual performance (Feather 124). While the 1833 *Act* only applied to dramatic works, composers of opera and musicals were able to collect a performance right under these auspices as their works were an integral part of the dramatic work. Subsequently, the *Copyright Act 1842* extended the same right to creators of music:

. . . be it therefore enacted, that the provisions of the said Act of his late Majesty, and of this Act, shall apply to musical compositions, and that the sole liberty of representing or performing, or causing or permitting to be represented or performed, any dramatic piece or musical composition, shall endure and be the property of the author thereof, and his assigns.  
(sec. 20)

As a result of the 1842 *Act* a public performance right was legally established as a separate economic right within the United Kingdom, however no serious attempt was made to enforce the right for more than seventy years.

The French Société des Auteurs, Compositeurs et Éditeurs de Musique (SACEM) began operation in France in 1851 and had a profound effect upon the establishment and acceptance of a public performance right within common-law jurisdictions. The French society was established on the basis of a copyright infringement action brought by a French composer, Ernest Bourget, against the owner of the Ambassador café, a Mr.

Morel. Bourget alleged that the café was liable for infringement since he had not given them permission for the performance of his music.<sup>88</sup> While in search of the legal citations that support the establishment of SACEM, the author contacted the society directly. Eventually an agent of SACEM responded with the legal background for the establishment of the case. The SACEM agent however was quick to note that French law was statute based, and thus very different from the common-law tradition within England, Canada and the United States

You shall keep in mind that French cases are usually quite short because they rely on statutes, in contrary to Common law systems where cases are an important legal source. However, author's right law is special in this perspective since it was based for a long time on very short revolutionary texts from 1791 and 1793; therefore the judges have been implicated in the process of the creation of this law, but their decision were mostly cursory as usual.<sup>89</sup>

As the SACEM agent had noted, the ruling was brief and with almost no discussion. The statute was clear: the author owned all rights including that of public performance. In a pattern that would be embraced by all subsequent performing rights organizations, successful litigation paved the way for the expansion of operations, and in this first instance, the establishment of SACEM.

Under the Berne Convention, which Britain signed on December 5, 1887,<sup>90</sup> foreign copyright owners were entitled to the same protection as the nationals of a

<sup>88</sup> *Tribunal de Commerce de la Seine*, 03/08/1848.

<sup>89</sup> Correspondence between the author and the Director of Relations of the Societe des Auteurs, Compositeurs et Editeurs de Musique, October 20<sup>th</sup>, 2009.

<sup>90</sup> The list of all signatory nations, and the dates on which they signed, can be viewed at [http://www.wipo.int/treaties/en/ShowResults.jsp?treaty\\_id=15](http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15), last accessed January 2012.

member country. Even though a public performance right had existed in Britain since 1842, British authors and composers were not sufficiently well organized to have been able to enforce this right in their own country. As soon as Berne came into force, SACEM opened a British office in London and began launching actions for the infringement of the performing rights assigned to them (Coover 40). While at first these activities were viewed as a nuisance by the British Music Publishing Industry, significant amounts of money were involved. By 1903, SACEM was collecting more than 100,000.00 pounds a year in the United Kingdom (97).

By the start of the twentieth century, many publishers in the British music industry began to take notice of the monies being collected by the continental society, while at the same time noting the reduction in their own sales of sheet music. Alternative sources of income were needed and so early in the twentieth century several performing rights organizations were formed. The Performing Right Society of England (PRS) and the American Society of Composers Authors and Publishers (ASCAP) both formed in 1914, and both would be instrumental in the establishment of a Canadian Performing Rights Society (CPRS) in 1925. The origins of these groups are described in the following section.

### **7.1 The Performing Right Society of the United Kingdom**

The Performing Right Society (PRS) was founded in the United Kingdom in March of 1914.<sup>91</sup> Despite the obvious difficulties of establishing a new business during the outbreak of a world war the PRS managed to survive and flourish. Possibly this early success can be attributed to the fact that SACEM, the French performing rights

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<sup>91</sup> Ironically, one of the founding members was William Boosey, of the famous publishing house Boosey & Hawkes. His uncle had been one of the fiercest opponents of the enactment of the performance right in Britain in the nineteenth century (see chapter six).

organization, had been litigating in the UK since the 1890s, thus paving the way for the eventual establishment of a national organization. However, the fact that a foreign performance right collective existed so far in advance of a national one raises an interesting question: namely, why did it take so long to establish a performance right organization in the UK?

A public performance right in music had explicitly existed in the UK since 1842, and arguably since 1833 with the Dramatic Copyright Act. The French agency had been collecting in the United Kingdom on behalf of their authors as far back as 1880 (James 16). However, it was not until 1914, more than seventy years after the creation of an explicit public performance right by statute, that the British Society was formed. In James's *The Story of the Performing Right Society*, written in 1951, the author merely ascribes the failure to inadequate copyright laws (17). However, bearing in mind the existence of foreign societies, that explanation hardly seems plausible. A later history by Cyril Ehrlich of the same organization, *Harmonious Alliance*, does seriously address the issue. Ehrlich rejects the notion of the delay being caused by legal concerns. "Such interpretations of history give undue weight to intricacies of law, a common tendency in this field of study, and pay scant regard to economic realities" (3).

Ehrlich does note that generally composers and authors were poorly organized, and as a rule suffered in their economic dealings with the businessmen of the industry. However, he also points out that there was nothing stopping the publishers from pressing their own interest in the collection of the performance right on their copyrights (4). There were likely two reasons the publishers had not attempted to do so. The first was simply that the notion of a public performance right seemed counterintuitive to the British



publishing industry of the period. They viewed the performance right as something which, if it existed at all, was purchased with the music (Coover 13).

More importantly, Ehrlich points out that the publishers did not see any value in pursuing the performance right as the amount of money being made from sheet music sales was massive (Ehrlich 5). It was not until a downturn in sales began to affect the publisher's income that the idea of collecting separately for the public performance right was seriously considered. However, given the background of Victorian music piracy, it would seem at least plausible that the downturn in sales was due as much to the profit margins of the publishers as it was to any market vagaries.

In 1912, H. S. J. Booth, a successful member of the Music Publishers Association, made a presentation to the fellow members in regard to the opportunity presented by the growth of cinema in the UK and the fees that might be collected from it if they could successfully establish a performing rights organization (Ehrlich 15).<sup>92</sup> Once sufficient support was raised the Performing Right Society was incorporated and began its attempts to enforce the public performance right as a separate source of revenue. However they faced stiff opposition from music users as well as from members of the industry (17). Not surprisingly, when the issue was debated in the popular press, Oliver Hawkes, one of the members of the newly formed Performing Right Society claimed it was the overwhelming desire of composers that was driving the public performance right issue and the establishment of the regime.<sup>93</sup> Hawkes was quoted as saying the public

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<sup>92</sup> At the time film was becoming popular. Though the films of the period were silent, they were usually accompanied at the least by a piano in the smaller venues, and by full orchestra in the larger locales. These accompaniments would use the standards and light classics of the day to evoke the moods of the film.

<sup>93</sup> The Hawkes family was a distinguished name in British publishing circles. The firm continues to this day, having subsequently partnered with another icon of the industry, the Boosey family.

performance right collective was “an irresistible wave. . . . which no publisher can stop” (Ehrlich 18).

Given the fact that some members of the Music Publishers Association had already made contact with composers about this very issue as early as 1890, and had made attempts to establish a British Performing Right Society, modeled on the French example, it is curious that it took another 26 years to come to fruition (Coover 43). Indeed, Coover notes the intention of the British agent of the SACEM, to start a British society in 1902 (97). Neither attempt was successful because neither effort had the full backing of the MPA, which is to say the publishers who dominated the industry. Once the Music Publishers Association saw the economic value in the union, the partnership was established, though attributed to the zeal of the composers.

Within the context of the theoretical framework established in chapter two, the establishment of the Performing Right Society marked the first cross-class alliance between composers and their traditional opponents, publishers, within the Anglo-American tradition. The fundamental reason for the establishment of the alliance within the sphere of the public performance right was the same as that for the larger political sphere, the economic advantage to both parties. As Ehrlich has noted, the creators had always suffered economically at the hands of publishers; however, for the publishers to successfully establish the Performing Right Society and expand their commodification of music into another form capable of creating even more surplus value, they needed the public face of the composers, as the right of public performance was bestowed upon the creator by virtue of the Copyright Act. Conversely, in order to disseminate their works and be paid for their labour, creators had to assign their copyright to a publisher. To

achieve their goals authors and publishers needed each other, and while the publishers held the economic power in the relationship, they could not successfully establish a public performance right collective without the participation of those, the authors or creators, for whom the right had been established. Thus the public face of the championing of the composer was as important as the establishment of the cross-class alliance, for this public face began the public inculcation of the *justness*, or the legitimization of the monetization of the public performance right.

After successfully establishing themselves in the UK, the Performing Right Society opened satellite operations in most of the British colonies, with the exception of Australia, New Zealand, South Africa and Canada, where autonomous societies were eventually established (James 8).<sup>94</sup> Notably, even in the early stages of the Performing Right Society (1918) the collection of fees from the Canadian market was discussed, however it was decided that the state of copyright law in Canada would make the process difficult, so the idea was abandoned (29). In 1925, following the enactment of the Canadian Copyright Act of 1924, the PRS was instrumental in the establishment of a performing rights society in Canada. This organization was known as the Canadian Performing Rights Society (CPRS), and its ultimate descendant is the Canadian collective known as the Society of Composers Authors and Publishers of Canada (SOCAN).

## **7.2 The American Society of Composers Authors and Publishers**

The American Society of Composers, Authors and Publishers (ASCAP) formed in New York City in 1914. Subsequent literature dramatized a founding myth (DeWhitt 10-12) that the society had been formed by Broadway luminary Victor Herbert to protect the

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<sup>94</sup> Autonomous in the sense that these societies were incorporated as legal entities in their native countries. The degree to which they were actually independent from the mother organization is however questionable.

downtrodden composer. The reality was somewhat different. George Maxwell, an agent of the European performing right societies arrived in New York, and being familiar with the operation of performing right societies in Europe, set about creating an American society (DeWhitt 10-12). Similar to the Performing Right Society in the UK, ASCAP would avail itself of the persona of the “downtrodden” composer to justify itself.

The first meeting of ASCAP took place in New York City in October 1913 and involved nine men including George Maxwell (American agent of a European Publisher), Nathan Burkan (copyright lawyer), Victor Herbert (composer), Jay Witmark (publisher), four other composers and one lyricist. A second meeting was held in February of 1914 attended by over one hundred members of the music industry at which the society was incorporated and a board and officers elected. George Maxwell became President, Victor Herbert Vice President and Nathan Burkan legal counsel (CAPAC, *Canadian Composer* 38). A composer, publisher or lyricist,<sup>95</sup> could join the organization as a member and assign the performing right of the works for which they held copyright to the society.<sup>96</sup> The society collected on behalf of its members for the public performance right from the various users and made distributions of the monies at periodic intervals in the manner specified in the bylaws of the organization.

The initial target of ASCAP were the numerous hotels and cabarets throughout New York City in which live music was a mainstay (10). However despite the fact that the public performance right had been established under the 1909 US revisions to

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<sup>95</sup> Lyricists contribute the textual elements to songs and constitute the “Author” portion of the various societies worldwide.

<sup>96</sup> The nature of assignment varied amongst organizations and over time. Some required assignment of all works, some allowed specificity. Some organizations required assignment for life and others for a standard contracted period.

copyright,<sup>97</sup> the immediate impact of ASCAP was minimal. Ultimately, it took the landmark decision of *Herbert v. Shanley* (issued by the US Supreme Court in 1917 in favour of Victor Herbert) to establish that cabaret performances (meaning in bars, nightclubs, hotels, etc.), were a performance for profit regardless of whether or not there was a door charge. The composer Victor Herbert charged that a restaurant, Shanley's, was infringing on Herbert's copyright as they had in their employ an orchestra and singer who, as part of the entertainment for diners, performed a piece from one of Herbert's operettas. It must be noted that the orchestra and singers were in possession of purchased copies of the musical work in question. Since no admission was charged for entry to the room the defendants claimed that the entertainment did not constitute a public performance. However the court found that:

If the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected. Performances not different in kind from those of the defendants could be given that might compete with and even destroy the success of the monopoly that the law intends the plaintiffs to have.

With respect to the defence that the music was not the focus of the people attending, but merely a part of the ambience, the court noted:

It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation, or disliking the rival noise, give a luxurious pleasure not to be had from

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<sup>97</sup> Section 1 d of the United States *Copyright Act* of 1909 states, “ to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever.”

eating a silent meal. If music did not pay, it would be given up. If it pays, it pays out of the public's pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough.

The early period of ASCAP was marked by a constant battle for survival, despite the Herbert decision. The American Federation of Musicians (DeWhitt 25), the Hoteliers Association (34), and the Motion Picture Exhibitors League of America (37-38) actively opposed ASCAP's right to license their use of music. And similar to the first attempts to establish a performing right organization in the United Kingdom, the majority of American music publishers were not interested in joining ASCAP. Nonetheless, during this same period ASCAP saw its monthly revenues rise from \$1,250 to \$10,000. The dramatic increase in revenues despite the ongoing battle with some of the largest music users led to rumours of a secret deal between ASCAP and the newly created Vaudeville Managers Protective Association (DeWhitt 40-41). The widespread allegations of collusion between the two associations would eventually lead to a Justice Department investigation in 1925.

Ultimately the investigation concluded that there were never any formal agreements concluded between vaudeville representatives and ASCAP, vaudeville agents did not receive any of ASCAP's receipts, nor did vaudeville ever boycott uses of any non-ASCAP music (DeWhitt 45). However, a personal letter from Mr. Witmark of the Witmark publishing firm (a founding member of ASCAP) submitted as part of a Senate hearing, would seem to corroborate the rumours of an alliance between ASCAP and the Vaudeville Managers Protective Association. Witmark wrote:

Mr. Casey gave us the assurance that the entire vaudeville circuit is with us and on account of existing conditions (the action of the Federal Government in trying to dissolve the U.B.O. and affiliate interest)<sup>98</sup> that it would not be wise to sign up, but there is a gentleman's agreement between us and they are going to do everything in their power to see that everybody connected with their syndicates will take out licenses (qtd. in DeWhitt 43).

Despite the increased income during this period (regardless of the source), ASCAP was in danger of collapse as the majority of publishers continued to withhold their copyrights. However, the economic depression of the 1920s, coupled with the establishment of player pianos, records and the advent of radio broadcasting, coincided with the plummet of sheet music sales. Similar to the U.K. experience, American publishers were looking for alternative ways to profit from their copyright and the collection of fees based on the performance right provided that means (DeWhitt 47).

Eventually an agreement was reached between ASCAP and the music publishers under which the publishers would join ASCAP and bring their catalogues along, and ASCAP would hire E. C. Mills, an agent of the publishers and a former employee of the vaudeville interests.<sup>99</sup> In addition, in a move that would have long lasting effects, the publishers demanded that the dispersal of fees (which up to that time had followed the PRS with equal thirds to the publisher, composer and lyricist) be changed so that half went to the publishers and the remaining half be shared by the composer and lyricist

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<sup>98</sup> The U.B.O. was the acronym for the United Booking Office which was the most powerful vaudeville chain of the time.

<sup>99</sup> According to vaudevillian Pat Casey, Mills had been hired to handle vaudevilles' fight against the White Rats actors union in 1916-17 (DeWhitt 47). The union had begun a 'war' against unfair booking policies by theatre agents in the early 20th century. (New York Times, Oct. 10, 1909).

(DeWhitt 50). As DeWhitt noted in her work on the history of ASCAP, although the public face was one of helping the downtrodden composer, within the industry itself ASCAP was “what many thought to be a publisher dominated organization” (88).

