COPYRIGHT AND MUSEUMS

LEGAL HANDBOOK AND STANDARD CONTRACTS

SOCIÉTÉ DES MUSÉES
DU QUÉBEC

SOCIÉTÉ DES MUSÉES DU QUÉBEC TEAM

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GRAPHIC DESIGN AND PRODUCTION: bertuch.ca

ISBN: 978-2-89172-097-7

This set of contracts was produced with financial support from the Canadian Cultural Investment Fund of the Department of Canadian Heritage. The Société des musées du Québec would also like to thank all contributors and members who made it possible to produce this project.

Patrimoine canadien Canadian Heritage

Canada

PRESENTATION

Museologists must have a variety of skills, among them the capacity to understand the statutes that govern daily practice. Whatever the mandate of the museum, those working in the field must understand and be able to apply appropriately the main statutes that circumscribe their actions and decisions. When it comes to copyright, Quebec museum professionals have to be familiar with two statutes: the Canadian *Copyright Act* and Quebec's *Act Respecting the Professional Status of Artists in the Visual Arts, Arts and Crafts and Literature, and Their Contracts with Promoters*. There are many issues associated with copyright, as well as a variety of obligations and responsibilities respecting dissemination, management, conservation, and other museum-related activities.

Given the recommendation made during the *États généraux des musées du Québec* that these institutions have a guide to good practices with regard to copyright, the SMQ decided to take on the project of creating a series of contracts specific to museums. The Training and Professional Development Department took charge of the project, convening a committee of enthusiastic experts who had lively discussions, analyzed the early