Again in a mirror of the British experience, the dominant group within the hegemonic frame (the publishers) had seized the opportunity to create a cross-class alliance in its economic interests, and had used its economic and organizational advantage to direct the goals of the hegemonic order, and at the same time began inculcating the notion of consent by “helping” the less fortunate party, in this instance the composer. Concurrently they had managed to weather the first crisis in the form of the resistance of the larger publishing community to participate in the newly formed performing right organization. As in Gramsci’s model, the elements of resistance were eventually assimilated and some of their desires (the subsequent division of royalties within the society can be viewed as an appeasement to holdout publishers) assimilated along with them thus ensuring a larger and stronger dominant order inculcating the ongoing process of hegemony.

In a remarkable example of foresight, ASCAP realized that broadcasting would offer significant opportunities for expansion. Thus it actively campaigned for a broadcasting tariff in the United States. The broadcasting tariff was premised on the belief that a radio broadcast was the equivalent of a public performance, and as such the advertising revenues raised should form the basis for a proportional tariff for the use of the music. Unlike the circumstances of the *Herbert v. Shanley* decision, the performance in this instance was not held to be taking place in what would normally be perceived as a public place (a restaurant in the case of Shanley) but rather in private homes where the



radio was being listened to.

In 1923 the National Association of Broadcasters (NAB) was formed from the ranks of private broadcasters in the United States. The original purpose, according to DeWhitt, was primarily to oppose the attempts by ASCAP to establish the broadcasting tariff. It was the position of the NAB that radio did not constitute a performance for profit, and they were prepared to defend their position all the way to the Supreme Court if necessary (DeWhitt 136). ASCAP also realized the value of lobbying and by 1927 had become an effective presence in Washington D.C., illustrating clearly that it intended to influence policy decisions (120).

As Gramsci had posited, if the dominant group wished to maintain their hegemony it was not enough to simply hold power, they must also lead since a rule based solely on power would constitute a crisis within the hegemony:

In every country the process is different, although the content is the same. And the content is the crisis of the ruling class's hegemony, which occurs either because the ruling class has failed in some major political responsibility for which it has requested, or forcibly extracted the consent of the broad masses (*Prison* 210).

While one may presently be dominant in a hegemony, the process is not static, but rather fluid. Thus to maintain dominance the ruling order must continue to ally its interests with the other groups and ensure that they *make* the interests of the dominant group the interests of the others. Hence, as ASCAP realized very early, they must lobby for influence on policy decisions that might affect them.

### 7.3 The Value of Broadcasting

According to Randle the estimated possible radio audience in the U.S. grew from approximately 6 million in 1925 to 38 million in 1929 (Randle 28-29). It was not immediately apparent in either Canada or the U.S. if the performance right extended to broadcasting. In Great Britain, though the BBC contested the existence of a performance right in broadcasting, they nevertheless paid the tariff from the beginning of their public broadcasts (Ehrlich 47). In the U.S., ASCAP had decided that broadcasting might be a very lucrative source of funding and in an obvious attempt to establish its territory offered temporary licenses. The licenses waived any fee, but admitted ASCAP's jurisdiction (Randle 369). This was a shrewd move on the part of ASCAP, as given the possibility of an undesirable decision, it seemed likely that many of the stations would agree to a license as "insurance" against an unfavourable outcome. If the courts did in fact decide in favour ASCAP's position on the validity of a broadcasting tariff, those stations which had accepted the (free) temporary license would have no concerns in regard to any infringement. If on the other hand the courts ruled that there was no basis for a broadcasting tariff, stations which had accepted the free licenses would simply not renew in the future. Such an action would seem to have been the prudent decision. However, the participation of such stations could also be seen to *imply* their acceptance of the ASCAP position.

In 1925 the public performance right would be extended to broadcasting in the U.S. in *Jerome H. Remick & Co. v. American Automobile Accessories Co.* The details of the case are as follows. The plaintiff, Jerome H. Remick and Co., claimed that the defendant, the American Automobile Accessories Co. had infringed on the copyright held

by the plaintiff in a musical composition (Dreamy Melody) when they broadcast a performance of the work on their radio station. The defendants claimed that it was not a public performance as listeners heard it in the privacy of their own homes, and further that it was not a performance for profit as listed within the 1909 United States *Copyright Act*: “any person entitled thereto, upon complying with the provisions of this act, shall have the exclusive right . . . to perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit.” In the decision, the court determined that a performance broadcast on radio was synonymous with a public performance regardless of the fact that it was enjoyed in a private home:

A performance, in our judgment, is no less public because the listeners are unable to communicate with one another, or are not assembled within an enclosure, or gathered together in some open stadium or park or other public place. Nor can a performance, in our judgment, be deemed private because each listener may enjoy it alone in the privacy of his home. Radio broadcasting is intended to, and in fact does, reach a very much larger number of the public at the moment of the rendition than any other medium of performance. The artist is consciously addressing a great, though unseen and widely scattered, audience, and is therefore participating in a public performance.

As to the question of whether or not it was a performance for profit, the court noted that *Herbert v. Shanley* had decided that question previously. Shortly thereafter ASCAP began to collect on behalf of their members for performing rights from radio broadcasts (Shepherd 70-71), with a tariff which was based on a percentage of the broadcaster’s

gross advertising sales. According to Randle, revenues from radio advertising in the U.S. grew from just under \$4 million in 1927 to \$75 million in 1929 (48).

With respect to the *Remick* ruling it is important to bear in mind that the broadcasts of the 1920s were largely done on a national basis and utilized live orchestras and performers. In fact each of the national broadcasters would have regional orchestras they would use for broadcast. Therefore at the time of this ruling, while recordings were coming into use, the standard broadcast performance was still a live performance which explains the courts comment in respect to the “. . . artist addressing a great, though unseen and widely scattered, audience. . .” Contrast this with the more recent ruling of October 2011 in the *United States v. American Society of Composers, Authors and Publishers*. In this ruling ASCAP was attempting to extend the public performance right into the digital environment of the internet. However, the court ruled that a digital download did not constitute a public performance as it was not happening contemporaneously. ASCAP appealed to the Supreme Court but the Supreme Court declined to hear the case. Given this current ruling one can only wonder what might have happened for the public performance right collectives as a whole had a similar ruling been made when records began to dominate the airwaves.

This chapter has followed the development of a public performance right within the Anglo-American legal tradition. While noting the impact of the continental society, SACEM specifically, the focus has been on the establishment of a fundamentally natural-rights-based philosophical regime within a legal system premised on economic efficiency. Following the course of that evolution (a brief chronology of the significant events is listed on the last page of this chapter) we can see the historical opposition within

the Anglo-American sphere. In fact, in the United Kingdom there is an outright rejection of the performance right despite the explicit entrenchment of the right in the 1842 *Act*. It is only the loss of income due to falling sheet music sales that will eventually lead to the formation of a performance right societies in the United Kingdom and the United States in the early twentieth century.

Within the larger context of social evolution this chapter has marked the significant passage of musical culture from a participatory communal process to an increasingly industrial based practice. In this respect, as noted by Attali, the change in the historical processes of musical culture reflects in microcosm the changes in overall social culture. Our societies move increasingly into an industrial age, away from a self-sufficient agrarian existence to one where industrial interests form the economic basis of society. The significant amounts of legislation both national and international within this period mark the efforts of the dominant industrial ethos to establish the legal structures necessary to maximize economic return on investment.

Within the Gramscian frame, this period creates the circumstances for the establishment of a new hegemonic order. The loss of sheet music sales which dominate the end of the nineteenth century and the beginning of the twentieth will provoke the need for new sources of income. This need for economic growth coupled with the potential market offered within the field of cinema will lead to the establishment of the historic bloc between composers and publishers. The initial success seen in the early part of the twentieth century will provide impetus for increasing expansion into new areas and technologies as the era unfolds. The following chapter will focus on the establishment of a public performance right regime in Canada in the early twentieth century and its impact

on the Canadian policy environment, along with the increasing effectiveness of the inculcation of the hegemonic order.

**Table 1 – Chapter 7 Chronology**

Year	Occurrence	Significance
1814	UK <i>Copyright Act</i>	Ties duration of copyright to life of author.
1833	<i>Dramatic Licensing Act</i> (UK)	Extends a right of performance to dramatic musical works (opera, operetta)
1842	<i>Copyright Act</i> (UK)	Grants an explicit right of public performance in all musical works.
1851	SACEM	Established in France.
1886	Berne Convention	Comes into force.
1887 – Dec. 5	Berne Convention	UK becomes signatory to Berne.
1887	SACEM	Establishes British office.
1902	SACEM	Attempts to form a British branch of their performance right organization.
1903	SACEM	Collects over 100,000 pounds in the UK on behalf of French interests.
	MPA	Ongoing discussions as to whether a performance rights regime might offset losses in sheet music sales.
1909	<i>Copyright Act</i> (US)	Explicitly creates a public performance right
1911	<i>Copyright Act</i> (UK)	A new Act is passed
1912	Booth's presentation to MPA	Suggests the financial possibilities of a performance right in connection with film
1914	Performing Rights Society (UK) and ASCAP (US)	First Anglo-American performance right societies formed.
1917	<i>Herbert v. Shanley</i>	Establishes cabaret performances as “for profit” and therefore eligible for performance right collection under US law.
1923	National Association of Broadcasters	Formed in the US
1925	<i>Jerome H. Remick Co. v. American Automobile Association Co.</i>	Establishes a radio broadcast as a public performance.

## Chapter 8: Evolution and Entrenchment of the Public Performance Right

This chapter will trace the evolution and entrenchment of the public performance right in Canada. As a Dominion possession of the United Kingdom, Canada was bound by the copyright law of the mother nation. The United Kingdom *Copyright Act* of 1911 had an explicit right of public performance, which was also law in the Dominion of Canada. However in 1921 Canada would pass its first national copyright legislation, mirroring the United Kingdom Act. The Canadian *Copyright Act* did not come into force until 1924.

The first significant attempt by the fledgling Canadian Performing Right Society (CPRS) to enforce the public performance right was litigation brought against Famous Players Theatres, in respect of a performance given by one of their orchestras of a single piece of music, the performance right of which was held under assignment by CPRS. To their dismay, the society lost the case on a technicality. Canadian law at the time required that the copyright be registered in Canada in addition to its country of origin <sup>100</sup> (*Canadian Performing Right Society v. Famous Players Canada Corp.*).

Despite this setback the Society continued to press for their license fees and their demands led to complaints in the House of Commons by members sympathetic to broadcasting interests.<sup>101</sup> As a result a Royal Commission to Investigate the Activities of the Canadian Performing Right Society Limited was struck to look into the operations of CPRS in 1932 (Ewing 1).

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<sup>100</sup> The 1908 revisions to the Berne convention established copyright coming in to existence at the moment of creation as opposed to the moment of registration. Registration, though perhaps recommended, was no longer necessary for copyright existence in Berne compliant nations. However, Canada did not become a signatory to Berne until April 10, 1928.

<sup>101</sup> See, Canada, *Debates of the House of Commons of the Dominion of Canada*, session 1931 vol I, pages 899-901.



## 8.1 The Ewing Commission

The Commission was charged with investigating whether CPRS was in compliance with the Copyright Act; whether CPRS had substantial control of performing rights in dramatico-musical or musical works; whether CPRS had unduly withheld the issue or grants of licenses; whether the CPRS fees were excessive and any other matters the Commissioner might deem relevant (Ewing 2).

The Commission under the direction of the Honourable Mr. Justice Ewing was a private affair, dealing only with the Society itself and six broadcasting stations from the west of Canada which had complained that the tariffs being charged were unjust (8-13). Justice Ewing consolidated the complaints into a small number, chief among them the fact that though the society claimed control of two to three million musical works, they had failed to list their assignments with the copyright office (5).<sup>102</sup> Further, the Society had claimed the right for some musical works which were, in fact, in the public domain (specifically some of the old masters such as Beethoven). The bulk of Ewing's fourteen page report dealt with the disparity in licensing fees for western radio stations as opposed to those located in the more densely populated regions of eastern Canada. The Society had set a standard fee for all of Canada based on transmitter power (unlike in the US where it was based on advertising revenues), and had not allowed for the huge variance in population between eastern and western cities (8-13). Ultimately the Report was not favourable to the Canadian Performing Right Society. Ewing made it clear that the Society had not fulfilled its legal obligations and at the same time had dealt unfairly with

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<sup>102</sup> Rights owners (composers, lyricists or publishers) would assign their rights to the Society, who would then collect on their behalf.

the public. As a result the Commission recommended that the fees charged be reduced to one-fifth the amount suggested by the Society (16).

## 8.2 The Parker Commission

Three years later, in 1935, the Royal Commission to Investigate the Activities of the Canadian Performing Right Society, Limited, and Similar Societies,<sup>103</sup> was convened by his Honour Judge Parker, to investigate continued complaints about the CPRS. Unlike the Ewing Commission, the Parker Commission gave public notice of meetings, and heard testimony from interested parties (Parker 4). In the presentation of the circumstances surrounding the inquiry, Judge Parker made note of the fact that specific amendments to the *Copyright Act* in 1931 were designed to allow the attribution of a performance right to radiographic transmissions. Previously the *Copyright Act* of 1921 had defined performance as “. . . any acoustic representation of a work and any visual representation of any dramatic action in a work, including such a representation made by means of any mechanical instrument “ (sec. 2 (q)); the 1931 *Copyright Amendment Act* defined a performance as “. . . any acoustic representation of a work or any visual representation of any dramatic action in a work, including such a representation made by means of any mechanical instrument or by radio communication” (sec. 2). Under section 3 of the *Copyright Act*, copyright was defined as the sole right:<sup>104</sup> “In case of any literary, dramatic, musical or artistic work, to communicate such work by radio communication.” This explicit addition of radio communication allowed the Performing Right Society to

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<sup>103</sup> Parker, Royal Commission to Investigate the Activities of the Canadian Performing Right Society, Limited, and Similar Societies, Report of his Honour Judge Parker, a Commissioner Appointed by the Inquiries Act and the Copyright Amendment Act of 1931, pursuant to Order in Council no. 738, 1935, [hereafter, Parker report]

<sup>104</sup> In this context “sole” means that it is the right of the copyright owner only. The copyright owner may choose to extend the use of their right through licenses and assignments, but the right belongs to them alone.

target broadcasters.

Judge Parker also made clear that it was the responsibility of the Society to file a list of holdings with the Copyright Office along with a statement of fees (tariffs) (Parker 7). Judge Parker observed that societies controlling these copyrights “have looked to the fees from licenses conferring the performing right on music users to compensate them in part for the losses suffered from the decrease in sales of sheet music and records. This consideration has been one of the factors determining the tariff of fees for performing rights” (9). The position being advocated by CPRS in defense of their fees was a familiar one for the performing rights societies generally. It was the loss of revenues from reduced sheet music sales that ultimately led to the formation of the Performing Right Society in the United Kingdom. Similarly, ASCAP took the same position after it had joined ranks with the U.S. music publishers.

Randle, in his treatise the *History of Radio Broadcasting and its Social and Economic Effect on the Entertainment Industry 1920-1930*, gave an entirely different reason than the growth of broadcasting for the failure of the sheet music industry in North America. According to Randle, despite the protestations of losses due to radio and mechanicals (recordings), the main reason for the failure of the sheet music industry was a 300% increase in price between 1919 and 1920. Total sales figures for sheet music remained the same, but units shipped dropped. Randle also points out that even at that early stage there were already alliances forming between ASCAP and the Music Publishers Protective Association to address the perceived threat from radio (363). Sales figures for mechanical royalties of 1920 to 1925 indicate that, despite claims to the contrary, it was not radio that was killing the record industry: rather it was the internal

competition in the industry (317-318).

At the time of the 1935 Parker Report, the Canadian Performing Right Society was owned equally by the Performing Right Society and the American Society of Composers Authors and Publishers. The six directors of the society were two Canadians, one PRS representative and three of the controlling members of ASCAP, including the managing director of ASCAP, E. C. Mills (Parker 14). As previously mentioned, ASCAP had already proven itself to be a politically adept organization capable of lobbying effectively in the halls of power. So did Judge Parker's statement that performing rights societies were looking to their tariffs to compensate them for losses in publishing reflect a consensus among government and business interests of this period that the performing rights societies position was valid, or had the arrival of ASACP in the Canadian market already begun to affect policy statements?

Possibly due to concerns about the influence of ASCAP, Judge Parker also noted that under the constitution of ASCAP, its board was self-perpetuating (18). In addition he mentioned the fact that unlike PRS (which divided its fees equally in a three-way split between publisher, author and composer), ASCAP distributed on the basis of fifty percent to the publisher and the remainder split between composer and author (32). Judge Parker also commented on the absence of any Canadian members in ASCAP as, under their existing constitution, Canadian composers, authors and publishers could not become members in ASCAP (19). Judge Parker was concerned about this exclusion because in essence it meant that all fees collected by these societies would leave Canada to be distributed in foreign nations.

Judge Parker noted that CPRS had still failed to file its lists with the Copyright

Office despite its legal obligation under the Copyright Act to do so (even though foreign societies had done so on their own) (33). After considering the basis of the broadcast fee (and its relation to other countries' broadcast systems at that time) he found that it was set too high and that it should be reduced by twenty-two and a half percent (36); he also found that the theatre rate was too high and reduced it to the 1931 tariff. Judge Parker explicitly mentioned pressure from E. C. Mills as being the reason CPRS had an unreasonable theatre tariff (46). The Parker Report also commented that it was "regrettable" that no publisher appeared to give evidence of a greater need for return on investment. The judge also said that CPRS was in fact a "super monopoly" (19) and though he allowed that there may be valid reasons for its existence, nonetheless Canadians should be protected from any undue burdens as a result. The Parker Report concluded by recommending that a permanent tribunal be established to approve any future tariffs and provide a means for music users to appeal any fees or policies set by the performance rights societies (49). This recommendation led to the establishment in Canada of the Copyright Appeal Board (CAB) in 1936.

Within this first period of development of the Canadian Performing Right Society (CPRS), the dominant hegemonic order, seen in the form of the American Society of Composers Authors and Publishers and the Performing Right Society of Britain, expand their sphere of influence and income, by forming a Canadian outpost. Concurrently, the pioneering work of ASCAP in terms of its encroachment into smaller, but more numerous venues such as cabaret, and then ultimately radio broadcasting, increases the territory under the control of the performing rights societies. The organs of the State, via

legal means as illustrated in *Herbert v. Shanley*,<sup>105</sup> and *Remick v. American Automobile Accessories* and the amendments to the *Canadian Act*, are utilized to encourage the acquiescence of other targeted venues, and enable the organizations to expand with less conflict. Though still very much under the control of their parent organizations, nonetheless CPRS benefitted from the legal precedents set (even if they were foreign) and continued to expand its influence as it moved into the next decade.

### 8.3 The 1940s

Understandably, in view of the Canadian war effort, the early part of the 1940s showed little change in the arena of the public performance right. However in 1945, there was at least a superficial change when CPRS became known as the Canadian Association of Publishers, Authors and Composers (CAPAC).<sup>106</sup> It is interesting to note that despite the traditional tension between Publishers and Composers, CAPAC chose to place *Publishers* before *Authors* in their corporate name. Some years following the name change an article was written in CAPAC's own publication, *The Canadian Composer*, describing the history of the American Society of Composers Authors and Publishers (ASCAP). In the article, pointed reference is made to the fact that ASCAP intentionally placed *Composers* at the front of the line in their name, (38) the rationale being that it would indicate that the composer was of utmost importance in the equation. It was somewhat ironic that they should choose to stress this point, as the alliance with the music publishers had certainly (at least in comparison to their Performing Right Society brethren) placed the creators at the back of the line (equal thirds versus a 50% split).

While the 1940s were quiet in Canada, a performance rights war was raging in the

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<sup>105</sup> Interestingly, *Herbert v. Shanley* has been cited by the Canadian court as recently as 1997: see *Society of Composers, Authors and Music Publishers of Canada v. 348803 Alberta Ltd. et al.*

<sup>106</sup> CAPAC, #105, p 32

U.S. and the outcome had significant long term effects upon the Canadian market. By 1935, 69% of American households had radios, creating a level of penetration that would not be surpassed until the TV era arrived in the 1950s (Randle 29). The broadcast licensing agreements with ASCAP allowed for a fee of 5% of the total advertising revenues of the member stations, and from a start of \$35,000.00 in their initial year of licensing in 1922, ASCAP's broadcast licensing revenue had increased to \$5.9 million by 1941 (Garofalo 332). The broadcast industry, never fond of ASCAP, and distressed to see so much of its profit moving away, formed their own licensing agency, Broadcast Music International (BMI). In its current website, BMI notes that it was:

Formed in 1939 as a non-profit-making performing right organization, BMI was the first to offer representation to songwriters of blues, country, jazz, r&b, gospel, folk, Latin and, ultimately, rock & roll. BMI was founded by radio executives to provide competition in the field of performing rights, to assure royalty payments to writers and publishers of music not represented by the existing performing right organization and to provide an alternative source of licensing for all music users.<sup>107</sup>

Thus, in the evolving rationale of justifications, BMI was also concerned about not only the composers, but also “all music users.”

ASCAP represented primarily the classical and light music (Broadway, operetta) composers and publishers, so BMI focused on the “pop” music of the day, signing up the country, and rhythm and blues artists. When the ASCAP contract ran out in 1941, the

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<sup>107</sup> <http://www.bmi.com/about/entry/533105>, last accessed January 2011

vast majority of broadcast stations had signed with BMI,<sup>108</sup> and thus overnight the programming content of radio changed to a “pop” orientation (DeWhitt 398). In conjunction with its establishment in the United States, BMI opened an office in Canada in 1940, and suddenly Canada had two performance right societies (Matejcek 1). BMI, while a performance right society, was somewhat different from CAPAC, as BMI was also a publisher. In fact, in an internal history of the Canadian branch of the organization, Jan Matejcek notes that BMI did not have many friends in those days “being in the hands of broadcasters, traditional opponents of copyright owners” (2). While engaged in the advocacy of performance rights, BMI was also actively engaged in the publication of contemporary composers. Indeed, as Matejcek notes, the latter was an absolute necessity if they were to have any repertoire on which to build a performance list (3). By 1947, BMI became successful enough in Canada that they incorporated a Canadian office, BMI Canada, the controlling interest of which was held by BMI America (6).

The appearance of BMI Canada drastically changed the community surrounding the public performance rights issue in Canada. Since 1925 a single performing right organization, CPRS/CAPAC (albeit under the control of PRS and ASCAP), had enjoyed a monopoly of control over the creator’s public performance rights in Canada. This is not to suggest that other individual composers and authors could not make submissions to government, or file a complaint with the Copyright Appeal Board, but CAPAC had been the largest, and most successfully organized player representing performance rights issues and as such dominated that end of the discussion. As of 1940 however BMI was making its presence in Canada known.

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<sup>108</sup> According to DeWhitt, 700 of the 750 stations operating in the United States signed up with BMI.



## 8.4 The Massey Commission

Unlike the two previously mentioned commissions, the Royal Commission on National Development in the Arts, Letters and Sciences, 1949-1951 (chaired by Vincent Massey) did not deal explicitly with the issue of performance rights. In fact there is virtually no mention of CAPAC, BMI, collectives, royalties or tariffs in the Commission Report. But the Massey Report did provide a valuable snapshot of the state of Canadian cultural concerns in the post-war period. It also focused quite heavily on the area of broadcasting, and heard a large number of submissions from various interested parties. All of these parties (by virtue of having an interest in broadcasting) would also have an interest in performance rights.<sup>109</sup>

The Commission's findings raised concerns over the way in which television broadcasting was already beginning to affect the nature of programming in the U.S., specifically appealing to the lowest common denominator in hopes of an increased advertising market (Massey 46-48). Conversely, the Commissioners were extremely pleased with the manner in which radio had flourished in Canada. The Commission noted

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<sup>109</sup> Listed below are some of the more significant musical organizations that made official submissions:

- Alberta Music Board
- All Canada Mutually Operated Radio Stations
- All Canada Radio Facilities Ltd.
- American Federation of Musicians of the United States and Canada (AFM)
- Association de Musiciens du Quebec
- Association of Canadian Radio Artists
- Banff School of Fine Arts
- British Columbia Registered Music Teachers Association
- Individual broadcasting stations (too numerous to list)
- Calgary Symphony et, al. (joint brief)
- Canadian Association of Broadcasters, once in 1949 and again in 1950
- CBC, various regions
- Canadian Music Council
- CAPAC
- Federation of Canadian Music Festivals
- Ontario Registered Music Teachers Association
- Royal Conservatory of Music

that the United States was alone among four leading countries of the Western world (the United States, France, England, Australia) in its conception that radio should be a private interest as opposed to a public trust (279). It was for this reason more than any other that the Commission rejected the requests of broadcasters for the creation of an independent governing body. The Commission felt that the Canadian Association of Broadcasters incorrectly believed radio to be an industry, while in their view it was a public service (283). No discussion of the impact of a performance right tariff upon that service took place. Indeed the choice of the Commission to use the phrase “public service” is very close to the notion of public trust, which in turn connects to the idea of public goods. Though not explicit in this regard, the Commission’s choice of language seems to imply a very different frame of reference for the ideal growth of broadcasting generally. Though they stopped short of calling the area of broadcasting a “public good” they nevertheless were explicit that the Commission did not see it as an industry.

### **8.5 The Isley Commission**

The Royal Commission on Patents, Copyright and Industrial Designs sat between 1954 and 1960. Its brief was:

to enquire as to whether federal legislation relating in any way to patents of invention, industrial designs, copyright and trademarks affords *reasonable incentive* to invention and research, to the development of literary and artistic talents, to creativeness, and to making available to the Canadian public scientific, technical, literary and artistic creations and other adaptations, applications and uses, in a manner and on terms adequately safeguarding the paramount public interest. (emphasis

added)(7)

The Commission delivered its report in two sections. The first section was devoted to copyright, an entire chapter of which was devoted to the issue of Performing Right Societies. The opening line of that section reads as follows: “One of the most controversial matters that came before the Commission was that of performing rights in musical works and the compensation to be paid by those using them” (95). An individual section of the report was devoted to CAPAC and another to BMI. The section discussing CAPAC again commented on the division of tariffs, but in this representation, while the numbers remain the same (50% to publisher), the reading is somewhat kinder than the previous Commissions which had investigated CPRS. “But CAPAC has a rule that no publisher member can, in any event, and regardless of his contract with a composer or author, receive from CAPAC more than 50% of the net compensation received by CAPAC” (96). Clearly the dominant ideology of the performing rights hegemony had been successfully influencing the policy channels, as the Isley report almost congratulated CAPAC for the same act for which the Parker Report had admonished them some twenty-three years earlier. And, once again, as in the Parker Report, mention is made of the fact that Canadian artists are poorly represented in the rolls of membership, and by far the largest amount of revenues flows out of Canada to the United States. As the Isley Commission pointed out, this led to the “somewhat loose statement that CAPAC is ASCAP operating in Canada under another name” (97).

Little mention was made of CAPAC’s ties to the Performing Right Society. The Report mentioned that the makeup of the CAPAC board (normally twelve members, though at the time of the Commission there were only ten serving) included only one

representative from each controlling partner (ASCAP and PRS). The remainder of the Board was made up of the past president, three member publishers, two member composers, and two representatives of foreign performing rights organizations (97). Given that the performing right societies were dominated by publisher interests, that meant that only 20% of the board were actually creators, and the remaining 80% would be more appropriately termed publishing interests. Thus, it was the creators that had the least representation.

The Isley Commission's review of BMI also noted the makeup of the board, but in this case the seven-member board was made up of three representatives of the CBC, three representatives of private radio organizations and the president of BMI-US (97). The transparency of the BMI relationship with the industry is striking: the entire board was made up of business concerns, broadcasting and publishing, with not even a token representation of the creators. Given BMI's statement that they were "the first to offer representation to songwriters of blues, country, jazz, r&b, gospel, folk, Latin and, ultimately, rock & roll,"<sup>110</sup> it is striking that their board was entirely bereft of composer representation.

According to the revenue figures offered for BMI and the CAPAC in the Report, BMI's licensing revenue was approximately one tenth of CAPAC's, clearly indicating CAPAC's continuing dominance in the marketplace (98). However bearing in mind that CAPAC had a 15-year monopoly in Canada and had been present in the market twice as long (at the time of the Isley Commission) as BMI, a 10% share of the existing licensing revenue in Canada was significant.

The Commission also noted that, in general, the only complaints heard from the

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<sup>110</sup> See BMI website at <http://www.bmi.com/about/>, last accessed Jan 2012.

performing right societies themselves were in reference to whether or not the Copyright Appeal Board had the right to regulate broadcast tariffs. The societies based their complaint on the fact that Canada was a signatory to the Rome revisions of Berne, and that Article 4, section 2 of the Rome revisions provided that “[t]he enjoyment and the exercise of these rights shall not be subject to the performance of any formality.” It was the opinion of the Commission that the word “formality” did not extend to the legal requirement to file statements of fees as required by the Copyright Act (Isley 100).

When the position of the Canadian Performing Right Society (CPRS) relative to the government of Canada in 1925, 1932 or 1936 is taken into account, it is doubtful that CPRS would have ever questioned the right of the government to regulate them. A mere thirty years later its successor, the Canadian Association of Publishers Authors and Composers (CAPAC), has become both comfortable enough and knowledgeable enough to question whether or not the government had the right to regulate their operations, based on the societies’ interpretation of amendments to the Berne convention.

Throughout these decades the societies expanded not only in their collection areas and amounts, but also in their influence on policy issues. CAPAC moved from the subject of investigation, to a recognized player in the policy process –a player confident enough to suggest that the State does not have the right to regulate them.

Although the performing right societies presented only one issue to the Isley commission, the same could not be said of music users who filed a long list of concerns with the Commission. These concerns were summarized by the Commission into fifteen basic areas (once again, the lack of a complete listing of assignments was among them, an issue that had been raised almost continuously since the appearance of the public

performance rights organizations in Canada in 1927). The Commission was relatively sympathetic with respect to many of the music users' positions, however the most important recommendation to arise from the concerns of music users was that the powers of the Copyright Appeal Board should be greatly enlarged and that the Copyright Appeal Board should have the power not only to approve the tariffs, but also to set them. In addition to enlarged powers and increased discretion for the Copyright Appeal Board, the Isley Commission recommended that a new Royal Commission be immediately appointed to:

make a complete investigation in the whole field of performing rights in so far as such rights are owned by performing rights societies. This commission should be empowered to determine the terms and conditions of licenses for all classes of users, including, but not limited to, proposed tariff rates of fees. The users as well as the societies should have the right to make proposals to this commission and the commission should have the power to initiate proposals itself. (Isley 106)

Despite this recommendation no such commission would ever be struck.

### **8.6 The 1960s and 70s**

In 1961 a convention was held in Rome for the purpose of extending copyright protection beyond its traditional recipients of author and publisher. The *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations* (Rome Convention) championed the extension of copyright protection to the producers and performers of recordings. The Rome Convention was significant because it granted a copyright in the actual recording to the producer while at

the same time establishing new rights for the performers. In Canada this new right in the sound recording copyright was deemed to belong to whomever owned the master recording; the situation was analogous to photographs, where the copyright was held not by the photographer necessarily, but rather by whomever owned the negative (Erola 30). This recognition of a producer's role might have arisen for a number of reasons, not least of which might have been United States influence on the process (under U.S. law it was common practice to assign the property rights of any creation made under contract to the employer). In light of the emerging recording practices of the 1960s (as discussed in chapter six) and the control of them by the producers, it was also arguably justified from a creative standpoint at this stage.

In the late 1960s the Economic Council of Canada (ECC) was charged with preparing a series of background documents outlining some of the issues involved in the creation of a new *Copyright Act* for Canada. In 1971 they released a series of studies examining the issue from various viewpoints, some of which will be sampled to give evidence of the evolving relationships within the policy environment. *Copyright in Context: The Challenge of Change* offered an historical review of copyright from the ancient world to the contemporary period, but went beyond simple historical data in its discussion of the performance right. Bruce. C. McDonald, the author of the report, suggested that the performance right doctrine might be of use in dealing with the emerging area of computer-based materials and he suggests that it might also be applied

to the loaning of books,<sup>111</sup> as was the practice in Sweden at this time (McDonald 27).

McDonald also suggested the idea of a collective like that used in the administration of the music performance right (in fact CAPAC is specifically mentioned) as one possible method that might be used to collect revenues on behalf of literary authors and computer programmers (28). This appears to be the first suggestion of the use of a performance right outside the sphere of music in Canada. As such, it suggests that the successful operation of collective societies in Canada for almost fifty years had “naturalized” the concept to the point where without any apparent prompting, a government agency was suggesting an expansion of the rights and, the possible utilization of a collective (modeled on the performing right collectives) to administer those rights.<sup>112</sup>

The 1971 *Report on Intellectual and Industrial Property* was even more enthusiastic in its support of an increased role for collective administration. As the report expressed it, “continuing technological change appears to make inevitable a greater use in the future of copyright ‘collectives’ such as the performing rights societies” (151). Shortly thereafter the report recommends: “an adjustment of the [*Copyright Act*] to permit the wider use of the performing rights society approach, including its extension into the field of printed and *other* materials” (emphasis added) (151). At the same time, while strongly endorsing the expansion of performance rights collectives, the report did

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<sup>111</sup> In fact the Public Lending Right Program was ultimately established in 1986 by the federal government to compensate writers for the use of their works through Canadian libraries. Originally known as the Payment for Public Use (PPU) Program, the program is intended to “recognize the significant contribution that Canada’s authors make to its national culture by compensating authors for the presence of their published work in Canada’s public libraries”. Source, <http://www.plr-dpp.ca/PLR/about/history.aspx>, last accessed January 2011.

<sup>112</sup> Recently, Professors Mark Perry (faculties of law and computer science at the University of Western Ontario) and Stephen Watt (faculty of computer science at the University of Western Ontario) co-authored a paper recommending the use of the public performance right model as a collection regime for computer software. The article is available in pdf form Department of Computer Science website at the University of Western Ontario, <http://www.csd.uwo.ca/~markp/htmls/softp.pdf>, last accessed January 2011.



not recommend the establishment of a performer's performance right for the performance of a work (159). The report did however recommend the inclusion of a producer's right in a sound recording and a broadcaster's right in an original broadcast (157).

Bearing in mind that the Rome Convention had recommended those same rights, it is not surprising that they would appear in a Canadian policy document ten years later. Nevertheless, these recommendations represent not only the common sense "naturalization" of the performance right concept, but the effectiveness of the network in lobbying its position such that the creation of new rights are being advocated. Indeed at this point we can clearly see that the hegemonic order has begun to move into the third stage of its development. In the initial period marked by the historic bloc, the interests were purely economic, and even as the order matured and advanced throughout the next decades the interests were still largely economic and largely driven by the dominant publishing interests. However by the late 1960s, the hegemonic order is expanding and influencing beyond its own original interests, and in the process begins its first steps towards the mature order, and ultimately an evolution of the order itself beyond its current form.

In October 1971, under the auspices of the World Intellectual Property Organization (WIPO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO), the *Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms* was drawn up. The purpose of the convention was fairly clear from the unwieldy title, but for those in doubt the preamble succinctly stated their intent in the introduction: "Concerned at the widespread and increasing unauthorized duplication of phonograms and the damage this is

occasioning to the interests of authors, performers and producers of phonograms” (WIPO, preamble).

Although the Convention can be seen to legitimize the concerns of the recording industry on an international scale, it had very little effect beyond that. It also did not create any real change within the copyright structures already in place, as it specifically left the means of implementation up to the member states. During this same period the recording industry also began to lobby governments internationally to establish a levy on blank media for the purpose of compensation due to illegal copying (Shuker 220). Industry estimates from 1982 stated that as much as 66 percent of the Asian and 11 percent of the Canadian and U.S. markets was being lost to pirated product (Frith, *Industrialization* 75). As is often the case with industry studies however, the industry view of the issue and the cultural view were at odds.<sup>113</sup>

As Simon Frith pointed out in a later work for the Liverpool Symposium on Popular Music: “Far from being a threat to the industry, home taping contributes crucially to the ways in which people learn about both new and old acts and nurture the musical enthusiasm on which the industry depends” (*Illegality and the Music Industry* 208). The industry viewed home taping as simply an illegal infringement on their copyright, and based their position on that. The cultural stance had evolved as a larger part of the “cassette culture” which had begun in the 1970s when the sharing of music and copying for personal use had become widespread. It is interesting to note that despite industry concerns over home taping and piracy, sales continued to climb. The American record industry broke the billion dollar mark for the first time in 1967 and by 1978 (at the height

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<sup>113</sup> The 1982 Keon report for Consumer and Corporate Affairs disputes these figures noting the research instruments are suggestive. See page 200.

of home taping concerns) they had surpassed \$4 billion (Frith, *Industrialization* 67).

While the connection between performance rights, issues of piracy, cassette culture of the 1970s and independent recording might not be immediately apparent, it does exist. As early as 1968, CAPAC was advocating to its members that they press for a mechanical rights collective in Canada, and in the meantime take out membership in an international organization dedicated to the collection of mechanical rights (CAPAC, #25 14). In addition, record manufacturers had attempted to capitalize on the existing copyright in sound recordings by submitting a tariff proposal to the Copyright Appeal Board in the fall of 1968. Because the issue of copyright revision had already been referred to the Economic Council of Canada the government strongly encouraged the manufacturers to drop their claim. In the meantime a bill (S-20) was tabled to rescind the copyright in a recording so as to prevent the collection of any new fees until the internal reports were delivered (Debates of the Senate, v 117, #36, pp 712-715)<sup>114</sup>. Subsequently the manufacturers' collective, Sound Recording Licenses did remove their request, and no further mention of this group appears in the subsequent government reports

### **8.7 Preparing for the Phase I Revisions to the Copyright Act**

The Federal Cultural Policy Review Committee (FCPRC) held cross country hearings in 1981 to gain a broad perspective on the state and direction of Canada's cultural policies. The Committee published a volume consisting exclusively of the more than one thousand submissions and briefs heard and received across Canada. Significant in the final submissions were the comments tabled in regard to Copyright by various members of the performance right community. It was particularly of interest to note that

<sup>114</sup> Also quoted in the February 1969 (#37) edition of the Canadian Composer published by CAPAC.

CAPAC was adamant in its opposition to the creation of a producer's right in sound recordings or a performer's right (Federal Cultural Policy Review Committee 189). Also of interest was the discussion of the disparity of the financial entitlement in relation to existing royalties between the music publisher and creator. CAPAC noted at the hearings that in 1979 it had dispersed \$4,444,204 in royalty payments to publishers and in that same period had dispersed \$3,044,537 to creators (187). In its 1984 internal report to its members, CAPAC lists its payments to publishers in 1981 as \$5,461,326, and to writers (creators) as \$3,969,792 (CAPAC, #191 20).

What CAPAC does not include in their submission to FCPRC is the makeup of their membership. In fact there seems little mention of it even in their own internal publishing: the last statement regarding the makeup of the membership was in 1968. At that time there were 852 writers (composers/authors) and 122 publishers, a ratio of almost 7 writers for every 1 publisher (CAPAC, #29 14), yet despite this disparity the publishers still received that largest proportion of royalties. Arguably of even more concern in an organization devoted to 'championing' the composer, was the fact that the board was made up half of composer lyricist members and half from publishers (CAPAC. #73, p 19). Membership numbers are still significantly disparate. The SOCAN report for 2010 list 94,000 creator members and 12,000 publisher members.

In 1982 the Department of Consumer and Corporate Affairs Canada (CCAC) published an analysis of audio and video home taping. At the time the recording industry was campaigning actively for blank media levies to replace sales lost to home taping. The report by Jim Keon included a critical examination of the industry surveys that had indicated such extensive losses. Keon found that "in general the tone and subject matter

of the questions contained in the survey were suggestive” (Keon 40), which is to say the instrument itself was designed to elicit a desired response. Keon also analyzed the national studies done by Statistics Canada, as well as those done in the United Kingdom and the United States. According to Keon’s findings, despite industry hyperbole, revenues in the recording industry had risen during a period of unprecedented home taping (39). Ultimately, while he did not preclude a future application, Keon recommended against the creation of a blank media levy.

Previously in 1981 the CCAC had published *An Economic Analysis of a Performer’s Right*. A follow-up to the ECC report of 1971, it also recommended against the establishment of a performer’s right (Globerman and Rothman 2). Also published during this period by Robert E. Babe was *A Study of Radio: Economic/Financial Profile of Private Sector Broadcasting in Canada*, a research report for the Task Force on Broadcasting Policy. The Babe report makes mention of several overlapping areas of interest with the performance rights network, which is not surprising given that the main impetus for the creation and subsistence of a performing rights society in Canada was to capture revenues from the broadcast industry. While recognizing this historical relationship (and tension) between broadcasters and performing rights societies, the report recommended that a performance right in sound recordings (sometimes called a producer’s right) be established (125).

The report declared that while creation of the right may create an onerous financial burden on the smaller broadcasters, the larger ones should easily be able to accommodate the increased costs. In addition, the report suggested that an earlier government White Paper on copyright, *From Gutenberg to Telidon*, had too easily been

swayed by broadcasters' arguments that the playing of music was "unpaid advertising."<sup>115</sup> The Babe report however dismissed such arguments noting that rather than unpaid advertising on behalf of the record producers, the broadcasting of recorded music was in fact the "pith and substance of their programming, and from that point of view alone payments should be required" (125). However, Babe seems to have missed the point that the broadcasters were already paying for the use of recordings by means of the tariffs levied by the performing rights collectives. What Babe was championing was an additional payment on top of the tariffs already being paid.

The Task Force on Broadcasting Policy was also responsible for another report delivered in January of 1986, *Music and Electronic Media in Canada*. It listed all the key industry associations then active in electronic media, many of which were now part of the expanding performance right policy network. Of the organizations listed, the Canadian Music Publishers Association (CMPA) is first among them, for the simple reason that it had existed longest, having been formed in 1949. The CMPA first appears in the network matrix in the listing of organizations making submissions to the Isley commission in 1957. In 1976 CMPA members founded the Canadian Musical Reproduction Rights Agency (CMRRA) which would act as a collective to seek the mechanical (recording) and synchronisation (addition of music to visual material) rights (Bergeron et al. 156). Such a group had been urged by CAPAC as early as 1968, but in an echo of the larger hegemonic frame, the creators on their own (regardless of the publisher members within their ranks) could not successfully create such a collective; the music publishers were able to.

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<sup>115</sup> This same argument had been advocated by the NAB in their disputes with ASCAP in the U.S. in the 1920s when they claimed that broadcasting actually served the copyright owner by popularizing his music.

The Canadian Independent Record Production Association (CIRPA) is also listed within the *Music and Electronic Media in Canada* report. CIRPA had been formed in 1972 to represent the interests of the independent record producers who had flourished in Canada largely as a result of Canadian Content (CANCON) rules.<sup>116</sup> The *Music and Electronic Media in Canada* report points out that CIRPA was formed in part because the existing Canadian Recording Industry Association (CRIA) by virtue of its membership structure and fee schedule primarily represented the interests of the large multinational corporations (Bergeron et al. 57). This last point is reflective of the concerns noted at the outset of chapter 5 in regard to the increasing centralization of economic power within the larger music industry. The issue would become even more pronounced as the multinationals merged together until only three were left to dominate the current industry. Finally in respect of additions to the policy network, the report also notes the appearance of the Canadian Academy of Recording Arts and Sciences (CARAS). CARAS was originally begun and operated by CRIA, but by the time of the report was now operating as an independent body (57). CARAS is the organization best known in the Canadian music industry for the management and presentation of the Juno awards ceremony each year. The Juno awards are the Canadian version of the Grammy awards, and are intended to recognize accomplishments within the Canadian recording industry.

The only aspect of this report of particular interest is its desire to establish a blank media levy. The authors used a great deal of the data from the Keon report of 1981, and also quote from that report. However, they manage to quote Keon out of context so as to

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<sup>116</sup> The Canadian Radio and Telecommunication Commission (CRTC) had introduced Canadian content rules for broadcasting in the 1960s as a means of insuring cultural sovereignty. One result was the growth in Canadian Record Producers to fill the demand for Canadian product. As the lobbying for a producer's right ensued in the policy network, these home grown producers naturally lobbied through their own association CIRPA.

obscure the fact that his report unequivocally stated that a blank media levy was unnecessary (Keon 248). The 1986 report also suggested that the increase in home taping was responsible for the dearth of new artists being recorded at that time. However, Frith, Albini and Garofalo have all made clear that the industry itself, in its desire to release only million sellers had destroyed the notion of emerging artists.<sup>117</sup>

### 8.8 BMI Canada

Although BMI had only garnered 15% of the performance right revenue at the time of the Isley Report, throughout the 1960s BMI increased its market share relative to CAPAC significantly. In 1969, partially to offset concerns voiced by other members of the policy community (publishers) that BMI was competing in the same arena it was licensing, BMI divested itself of its publishing arm (Matejcek 26). In 1976, most likely in an attempt to improve its position with Canadian nationalists, BMI Canada officially separated from its US parent corporation BMI-US. BMI Canada was then reorganized as wholly Canadian and non-profit (36). One of the conditions of the divestiture of control by BMI-US was that BMI Canada cease using the BMI name and so, as of 1977, BMI became known as the Performing Rights Organization of Canada (PROCAN) (41).

In 1981, while appearing before the Federal Cultural Policy Review Committee an executive of PROCAN, Jan Matejcek, was approached by several members of the Committee, all of whom suggested that Canada would be better served by a single performing rights society. At the time PROCAN was less than enthusiastic (Matejcek 68). However, in September of 1985 the Copyright Appeal Board urged PROCAN and CAPAC to “Pursue a ‘harmonization’ and ‘uniformization’ of their tariffs” (87).

<sup>117</sup> See Albini at, <http://www.negativland.com/albini.html>, last accessed January 2012.



In light of the fact that the conjoining of the two organizations would create a single monopoly for public performance rights in Canada, it is quite remarkable that a government body would actually suggest it. According to the Competition Bureau of Canada, the *Competition Act* “is a federal law governing most business conduct in Canada. It contains both criminal and civil provisions aimed at preventing anti-competitive practices in the marketplace.”<sup>118</sup> Surely nothing could be more anti-competitive than a monopoly. It is particularly interesting when one considers that when PROCAN unilaterally approached the “Combines” (Director of Investigation and Research of the Bureau of Competition Policy) they were told any attempt to merge would result in prosecution (Matejcek 95). Subsequently, according to Matejcek, PROCAN directly approached the Minister of Communications, Marcel Masse, in 1986 and realized that support for such a change went high indeed (96). Masse informed PROCAN that the impending copyright revision act would in fact allow the creation of new collectives such as the one they were exploring (96).

In respect of the hegemonic order this period of copyright revisions represents the cusp of its mature status. The essential concept which the order has been attempting to inculcate has become so common sense by this period that not only is it completely accepted, but the sitting government itself is encouraging the creation of a single “super” monopoly. Considering the history briefly outlined in this chapter such an outcome seems extraordinary. The initial attempts to legally enforce the public performance right within Canada in 1927 fail due to a lack of registration on the part of CPRS; the Ewing Commission is called to investigate the practices of CPRS in 1931; the Parker

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<sup>118</sup> Source, Competition Bureau of Canada, at [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h\\_00148.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00148.html), last accessed January 2012.

Commission is called to investigate CPRS again in 1935; competition arrives in Canada in the form of BMI in 1940; the Isley Commission of 1957 calls for an investigation into the entire area of performing rights. Despite these setbacks the hegemonic order surrounding the public performance right continues to incorporate those in opposition, or when that fails uses legal means to force their position upon their opposition.

As the 1960s come to a close the order is solidly established and begins to seek influence beyond their original specific site of the public performance right. This can be seen in the form of attempts to encourage and create a mechanical reproduction rights agency, though as noted, without publisher support such efforts failed. Nevertheless they indicate the expansion of the order and its continued growth in membership. A membership growth which has come in part by enfolding those groups that had opposed them originally such as the American Federation of Musicians. Increasingly the dominant order is being heard at the policy table resulting in part in the numerous documents issuing from various government departments throughout the late 60s and through the 1980s, which use the public performance right schema as a model for future collectives in expanded areas

As the coming revisions of the *Copyright Act* indicate, the public performance right hegemony has become a model for future expansionary movements within copyright, which will benefit copyright owners, and some creators, but will adversely affect the larger community of users. Due to the significant numbers of studies and pieces of legislation mentioned in this chapter, once again a chronological listing follows. In this instance, as a result of the exponential growth in publications in the latter part of the century the chronology is divided into two periods; 1920-1970 and 1970-1986.

**Table 2 –Chapter 8 Chronology 1920-1970**

Year	Occurrence	Significance
1922	ASCAP (US)	Begins to license radio broadcasts (revenues of \$35,000).
1924	<i>Copyright Act</i> (Canada)	Comes into force after being passed in 1921.
1925	Canadian Performing Rights Society (CPRS)	Formed in Canada
1927	<i>Canadian Performing Right Society v. Famous Players Canada Corp.</i>	CPRS loses in its first effort to enforce public performance right.
1932	Ewing Commission	Called to investigate complaints.
1935	Parker Commission	Called due to ongoing concerns in regard to tariffs.
1936	Copyright Appeal Board	Created on basis of Parker Commission.
1939	Canada declares war on Germany	Canada enters into WWII.
1939	Broadcast Music International (BMI)	Formed by the NAB in the US.
1940	BMI	Opens satellite office in Canada.
1941	ASCAP (US)	Last year ASCAP has exclusive license with broadcasters.
1941	BMI	Begins to provide music for broadcasters and ASCAP is locked out.
1945	CPRS	Changes name to CAPAC
1947	BMI Canada	Incorporated in Canada.
1949	Canadian Music Publishers Association (CMPA)	Publishers industry association formed.
1949-1951	Massey Commission	Surveys arts and literature across Canada.
1959	Isley Commission	Report on Intellectual Property
1961	Rome Convention	Recommends the addition of neighbouring rights to copyright.
1963	Canadian Record Manufacturers Association (CRMA)	Formed.
1969	BMI	Divests itself of publishing arm.

**Table 3—Chapter 8 Chronology 1970-1986**

Year	Occurrence	Significance
1971	Economic Council of Canada (ECC)	Publishes report <i>Copyright in Context: The Challenge of Change</i> .
1971	ECC	Publishes <i>Report on Intellectual and Industrial Property</i> .
1971	WIPO	Publishes <i>Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms</i> .
1972	Canadian Independent Record Publication Association (CIRPA)	Formed.
1972	CMRA	Changes name to Canadian Recording Industry Association (CRIA).
1976	BMI Canada	Separates from US parent and becomes PROCAN.
1981	Federal Cultural Policy Review Committee (FCPRC)	Holds meetings with artists and industry representatives across Canada.
1981	Department of Consumer and Corporate Affairs Canada (CCAC)	Publishes <i>An Economic Analysis of a Performers Right</i> .
1982	CCAC	Publishes <i>Audio and Video Home Taping: Impact on Copyright Payments</i> (Keon).
1985	Task Force on Broadcasting Policy	Publishes <i>A Study of Radio: Economic/Financial Profile of Private Sector Broadcasting in Canada</i> .
1986	Task Force on Broadcasting Policy	Publishes <i>Music and Electronic Media in Canada</i> .

## Chapter 9: Copyright Revision and the Growth of Collectivization

This chapter will briefly recount the changes within Canadian copyright as a result of the copyright revision process. The Phase I revisions in particular, which culminated in the 1988 *Act*, had a major impact on collective copyright management.

After almost thirty years of recommendations (Isley Report was issued in 1959) the Copyright Act underwent major revision in 1988. The 1988 revision, referred to as Phase I, was particularly significant for the policy network concerned with performance rights. Section 70.1 allowed for the creation of a collective society to collect fees on behalf of any group of authors as listed under section 3. The effect of these revisions was the statutory freedom to create new collective agencies. The first new collective formed was CANCOPY (now known as Access Copyright), which would collect fees for the photocopying of copyrighted works from Canadian users (focusing primarily on educational institutions and libraries).

While Cancopy was the first new collective formed as a result of the changes to the Act, by 2011 thirty-four copyright collectives, the offspring of the public performance right collectives, were registered with the Copyright Board. With respect to the public performance right, the amalgamation of CAPAC and PROCAN into a single body in 1990, known as the Society of Composers, Authors and Music Publishers of Canada (SOCAN), formed the first true monopoly in public performance rights in Canada since BMI had entered Canada in 1941 (Matejcek 122-123).

As a result of the Phase I revisions, the Copyright Appeal Board became known simply as the Copyright Board. The Copyright Appeal Board (CAB) had been formed in 1936 at the recommendation of the Parker Commission. The original board operated part-

time, with the board meeting on several occasions per year to assess tariffs for the public performance of music. The CAB had been formed in response to what was seen at the time as usurious requests and increases in the costs of licenses set out by the Canadian Performing Right Society. The Parliamentary debates of 1935 are quite vivid in their descriptions of the CPRS as a “racket,” “evil,” “highwaymen” and that some form of control was needed to “put an end to price fixing and extortion” (*Debates of the House of Commons 1935 644*). It is sufficient to point out that the behaviour of the collective was seen as beyond control and the forming of the permanent tribunal was for the purpose of oversight and perhaps even restraint.

While the Copyright Appeal Board had dealt exclusively with the regulation of tariffs for the public performance right in music (the only collective recognized under Copyright until the 1988 revisions to the Act), the new Copyright Board would oversee collective administration in all existing (at that time only SOCAN and CANCOPY) and future areas (Copyright Act sec. 66). Additionally the new board would operate full-time, with a chairman and four members. This is in contrast to the original CAB which required one judge and two civil servants to sit part-time, with their service done in conjunction with their full-time positions. However as Howard Knopf has noted, a chairman is not absolutely required by the Act, and in fact the board operated for several years without a chair. Additionally the board also employs several full-time professional and administrative persons giving a total of 16 full-time equivalent positions (Copyright Board of Canada, [http:// www.cb-cda.gc.ca](http://www.cb-cda.gc.ca), last accessed Jan. 2012).

Knopf has also stressed the fact that because the board is an administrative tribunal as set out under s. 28 of the Federal Courts Act (Knopf 14) there is no internal

appeal process available to either copyright user or owner if they are dissatisfied with the ruling of the board. The only option is an appeal to the federal court. Obviously given the costs involved this is not an attractive option for anyone, but particularly not for a small-scale or independent user.

Again with respect to disagreements between owner and user, the board places a great value on “expert” witnesses. Unfortunately, as discussed in chapter four with respect to Pam Samuelson’s work, most of these experts are in fact closely related to the industries petitioning the board. In fact as Knopf comments they are often “effectively playing a management and/or advocacy role for the collective” (Knopf 22). Knopf continues, “[t]he board has shown great reluctance to permit any questions relating to independence of the experts or going to the weight of their testimony” (22). Such behaviour is of course contrary to the normal rule of Canadian courts, and though the Copyright Board is not a court, Knopf’s concern that the board “should not completely discard basic evidentiary principles” (23) seems eminently reasonable.

While the role of the board is to strike a “balance” (which is the role of copyright generally) between users and owners, the board is made up primarily of specialists in intellectual property generally with a legal background. If there is in fact a desire to maintain balance, then appointments to the board that are more reflective of user’s interests would be a good start. Indeed, given that the mandate of the original board was to control the egregious demands of the collectives’ tariff requests it is interesting that there is no substantive representation of user’s interests on the board beyond the objectivity of the board members themselves. If one peruses the speeches of the various

chairmen of the Copyright Board,<sup>119</sup> it is evident that they hold intellectual property as sacrosanct. Most of the speeches indicate a need for expanding the parameters of the existing law to encompass new areas. However, if that is the culture in which the board members and staff are entrenched can they truly be objective in their consideration of the positions of current social movements surrounding copyright (copyleft, creative commons, excess copyright) that may question the existence of collective management, or the right of collectives to extend their areas of collection?

### 9.1 Copyright Review Process: Phase II

In 1997, the Phase II revisions of copyright reform were enacted in Canada. For the music industry there were two key changes which resulted from the amendment. A tariff on blank audiotapes was instituted and “neighbouring rights”<sup>120</sup> on sound recordings were recognized for the first time. The neighbouring rights were copyrights in a performer’s performance (discussed in the opening of chapter seven for the purpose of distinguishing it from a public performance right), and a producer’s right in a recording. The blank media levy was intended to recoup any losses borne by record producers, composers, lyricists and performers in respect of private copying. It also established a rental right for such artists to be collected in the event that the copyright owner allowed such acts. Additionally, the changes to the Act also allowed for reciprocal agreements to be established with other signatory nations.

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<sup>119</sup> Available on the Copyright Board website at <http://www.cb-cda.gc.ca/>, last accessed January 2012.

<sup>120</sup> The recognition of neighbouring rights was a result of Canada becoming a signatory (in December of 1997) to the 1996 World Intellectual Property Organization (WIPO) Treaty on Performances and Phonograms. The treaty mirrored the provisions of the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations. Both agreements entitled producers of sound recordings and artists whose performances are captured on sound recordings to receive royalty payments on public performances or broadcasts.



In terms of the hegemonic order, this is the point at which the order achieves full maturity. By this time the dominant ideology of the order, the inculcation of a non-intuitive rights system, has become so broadly successful that it is completely unquestioned and is institutionalized across a broad spectrum of user groups to create new revenue streams. Ultimately however, while the original order now represented by SOCAN will continue to be an influential member, the new hegemonic structure has expanded beyond the focus of just the public performance right.

## 9.2 Copyright Review Post Phase II

Beginning in 1993, and culminating in March of 2004 an extraordinarily significant lawsuit was working its way through the courts. The case involved alleged copyright infringement and was brought by legal publishers against the Great Library of the Law Society of Upper Canada, which was providing photocopy services to researchers. The ruling of the Supreme Court focused on four major questions. Are the publishers' materials (in the form of headnotes, summaries and indices) original works protected by copyright? Did the Great Library authorize copyright infringement by maintaining photocopiers for its patrons use? Did the Law Society's dealings with the publishers' works fall within the statutory exemption for "fair dealing" under section 29 of the Act? Did Canada Law book consent to have its works reproduced by the Great Library (*CCH Canadian Ltd. v. Law Society of Upper Canada*)?

Writing the response for the court, Justice McLachlin stated that while the court had ruled that copyright did exist in the publishers' materials, it had not been infringed as the Law Society's dealings with the works were for research purposes and as such fell within the fair dealing exemptions offered under section 29 of the Act (sec. 6). With

respect to the Great Library “authorizing” infringement by virtue of providing photocopiers for the use of patrons, the court ruled that they had not (sec. 44-46). As to whether or not Canada Law Book had given consent to have its works reproduced, the court chose not rule, as they felt that their lengthy findings on the matter of fair dealing made a ruling unnecessary.

### **9.3 Fair Dealing**

Arguably the most significant issue addressed in the CCH decision was that of the fair dealing exception, which when coupled with the acknowledgement of users’ rights, provided a strong argument for greater use of copyright works within the provisions of fair dealing. At section 48 the court notes, “[a]ny act falling within the fair dealing exception, will not be an infringement of copyright. The fair dealing exception, like other exceptions in the Copyright Act, is a user’s right.” The court also noted that with respect to the fair dealing exception: “[i]n order to maintain the proper balance between the rights of a copyright owner and user’s interests, it must not be interpreted restrictively” (sec. 48). This was a significant statement, as copyright owners had generally viewed such exceptions to copyright as loopholes. As an example, Howard Knopf, a member of Access Copyright as well as a practicing lawyer in the field of intellectual property, noted in his online blog of April 8, 2011 that when Access Copyright published its “toolkit” for the Canadian Federal election of May 2011, it included the following: “there is no need for an uncompensated exception when a work is available at a reasonable price and can be obtained with reasonable effort. In other words, exceptions should be unavailable whenever a licence for the use is available from a collective society.” As Knopf noted, such a position flies in the face of the CCH ruling.

In its lengthy discussion of fair dealing the court noted six factors that should be considered to determine if the dealing was fair. The purpose of the dealing; the character of the dealing; the amount of the dealing; alternatives to the dealing; the nature of the work; and the effect of the dealing on the work. Given the Access Copyright position stated in Howard Knopf's blog, the court was prescient when it stated,

The availability of a license is not relevant to deciding whether a dealing has been fair. As discussed, fair dealing is an integral part of the scheme of copyright law in Canada. Any act falling within the fair dealing exception will not infringe copyright. If a copyright owner were allowed to license people to use its work and then point to a person's decision not to obtain a license as proof his or her dealings were not fair, this would extend the scope of the owner's monopoly over the use of his or her work in a manner that would not be consistent with the *Copyright Act's* balance between owner's rights and user's interests. (*CCH Canadian Ltd. v. Law Society of Upper Canada*,)

In essence the court was simply noting that just because we can charge a toll does not mean we should, and in the balance necessitated in their interpretation of the Act, the fact that an owner may license their works for use does not negate the ability of users to exercise their rights under the fair dealing exception.

Following closely on the landmark ruling of *CCH*, the May 2004 *Report of the Standing Committee on Heritage* chaired by M.P. Sarmite Bulte (hereinafter referred to as the Bulte Report) was delivered. The Bulte Report made nine recommendations with respect to IP reforms to the Copyright Act of Canada. Three of those recommendations

advocated the creation of extended collective licensing regimes on the Internet.<sup>121</sup> These regimes were being extended in the sense that they were being posited to cover areas previously not licensed, specifically educational uses of the internet, file sharing online, and library transmission of digital documents. More significantly, the areas in which the collectives were being posited as a plausible means of operation arguably fall within copyright exemptions. The March 2004 rulings of the Supreme Court would seem to indicate that such collective licenses are not only unnecessary, but would in fact be an infringement of user's rights.<sup>122</sup>

#### **9.4 Access Copyright Extends Its Reach**

Access Copyright was formed in 1988 under the name Cancopy following the Phase I revisions to the Act. Following litigation launched against a photocopying service in Ottawa<sup>123</sup> they were able to negotiate a contract with the Ontario Ministry of Education in 1992. Licensing revenue for the 1992 fiscal year was \$2 million, however due to costs of creation and litigation, disbursements for that year amounted to \$265,000 (Friedland 19).

When Cancopy was formed, the initial agreement signed by all publisher participants stated, "You agree to accept the division of revenues between authors and publishers determined (as a percentage) by the Board of Directors for the genre or genres

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<sup>121</sup> It is also an unfortunate reality of political machinations that lobby interests can have a significant impact on outcomes. In the case of the Bulte committee, it was subsequently noted that a fundraising event for her re-election campaign had been sponsored and run by the Canadian Recording Industry. Had the Bulte report's extended licensing regimes become law, the recording industry would have benefited considerably.

<sup>122</sup> See Trosow (*Changing Landscape*), Wilkinson (*Filtering the Flow*) and Geist (*In the Public Interest*). The recent SCC rulings have been explicit in their statement that user's rights are just that, rights, and not simply loopholes to copyright.

<sup>123</sup> See *R. v. Laurier Office Mart Inc.* While the Laurier Office Mart received a great deal of initial attention and helped build a stronghold for CanCopy, ultimately charges were dropped due to insufficient evidence on the part of the crown. However CanCopy did win a civil suit against a photocopy shop located near the University of Toronto. *Globe and Mail* April 23<sup>rd</sup>, 1994, p. C1.

of your publications, notwithstanding any agreement between yourself and any author on any publication or your entitlement to all revenues from any publication” (Friedland 18).<sup>124</sup> Subsequently Access Copyright would set rates of 50/50 on all educational publishing and 65/35 (in favour of creators) for all other work (19). However, in September of 1992, following the successful negotiation of the kindergarten to grade 12 license with the Ontario Ministry of Education, the publisher members let it be known that they would withdraw their support from the collective if their existing contracts with creators were overridden (as per the participation agreement signed upon entry). Friedland’s report indicates the board would ultimately “cave” to publisher demands, which led to an increasing use of contract overrides (21). In practice this meant that while a publisher could sign the agreement with Access Copyright guaranteeing the 50/50 or 65/35 royalty split, if the publishers’ contract with the creator specified a different arrangement, for example 25% to creator and 75% to publisher, that contract between the publisher and creator would override the Access Copyright agreement.

Backlash from creator members became a growing concern, and following complaints raised in 2003, an internal investigation noted that, “In reality, our splits are routinely overridden by private contract; almost 75% of our domestic distributions go to publishers” (qtd. from an external report of CANCOPY in Friedland 21). In July of 2005 four creator groups within Access Copyright presented a written submission to the board noting the extreme discontent among creator members with regard to the disparate distribution. As a result Friedland was charged with undertaking an investigation in July of 2006 (22). Ultimately Friedland recommended far more transparency in the entire distribution process. His two strongest suggestions were a 50/50 split without contract

<sup>124</sup> Note that a similarly worded agreement was also signed by creator members.

overrides, and a new structure for the board with its makeup consisting of 4 creator members, 4 publisher members, 4 independent members and the executive director as chair (43). Judging from their current website,<sup>125</sup> neither of these recommendations have come to pass.

The remarkable thing about Access Copyright is how quickly it insinuated itself within the educational system, and how effectively it managed the organs of the state (RCMP, Crown attorneys) to ensure its success. Indeed as Friedland comments approximately 75% of the Access Copyright revenues flow from its educational tariffs, in contrast to the 12% that educational streams account for in the overall revenues of the Copyright Clearance Centre in the United States (Friedland 24-25). The “Fair Use” provisions within copyright in the United States are somewhat more explicit than those provided under “fair dealing” in Canada. That is why litigation, and the prevailing fear of litigation, proved so successful for Access Copyright.

In March of 2010, Access Copyright (AC) filed a new proposed tariff for universities and colleges with the Copyright Board. The new tariff was a considerable increase over the previous moving from \$3.38 per full time enrolled student (FTE), to a proposed \$45 per FTE for universities (\$35 for colleges). This amounted to a 1300% increase over the previous agreement for universities (a 1000% increase for colleges).

The tariff created other concerns for colleges and universities beyond the egregious increase in fees. While previous AC licenses had noted that the AC license did not apply to any use of works covered by fair dealing provisions of the Act despite the strong delineation of fair dealing (or perhaps because of) in the CCH ruling, in the proposed AC agreement fair dealing is conspicuous by its absence.

<sup>125</sup> <http://accesscopyright.ca/> last accessed January 2012.

The most disturbing aspect of the proposed tariff was its intent to expand into the area of digital licensing. Under section 2 of the tariff “definitions,” copy was defined:

“Copy” means any reproduction, in any material form whatever, including a Digital Copy, that is made by or as a consequence of any of the following activities:

- (a) reproducing by a reprographic process, including reproduction by photocopying and xerography;
  - (b) scanning a paper copy to make a Digital Copy;
  - (c) printing a Digital Copy;
  - (d) transmission by electronic mail;
  - (e) transmission by facsimile;
  - (f) storage of a Digital Copy on a local storage device or medium;
  - (g) posting or uploading a Digital Copy to a Secure Network or storing a Digital Copy on a Secure Network;
  - (h) transmitting a Digital Copy from a Secure Network and storing it on a local storage device or medium;
  - (i) projecting an image using a computer or other device;
  - (j) displaying a Digital Copy on a computer or other device;
- and
- (k) posting a link or hyperlink to a Digital Copy. (*Access Copyright Post-Secondary Educational Institution Tariff*)

The CCH ruling had made clear that a transmission by facsimile was not in and of itself an infringing act, but was to be viewed within the framework of the fair dealing criteria.

Similarly, the digital uses enumerated by the proposed tariff were also not necessarily infringing. For example, the vast majority of serials held in university libraries now are digital. The universities already have licenses in place with the vendors for the uses of these materials. Students and faculty regularly access and download them from secure networks across the country. However, the AC proposed tariff, as a binding contract, would supersede the individual contracts of the institutions. Given the success that ACs publishing ranks had experienced in overriding the AC contract with their own personal contracts with creators, one is left to wonder if AC recognized the value of that tactic as they fashioned their tariff proposal. Additionally, the very notion that posting a link to a separate website could constitute a copy within the meaning of the Copyright Act is ridiculous. One might as well suggest that by making available a map of a city (as is commonplace with virtually every tourist destination) that was subsequently used in the commission of a crime, the tourist bureau should now be held culpable in the crime.

Issues that might be raised with respect to the AC tariff proposal go far beyond the locus of this thesis and will likely provide the focus of a great deal of academic work for a significant period. However the point that is most compelling here is the fact that AC could table such an extraordinary proposal within twenty two years of their creation. The fact that AC would file such a staggeringly high increase and would attempt to expand its area of collection beyond that defined in the current Copyright Act is indicative of just how comfortable and secure the new regime feels. However, this tariff request may be indicative of another Gramsci moment—of organic crisis as more and more students and academics begin to pay attention to the machinations of the collectives that surround them.



## 9.5 Further Copyright Developments Post Phase II

In June of 1999, Shawn Fanning created a file sharing system known as Napster. Napster would ultimately come to trial and be shut down in July of 2001. The format had proved so successful that new file sharing services sprang up quickly, Kazza, Grokster, BitTorrent, etc., and most significantly, iTunes. Eventually the recording industry decided to try a new attack, and sued the individuals downloading the music instead. In a series of cases across the America the Recording Industry Association of America (RIAA) brought suit against individual downloaders. In each case they sought the maximum in damages to make an example of the downloader. Despite the fact that they won some significant cases (and awards) the final result was not exactly what they hoped for. Not only did the public not cease and desist, the RIAA and the recording industry in general became among the most hated groups in America. For example, a website called <[www.boycott-riaa.com](http://www.boycott-riaa.com)> appeared which listed as its mission:

Boycott-RIAA was founded because we love music. We cannot stand by silently while the recording industry continues its decades-long effort to lock up our culture and heritage by misrepresenting the facts to the public, to artists, the fans and to our government. Our mission is to represent the position of the consumers and of the independent music artists against this nearly completely foreign-owned cartel which exhibits behaviors indicative of deliberate and outright contempt for the law, and of those whose job is to enforce it (simultaneously, they implore the government to persecute grandmothers and children on their behalf!).<sup>126</sup>

It was not only the general public who complained bitterly about such tactics, but

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<sup>126</sup> The website is no longer active but was live into 2011.

also many of the artists the RIAA purported to be defending. In Canada, the Canadian Music Creators Coalition (CMCC) was created in part because the artists who actually performed and wrote the music instinctively realized that suing their fans was not a good long-term business strategy:

Until now, a group of multinational record labels has done most of the talking about what Canadian artists need out of copyright. Record companies and music publishers are not our enemies, but let's be clear: lobbyists for major labels are looking out for their shareholders, and seldom speak for Canadian artists. Legislative proposals that would facilitate lawsuits against our fans or increase the labels' control over the enjoyment of music are made not in our names, but on behalf of the labels' foreign parent companies.

Given the generally held notion that copyright protects the creator, it would be difficult to find a more explicit statement pointing out that it is industrial interests that are influencing and controlling the debate. Ultimately the Recording Industry Association of America gave up its campaign of prosecuting individual users, and while it no longer initiates new cases, it proceeds with those before the courts. In one such case in July of 2009, it successfully sued an individual user for infringement in Boston. Joel Tenebaum, a Boston University student, admitted to downloading and distributing (uploading) 30 songs. A federal court found him guilty of infringement and ordered him to pay \$675,000 in restitution to four record labels.<sup>127</sup>

Nor was it only fans that were prosecuted. As Lawrence Lessig outlined in *Free Culture*, there was an alternate business model in production at the same time as Napster.

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<sup>127</sup> Globe and Mail, August 1, 2009, p A2.

In January of 2003 MP3.com came online allowing users to access their own music from any location via the internet.<sup>128</sup> To do so MP3.com purchased 50,000 music compact discs to load on their central server. Each user would log in from their home computer and insert their own disc into their drive. The MP3.com system would then register which discs the user owned to make them available to the user via their membership information. While certainly the system could have been used to illegally copy music, that music was already available for free via Napster. The intent of MP3.com was to "give users access to their own content, and as a by-product, by seeing the content they already owned, to discover the kind of content the users liked" (Lessig 190). If this model seems familiar now it is because it is the same model Amazon and iTunes operate on, namely determining taste patterns (and delivering content to the user) based on the interests their personal buying patterns had indicated.

Nine days after MP3.com began operations,<sup>129</sup> the five major labels brought suit against MP3.com for infringement. MP3.com settled with 4 of the 5, but an agreement could not be reached with the fifth, Vivendi-Universal, which subsequently won the judgment. In addition to the fine of \$118 million levied by the court, MP3.com settled with Vivendi, paying out over \$54 million. Less than a year later Vivendi purchased MP3.com.

Not long after assuming ownership of MP3.com, the new owner, Vivendi, sued the law firms that had advised MP3.com in respect of their copyright concerns in regard to their online distribution. Vivendi claimed malpractice on the part of the law firms. As Lessig noted, "[t]his lawsuit alleged that it should have been obvious that the courts

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<sup>128</sup> See [http://www.lessig.org/blog/2003/09/kluger\\_krugman.html](http://www.lessig.org/blog/2003/09/kluger_krugman.html), last accessed January 2012.

<sup>129</sup> Ibid.

would find this behaviour illegal; therefore, this lawsuit sought to punish any lawyer who had dared to suggest that the law was less restrictive than the labels demanded" (Lessig 190). Thus the major labels made it clear that they, much like their industry lobby agency the RIAA, they would not only seek to stop any attempt to undermine their business model, they would do so with as much force as the law would allow.

The music industry has tried litigating the servers (Napster, Kazaa), litigating the users (RIAA v. named defendants), litigating the lawyers (Vivendi Universal v. the MP3.com legal team), lobbying the government to increase IP protections (SOCAN, CRIA, etc.), and nevertheless users continue to share files. The hegemonic order has survived numerous attacks throughout its lifetime, but the crisis triggered by the practice of downloading may be the truly organic crisis that Gramsci noted would, or at least could be the downfall of the hegemony. For Gramsci, each man was an individual capable of self actualization, within and beyond his class status. The individual was capable of bringing "into being new modes of thought," which is to say he was capable of choosing his own moral path or developing an entirely new strain of thought that might or might not reflect the common values of his class status. Thus, the current crisis surrounding the downloading of digitized music can in part be attributed to creation of a "new mode of thought" with respect to notions of copyright, owning and sharing, which were certainly not those being advocated by the dominant order. Further, this new mode of thinking has led to a new discourse which has begun to question the foundations of the dominant order and as such place its hegemony in question. This is the organic crisis envisioned by Gramsci which had the potential to topple the ruling hegemonic order: "If the ruling class has lost its consensus, i.e. is no longer 'leading' but only 'dominant,'

exercising coercive force alone, this means precisely that the great masses have become detached from their traditional ideologies, and no longer believe what they used to believe previously” (*Prison* 275).

The masses of the public have become disconnected from the traditional copyright ideologies, which the performance right organizations have laboured so long and hard to inculcate. Within the performance rights frame there have been numerous instances of such resistance ranging from the publishing class themselves at the outset, through various trade and social unions as well as larger media interests,<sup>130</sup> however despite significant opposition none have ever successfully challenged the dominant group, though they have influenced some outcomes. In fact, most have ultimately been assimilated into the process itself and have become part of that which they opposed. This current schism with respect to downloading may finally trigger the organic crisis necessary to destabilize the established hegemonic order.

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<sup>130</sup> Recall from chapters five through seven that the music publishers, the musicians’ union, broadcasters and a large portion of the general public, as demonstrated by the rancor of the House Debates in 1935, originally opposed public performance right regimes.

**Table 4--Chronology of Significant Events in Canadian Performance Rights****Network**

Year	Occurrence	Significance
1921	<i>Copyright Act</i>	First domestic copyright legislation.
1925	Canadian Performing Right Society established	British P.R.S. attempts to create a Canadian organization.
1927	<i>CPRS v. Famous Players</i>	First attempted use organs of state (courts) to enforce public performance right in Canada. Fails due to lack of registration (then required)
1931	Ewing Commission	First governmental response to concerns over CPRS
1935	Parker Commission	Recommends a Copyright Appeal Board (CAB) be established.
1941	CPRS changes name to Canadian Association of Publishers, Authors & Composers (CAPAC)	Nationalization of name during wartime.
1941	BMI established in Canada	Competition for CAPAC
1951	Massey Commission	Reflects policy issues in relation to the Arts and in particular questions surrounding broadcasting.
1959	Isley Commission	Entire chapter of report devoted to issue of public performance right; called for full investigation of area.
1961	Rome Convention	Called for creation of neighbouring rights for performers performance, producers and broadcasters right. Canada noted convention but did not sign.
1988	<i>Copyright Act of Canada</i>	Phase I revisions
1997	<i>Copyright Act of Canada</i>	Phase II revisions

## Chapter 10: Summary and Conclusion

In this final chapter I will return to the discussion of Antonio Gramsci's philosophy of hegemony. Throughout the thesis connections have been made between the historical events and the hegemonic frame; however, they have been disparate and not necessarily chronological. Therefore in Part I of this chapter, I will summarize the key points of the hegemonic philosophy with respect to the public performance rights networks, and review the highlights of the hegemonic order in a chronological manner. Part II will then reconsider the objectives and research questions set out in chapter 1 in light of my findings. Finally, in Part III, I shall offer some alternative processes which could serve the policy goal of encouraging creation, but across a much broader spectrum and with greater benefits to the general culture.

### 10.1 Part I: A Chronological Review of the Gramscian Hegemonic Order

The music industry is perhaps the preeminent example of the commodification of cultural artifacts and also the preeminent example of the incessant expansionary nature of capital and class division. Within those structures musicians in general are the eternal proletariat, forced to eke an existence out of the labour of the bodies. While a few do manage to achieve significant material success those lucky enough to do so are more akin to lottery winners than successful entrepreneurs. Though composers might be seen as operating on a different level than musicians (since they are necessarily using a greater proportion of their intellect as opposed to the physical skills of their bodies to create compositions for performance) they are nevertheless dependent on their physical body in some form to communicate their composition to others so it may be performed. The composition itself has no productive value without a performance of it. It may have a

useful value for the composer even if only in a mental state, but to have productive value in the creation of capital the composition must be realized in some form. It must be able to move beyond the composer. Traditionally this movement has occurred by means of rendering it within a form of musical notation thereby allowing it the fixation necessary to attract copyright in the earliest forms.<sup>131</sup>

Historically the copyright had to be assigned to the publisher as a matter of course for the work to be published. Looking back to the first stirrings of the public performance right issue we see the fundamental problem lay with the simple fact that composers were not being fairly compensated for their works by the publishers. The publishers, the new emerging middle class, controlled the means of production and distribution and they would choose to invest in those works they felt would sell. For the composers it was a closed system. If you could convince a publisher of the potential value of your work they might choose to publish it, but if so they would in all likelihood offer you a lump sum in exchange for the copyright. Coovers' collection includes an article from the *Evening Standard* of September 1902. The article points out the significant disparity between the profits of composers and the publishers. They note that Johann Strauss was paid 40 pounds for his *Blue Danube* waltz, which sold 400,000 copies in a single year in America and England and generated over 100,000 pounds for the publisher. (Coover 89) Or put another way, for every pound profit the composer received, the publisher received 2,500 pounds profit.

Gramsci made clear that his interpretation of Marx rejected the economic and

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<sup>131</sup> Note however that within recent copyright convention (post 1988) fixation is no longer a requirement for copyright. While it is expected in most circumstances, the release from fixation is intended in part to allow certain types of works such as improvisation, experimental theatre or indigenous performances protection under the act.



historical determinism of the rigid base-superstructure dualism that was often associated with Marx. For Gramsci there were no absolutes, there were only possibilities that each man could strive for. Though he recognized the fundamentally political economic nature of class struggle, Gramsci, also realized that a society was the sum of all its cultural and ideological parts, not simply its class status. Therefore the dialectic nature of the social order, its interrelationships with their varying influences and exchanges, could and would have political outcomes regardless of class status: “A third moment is that in which one becomes aware that one’s own corporate interests, in their present and future development, transcend the corporate limits of the purely economic class, and can and must become the interests of other subordinate groups too” (Gramsci, *Prison* 181). Gramsci does not simply say that their interests must be imposed on the subordinate group, but rather that the dominant group’s interests *become the interests of the subordinate*. Herein lies the notion of consent that is at the heart of hegemony.

Within the context of the struggle between composers and publishers the majority of power was in the publishers control. Although there existed an explicit performance right in the U.K as early as 1842, the publishers made it clear that they had no intention of observing it. In fact they were able to overcome their own internal competitive class interests to form an association in 1881 primarily to oppose the right at the national level (Coover 9). Their lack of success was likely due to the larger capital interests beyond their own which held more influence with the various governments involved and whom would benefit from an increased level of trade brought about by an international agreement. However despite the advancement of the Berne Convention, the British publishers still ignored the public performance right. It was only the reduction in sheet

music sales that created an incentive to expand into new areas (Ehrlich 5).

The necessity of expansion led to the first cross-class alliance with the composers. Without the public face of the composer, the publishers would not have been able to collect the performance right. For the composers it was a simple decision. They had been struggling for decades to improve their position and while this outcome did not address the imbalance that existed with respect to the disparate profits of publisher and composer, it would however lead to more money for the composers and that was enough. However the creation of a right of public performance did not address the core issue of disparity between publisher and composer in terms of both recompense and power. In fact instead of the imbalance being addressed within the ranks of capital, it was instead deflected with the advocacy of a public performance right, the costs of which would not be borne by the publisher but would instead provide the publishers with a new revenue stream.

British opposition to a public performance right was extreme. Consider the following: despite the fact that the United Kingdom *Copyright Act* of 1842 had established a public performance right for musical works, it was not successfully collected. The French performance right society, Societe de Auteurs, Compositeurs et Editeurs du Musique (SACEM), had pursued their rights on British soil since 1881 but with only minimal success. The Music Publishers Association was formed in large part to stop the imposition of a public performance right. Great Britain signed the Berne Convention in 1887, and yet the attempt to form a British performing rights society in 1890 failed without the support of the MPA.

The Berne Convention is significant here for a number of reasons. First and foremost, the nature of continental law generally regarding copyright, and French law

specifically, was different from the common-law origins of the British system and, as noted previously, it was French interests who were the driving force behind the Berne Convention. With respect to the performance right in particular, Article 11 of the Berne Convention stated, “The stipulations of the present Convention shall apply to the public representation of dramatic or dramatico-musical works and to the public performance of musical works, whether such works be published or not.”

Berne was the first international treaty establishing a public performance right. The 1908 Berlin revision to Berne moved the establishment of copyright from the moment of publication to the moment of creation. This shift was seen as a significant step for authors and creators as it helped to establish a conception of copyright as a “creator’s” right (Seignette 21). In addition there was the recognition of a mechanical right for the copyright owner due to the success of the mechanical music business (piano rolls, gramophones, melodeons) (Laing 87). The new mechanical rights would also provide new territories for the expansion of the performance right hegemony.

Public performance rights collectives are a classic example of the expansionary instincts of capital, as are copyright collectives generally. As the collectives become established and entrenched in their place of origin, they cast their nets farther afield to extract new value from their existing catalogs. The initial establishment of the order (SACEM) in France in 1851 led to its establishment in Britain in 1881, and ultimately the establishment of an international treaty (Berne) to insure a “natural right” based system of copyright on an international scale. Subsequent applications of coercion, in the form of litigation, insured adherence. As one beachhead was established and secured, new ones were begun. Though not directly associated with SACEM, it was its successful

imposition and expansion that ultimately led to the creation of the PRS in Britain and ASCAP in the United States. Ultimately it was the expansionary nature of those two entities that led to the successful establishment of the CPRS in Canada. The internationalization of the public performance right through Berne also allowed for one of the first truly successful expressions of trans-national capital, as the agreements between collective societies, as between Berne signatories, were reciprocal.

In 1914 the Performing Right Society (PRS) was incorporated and began its attempts to enforce the public performance. In retrospect, the failures of previous attempts to start a British collective were not due to any lack of desire from composers, but rather the lack of support from the Music Publishers Association. Once the publishers saw the economic value in the union with creators, the partnership was established, thereby forming the *historic bloc* as delineated by Gramsci and the first infant steps of the ruling hegemony.

The Performing Right Society (PRS) was the first cross class alliance between composers and their traditional opponents, publishers, within the Anglo-American tradition. And, as Gramsci noted with respect to the establishment of any hegemonic order, the basis was purely economic. For the publishers to successfully establish the PRS they needed the public face of the composers. The right of public performance was bestowed upon the creator by virtue of the *Copyright Act*, but in order to successfully disseminate his works the creator had to assign his copyright to a publisher. Thus the public face of the championing of the composer was as important as the establishment of the historic bloc. It was this public face that allowed the public inculcation of the *justness* of the performance right. Had the attempts been made to collect purely on the basis of the

publishers' right it would not have succeeded. Considering the tone of the debates in Canada's Parliament, it was only marginally accepted even with the composers as the public face.

Gramsci noted that throughout the course of the hegemonic order the dominant group leading the order would face various moments of crisis. Some of the crises faced in the establishment of the order in North America are particularly well documented. Despite winning a significant victory establishing their right to collect from cabarets in the Herbert decision, ASCAP continued to face an uphill battle. The American Federation of Musicians advised its members not to perform any works by ASCAP members out of fear that the increased costs might adversely effect their employment in hotels and lounges (DeWhitt 25). In addition to the AFM, the Hoteliers Association (34) and the Motion Picture Exhibitors Association (37-38) actively opposed ASCAP's right to license their use of music. Similarly many music publishers felt that a successful application of the performing right would in effect mean that users would have to pay for music twice: once when purchased from the publisher and again when used. Shortly after the Herbert ruling of 1917, the music publishers would form their own association, the Music Publishers Protective Association (MPPA) in response to concerns about the impact that ASCAP might have on their industry (35). However, similar to the British experience, the economic depression of the 1920s, coupled with technological changes, saw the sales of sheet music plummet and the publishers' need to find alternate ways to profit from their copyrights.<sup>132</sup> Ultimately a deal was struck and the majority of

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<sup>132</sup> That was in fact cited as one of the justifications for the expansion of the performance right in the report of the Parker Commission. Similar rationales can be found in pleas made for the blank media levy relative to cassette copying, and the current request for increased intellectual property rights in the wake of perceived losses due to downloading.

publishers joined ASCAP and brought their catalogues along with them.

The emergence of radio broadcasting also created opportunities for growth for the hegemonic order. It was not immediately apparent in either Canada or the US if the performance right extended to broadcasting. In the US, ASCAP decided that broadcasting might be a very lucrative source of funding and in an obvious attempt to establish its territory offered temporary licenses. The licenses waived any fee, but admitted ASCAP's jurisdiction (Randle 369). In 1923 the National Association of Broadcasters (NAB) was formed from the ranks of private broadcasters in the United States. It was the position of the NAB that radio did not constitute a performance for profit, and they were prepared to defend their position all the way to the Supreme Court if necessary (369). In 1925 the performance right was extended to broadcasting in the US. This move to expand into new related territories would become habitual within the hegemony.<sup>133</sup>

Possibly as a result of their experience with the broadcasting tariff, ASCAP realized the value of lobbying and by 1927 had become an effective presence in Washington, illustrating clearly that it intended to influence policy decisions (DeWhitt 120). This period marks the first efforts of the hegemonic order to inculcate their ideology beyond their membership and target markets. By virtue of influencing directly at the policy level they helped to enable the expansion of their regimes with less recourse to individual legal actions. It was also at this time that ASCAP began to expand into Canada in association with the PRS, in their joint establishment of the Canadian Performing

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<sup>133</sup> Given the success of ASCAP in this instance, one cannot help but wonder if their contemporary descendants, Access Copy, might have fared better in the current tariff process had they merely extended their territory via their contracting, without simultaneously increasing their license fees. While they likely would have still faced opposition, it probably would not have been as widespread or heated. In fact, given university administrators' overall concern with the bottom line, it might just simply have gone through. Once AC had established their territory they could have gradually raised the rates.

Right Society (CPRS) in 1927.

In an echo of its forming partners, the CPRS also faced hostility at its inception, ultimately resulting in Royal Commissions to investigate its actions in 1932 and 1935. Enough concerns were raised during the second commission that a permanent tribunal, the Copyright Appeal Board, was formed in 1936 specifically to deal with issues related to the performance right.

During the same period in the United States, the broadcast licensing revenues rose from \$960,000 to \$4.3 million between 1931 and 1939 (Huginin 9). As a result, the broadcast industry, in conjunction with their trade association the NAB formed their own licensing agency, Broadcast Music International (BMI). Following the Second World War, and following the pattern of the other performing rights organizations, BMI expanded into Canada and set up a Canadian office to collect on the performance right. Each crisis faced by the hegemonic order is successfully overcome and opposition is either broken through the coercion of the state via the courts, or absorbed into the hegemony. While the NAB may have opposed ASCAP, after their failure in the courts they eventually adopted the ideology of the dominant order and while still in competition with elements within the hegemony (ASCAP) they nonetheless had become proponents of the dominant ideology of the hegemonic order (the public performance right).

As the hegemony moved further into the twentieth century it continued to grow in power and influence. Surviving the attacks and crises of the Royal Commissions, opposition from broadcasters and public, they continued to move forward and simultaneously began the political process of lobbying to influence policy outcomes. The Isley Commission of 1959 devoted an entire chapter of its report solely to the issue of

performance rights, though the tone had changed markedly from the earlier Royal Commissions. Not only were the performance rights regimes being generally treated with less suspicion (curious, given that two previous commissions had been specifically called to investigate them), but they had reached a level of confidence that allowed them to posit that the government had no right to regulate them via the Copyright Appeal Board. By this time the hegemony was far more advanced, entrenched and confident. It continued to expand, having established itself in radio and now began its encroachment into television.

By the time the performance right hegemony entered the 1960s it was so thoroughly entrenched that it was no longer questioned. In fact just the opposite began to occur, the publications of the Economic Council of Canada (ECC), which had been charged with investigating a new copyright policy for Canada, began to reflect the effectiveness of the hegemonic order surrounding the public performance rights regimes upon the policy process. In a series of reports, *Copyright in Context: the Challenge of Change, Report on Intellectual and Industrial Property*, the ECC strongly recommended the adoption of copyright collectives modeled on the performance rights regimes but for the purposes of collection in other areas. Perhaps the ultimate indicator of the extent to which the hegemony surrounding the performance right was successful is the fact that it was the Minister of Culture himself who suggested that the two separate performing rights agencies in Canada (CAPAC and PROCAN) amalgamate into a single monopoly. Following the changes to the Copyright Act of Canada in 1988, they did so, forming SOCAN. At the same time the hegemonic order reached its full maturation with the extension of copyright collectives across a broad spectrum beyond the public performance right with the Phase I revisions to copyright in 1988.



In observing the extension of copyright collective management regimes across a broad base of interests, it is imperative to stress the “natural outcome,” the “common sense” with which this direction was perceived. The policy changes were the natural evolution of the policy process. However, as discussed in chapter four, the concept of a separate economic right (the public performance right itself) within the larger copyright frame was anything but a natural outcome. In fact the very people who subsequently championed the right for their own economic interests, the publishers, were at the outset vehemently opposed to the right.

Gramsci recognized that at various times within the hegemonic process crises would develop, and while some would be insignificant others would be “organic” of deep pockets of discontent within society. Such crises create the opportunity for new classes to overthrow the established order: “If the ruling class has lost its consensus, i.e. is no longer “leading” but only “dominant,” exercising coercive force alone, this means precisely that the great masses have become detached from their traditional ideologies, and no longer believe what they used to believe previously” (Gramsci, *Prison* 275). Within the performance rights frame there were numerous instances of such resistance ranging from the publishing class themselves at the outset, through various trade and social unions as well as larger media interests; however, despite mounting opposition none have ever successfully challenged the dominant group, though they have influenced some outcomes. In fact, most have ultimately been assimilated into the process itself and have become part of that which they opposed. Indeed that has been the overwhelming success of the hegemonic order.

Despite the fact that as a class they have been dependent upon the labour of their

bodies to forge an existence, composers and performers have continued to participate in the industrial process despite the overwhelming evidence that industrial capital will take advantage of them at every opportunity. Nor is this simply an historical observation. As Paul McGuinness noted in his speech to an international managers summit in 2008, the music business is rife with a history of abusing artists,

We were never interested in joining that long, humiliating list of miserable artists who made lousy deals, got exploited and ended up broke and with no control over how their life's work was used, and no say in how their names and likenesses were bought and sold. (McGuinness, n.p. 2008)

It continues to do so today even as it complains bitterly about ‘piracy’ and ‘theft’ with respect to downloading and digital music issues. As manager of U2 McGuinness has made many millions from the industry as have his clients. Of course unlike most, his clients have won the lottery so they have much more to lose if the traditional business model was to change, nevertheless it is interesting that they continue to maintain the status quo when they so clearly understand the inequity of power in the relationship. McGuinness cites the 360 deals being pushed by the industry as evidence of the continued exploitation of the artist, “It's ironic that, at a time when the majors are asking the artists to trust them to share advertising revenue they are also pushing the dreadful "360 model"”<sup>134</sup> (Ibid).

Yet the fundamental premise of his speech is that people are stealing from him and his artists and they need to enact laws to go after the Internet Service Providers. Even as he points out the historic and ongoing abuse he continues to support and promote the

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<sup>134</sup> The term 360 deal refers to an increasingly common practice in the music industry to sign artists to deals that provide the industry label to a proportion of income from all aspects of the artists income, not simply those related to the music or recording. As such the industry interests can also collect on any uses of the artists likeness, touring income, merchandise sales and/or expansion into new fields (such as film or TV).

ruling ideology. This itself is evidence of a successful hegemony. However, as noted U2 are very successful and while they may think the traditional copyright model and practice should be maintained (and expanded), many of their fans would disagree.

The current crisis surrounding the downloading of digitized music and copyright generally seems to reflect a new mode of thought with respect to the conception of copyright, owning and sharing, notions which were certainly not those being advocated by the dominant order. This new mode of thought can be seen to be much more reflective of the social classes that actually make use of the works. The way in which our contemporary society views copyright with respect to reuse and sharing within our social frames is very different from the way in which industrial concerns would like it to be seen. In turn this new mode of thinking has led to a new discourse, which has begun to question the foundations of the dominant order and place the hegemony in question.

The prevalence of this new copyright discourse, and the continuing rejection of the dominant order's ideology in regard to copyright seem indicative of the organic crisis which Gramsci noted would be necessary for the overthrow of a dominant order. While only time will tell, we appear to be on the cusp of such a crisis presently.

## **10.2 Part II: Resolution of Research Questions**

This thesis began with a realization that the standard justifications normally offered in support of copyright were generally lacking. When considered in the historic context of what constitutes a performance, the justifications were even less satisfying. Throughout my life as musician, librarian, arts administrator and scholar I have often wondered why it was musicians, who generally benefitted least, were so often the loudest supporters of these regimes. Ultimately that question led to the series of research

questions I posited at the start of this thesis, which will now be reviewed.

**Question 1:** Historically copyright justifications are couched in the rhetoric of *protecting the creator*. Is the performance right justifiable on that basis? If so, what are the social costs created by a robust performance right?

Although copyright regimes are generally justified on the basis of the protection of the creator, the reality is that the creator almost always signs over the copyright to their work as a condition of publication. With respect to the public performance right, even after copyright has been assigned to a publisher or other agent, the creator may still collect the public performance right however that right has always been shared 50/50 with the publisher (at best). In fact, the biggest winners financially from the performance right are the publishers, who regularly take the largest share of performance right dispersals. In general the income derived from performance right sources is minimal unless the composer has a significant commercial success. While this thesis has focused on the public performance right in music, if we look at the literary copyright collective Access Copyright, we can see that even by their own internal investigations the situation is far worse for creators, with the Friedland Report indicating approximately 75% of revenues going to the publishers' interests (21).

If we accept the premise that the intent of copyright as a public policy is to encourage the creation of new works, then we must also accept the overwhelming evidence of the economic literature that indicates that performance right regimes do not achieve this policy goal. Since the right cannot be justified on the basis of the creator or the incenting of creation, then the social costs can not be justified.

**Question 2:** Has there been any notable shift in the manner in which performance rights issues are considered at the State level over time?

Given the historic case study presented, it is evident that the relations between the performing rights organizations and governments have changed dramatically over the decades reflecting the growing influence of the collectives. The infant Canadian Performing Right Society was the subject of two Royal Commission investigations in 1932 and 1935. As a result of the 1935 commission the Copyright Appeal Board was established in 1936 specifically as an oversight body to deal with performance right tariffs (in music only). However, throughout the following decades the government reports indicated a successively warmer response to the performance right regimes, and an increasing role on the part of these regimes in the policy process. As noted in the case study, the culmination of this process was the wholesale adoption of collective management as a copyright policy tool with the Phase I revisions to copyright in 1988. Concurrent with the greater acceptance of the collectives was a subtle change in the role of the Copyright Appeal Board, now known as the Copyright Board (renamed and given an expanded role in the 1988 Copyright revision). While the original Board acted as advocate for the public interest providing oversight on the collectives, the contemporary Board is perceived quite differently. The following appears on the Treasury Board of Canada's Copyright Board webpage as part of the "raison d'être" for the Board itself:

In this context, our country's handling of intellectual property matters is a critical element in our long-term success in innovation, and by extension, to our long-term economic health. The terms and conditions by which

intellectual property owners (such as owners of copyrighted works) are compensated will largely define the incentive structure for innovation in and creation of copyrighted materials.

Statements from the Minister such as this coupled with some recent decisions and statements from the Board itself seem sufficiently clear in their indication that the Board is no longer concerned primarily with the public interest with respect to overly excessive tariffs.

**Question 3:** Has the policy network surrounding the Performance Right changed in any significant manner since the period marked by the 1988 Copyright amendments?

Unquestionably the network has changed significantly since 1988. While the original public performance right agencies (now known as SOCAN) within the broader performing rights regime continues to hold significant power in the network, the network itself has grown from the two legally existing entities under Copyright prior to the 1988 revisions (CAPAC & PROCAN, both performance rights collectives) into 34 registered copyright collectives now listed with the Copyright Board. The public performance right is no longer the only exclusive right being administered by a collective society. While these new collectives are not specifically performance right collectives in music, they were nonetheless modelled on the performance right collectives. In fact CAPAC (SOCAN's precursor) was specifically noted as a model for a reprography collective in government publications as early as 1971 (McDonald).

**Question 4:** Has the influence of original performance rights collectives continued to

significantly impact the larger collective rights management network since the 1988 copyright revisions, or has the network seen the establishment of new key players?

There has not only been considerable growth in terms of the numbers of collectives now in existence, but also in terms of the confidence and abilities of those collectives to operate in the larger network. The growth in terms of both financial market share and the confidence to pursue their interests at the tribunal level as indicated with Access Copyright clearly indicates the existence of new key players. Nevertheless, SOCAN is still unquestionably the dominant player in the network with income of over \$255 million collected in 2008. However, in a 2006 report to Heritage Canada, C. Craig Parks noted that SOCAN's biggest concern was “the impact of the introduction of new rights on its ability to maintain or increase its revenues, in light of the finite amount of money that users are prepared to pay for the use of intellectual property” (Parks, G 2). Therefore, despite the fact that SOCAN is the largest collective in operation, it is nonetheless poignantly aware that there is a finite limit to how much revenue can be streamed from users. The greater the number of collectives looking for a royalty the sooner that limit will be reached. The generally negative response to the Access Copyright proposed tariff increases for Universities and Colleges may indeed be a sign that end users have begun to take notice of the increasing requests for money in return for the use of intellectual goods. While SOCAN and Access Copyright are asking for recompense for different specific rights (public performance and performers’ performance versus reproduction) they are nonetheless the two biggest winners in terms of money received. As such, SOCAN’s concern is valid that end users will take notice and that there is a limit to the amount of fees and other costs they will tolerate.

**Question 5:** Given the membership numbers of performing rights organizations such as SOCAN, is there a disproportionate representation of their interests in the legislative process?

During the period when performance rights organizations arguably most impacted the policy process (1960s and 1970s leading up to the Phase I revisions to copyright) the numbers were relatively small. In 1968 CAPAC listed in its internal publication that there were 852 writers (composers/authors) and 122 publishers (14). Given those numbers their impact was certainly disproportionate. The current SOCAN report for 2010 lists membership as 94,000 creators and 12,000 publishers. However, given concerns as to how those membership numbers are determined it is difficult to assess what the proportions are now. Nevertheless considering the numbers involved the impact has certainly been quite significant when the historic changes to the Copyright Act leading to such extensive collective regimes are viewed within a historic perspective.

**Question 6:** Given the internal membership both historical and current of SOCAN, is there a disproportional amount of influence wielded by publisher interests as opposed to creator?

As noted in SOCAN Annual Report to Members (2010) mentioned in answer to question five the current membership makeup of SOCAN constitutes a ratio of 7.8 creators for every 1 publisher. It was also noted that this disparity has had a long history (7 creators to 1 publisher in the 60s) and yet the SOCAN board is made up of equal parts publishers and creators. Based on membership alone there was clearly a disproportionate



amount of influence vested in the publishing interests, which is further supported by the answer to question 7. Concurrent with that I would note that as their own independent report, written by Michael L. Friedland, indicated within Access Copyright the situation is even more pronounced to the detriment of authors.

**Question 7:** With respect to financial returns have the interests of the dominant and subordinate groups in the hegemonic process been equally well served?

Based solely on the financials publicly posted by SOCAN it is clear that historically the public performance right has been financially far more advantageous to publishers than creators. As noted in the Federal Cultural Policy Review Committee findings, the publishers received significantly more royalties than the creators received.<sup>135</sup> Also, when we consider the membership ratio (approximately four creator members for each publisher member), the publishing interests were clearly the financial winners. That being said, the current financial reports for SOCAN indicate that when international affiliates are included the creators receive a larger share of royalties, However, once again without knowing the exact distribution of membership it is difficult to ascertain, but there are indications the creator's lot is improving.

### 10.3 Part III: Possible Alternatives

If the policy objective of the copyright regime is the creation of new cultural works and that is to be achieved through means of financial incentive, is there an alternative to the copyright/performance rights schema?

Bear in mind as alternatives are considered that digital music accounts for 27% of

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<sup>135</sup> See note page 200.

the global market presently and over 40% of the market the United States (the most lucrative). In other words the digital issues briefly touched upon in the earlier chapters will only become larger. Therefore any alternatives will have to find a way of addressing the digital world. It is also pertinent to recall the work of Oberholzer-Gee and Strumpf with regard to evidence of copyright incentive as a necessity for creation, which strengthens the case that alternatives to intellectual property regimes may in fact encourage greater creation. Given the widespread downloading taking place globally, and its impact on incentive, they expected to see a reduction in creation. However they found the opposite:

The publication of new books rose by 66% over the 2002-2007 period.

Since 2000, the annual release of new music albums has more than doubled, and worldwide feature film production is up by more than 30% since 2003. At the same time, empirical research in file sharing documents that consumer welfare increased substantially due to the new technology. (“File Sharing and Copyright” 2)

With this factor in mind, there are two strong policy initiatives which could complement each other and create a system that would ensure fair remuneration, reuse and at the same time incentives for further creation. The first would focus on a tax reduction scheme to benefit artists and the second could provide an alternative to the standard copyright practice currently in place.

The first system is already in place and has been functioning in various forms since 1969. I refer to the Republic of Ireland’s Artists Exemption. Under this system artists in the Republic of Ireland are exempted from paying tax on income earned from

the sale of their works. The exemption is limited to a maximum of 250,000 Euros per annum, but may be used in conjunction with other taxable income. For example a musician teaching music part time (or full time) and simultaneously performing and selling their works would pay tax on any income derived from their employment as a teacher, but none on the sales of their work as an independent artist (up to the 250,000 max). This exemption is not limited to musicians but is available to all creative artists whose works fall in to one of the following categories, “a. a book or other writing; b. a play; c. a musical composition; d. a painting or other like picture, and e. a sculpture” (Ireland, Office of Revenue Commissioners, Artists Exemption Information and Guidelines, 2012).

The effect of this has been not only the growth and retention of creative artists in Ireland, but Ireland itself has become a centre for artists from around the world, and the companies that work with them (O’Connor 1004-1005). As the authors noted in their analysis of the scheme for the *Journal of Business Research*,:

The effect of what, on its face, would appear to be a rather modest tax exemption created by what some would look on as a country of small population and modest means has, in terms of the national wealth, been significant, drawing to the country productive and creative citizens from other nations and retaining in that country similarly creative and productive natives. (O’Connor 1005)

O’Connor continues, “The exemption has in every respect, created much more wealth to the nation of Eire than had the exemption not been granted” (1005). Therefore it would seem that a simple system of tax exemption could have significant impacts for creative

artists generally and musicians in particular. The fundamental criteria for the Irish system is that the work has to have cultural or artistic merit. While the Irish system does not go this far, a Canadian system might include not only created works, but also performances generally. Such a system would not only be a substantial benefit to the artists, especially to those just establishing their careers, but would also result in more works of art being created and performed, which is the intent of the policy discussed at the outset.

The second policy initiative has been developed by William W. Fisher of the Berkman Institute at Harvard. Fisher has proposed a compensation system that would, as he puts it, “provide an alternative to the increasingly creaky copyright regime” (16). In Fisher’s system, which relies on the experience of the United States as the benchmark, the copyright owner would register their work (audio or video) with the Copyright Office. The copyright owner would then receive a unique file name which would be used to track distribution, consumption, and modification. Fisher advocates a system of estimated use such as the ones pioneered by television broadcasters (the Nielsen ratings). Payment would come directly from the government, with the money being raised ‘most likely’ through a tax. The tax however would probably be directed at the manufacturers and industries associated with the creation of hardware and services connected to digital use as opposed to end users. However even if it were a direct tax on the population, in a worst case scenario Fisher estimates that cost to the consumer would be roughly half what they are currently paying (45). Fisher believes that once such a regime were in place “copyright law would be reformed to eliminate most of the current prohibitions on the unauthorized reproduction and use of published recorded music and films” (16).

It would seem that a hybrid of these two policies would offer substantial benefits

for both music users and creators. A system of tax exemption would greatly benefit the majority of artists while at the same time encouraging new works and performances. If such a system were enacted in conjunction with an alternative copyright administration regime such as the one proffered by Fisher, the benefits would be significant. In addition to the obvious benefits of on demand delivery, the decreased need for protection would allow new creative reuses of the copyright works. With more artists (the result in Ireland) creating more works, and having the benefit of a less restrictive copyright environment such as Fisher suggests, the end results would be a greatly expanded cultural inventory at a substantially reduced cost. Interestingly, in the Canadian Parliamentary debates of 1935 the notion of direct compensation was raised. However Mr. Taylor, the honourable member for Nanaimo British Columbia, suggested a flat rate be paid by the sitting government to the society itself, primarily to avoid the individual harassment of citizens (*Debates of the House of Commons of the Dominion of Canada, 1935, 3984*).

#### **10.4 Conclusion**

In this thesis I have tracked the establishment and expansion of the public performance right within the Anglo-American system. Within that process I have looked at the fundamental justifications for the public performance right as part of copyright regimes and found them wanting. The case study has tracked the expansion of the performance rights organizations, their increasing political awareness and ultimate participation and adoption as part of the Canadian policy process. Within this historical process I have posited the existence of a hegemonic order in the overall function of the performance rights network with the dominant order being held by the publishing interests. The hegemonic order reached its ultimate state with the expansion of collective

rights management within Canada beyond the realm of music performance as a result of the 1988 revisions to the *Copyright Act* of Canada. Without the establishment of the hegemonic order surrounding the public performance right, it is highly doubtful that there would be thirty-four copyright collectives presently registered with the Copyright Board of Canada.

While the objects of focus have been composers and publishers the process has in fact been one of class struggle between those who labour in creation and the capital interests who control the means of production and distribution. The entry point into the issue has been through the discussion of the right of public performance as defined within copyright, but the struggle reflects the overall struggle within our society between those who have the means to control the publication, distribution, use and censorship of information and those who wish to ensure access to information and freedom to communicate as a basic human right. Within this context the impact of a seemingly minor aspect of copyright, the public performance right, within the basket of rights afforded owners has had a tremendously large impact on downstream society. It is extremely unlikely that the monolithic structures which entrench the public performance rights regimes specifically and copyright in general would ever be abandoned. Nevertheless, perhaps this thesis can serve as a warning to the creeping expansion of intellectual property policy even in areas that might be seen to be 'common sense', or conversely of no import at all.

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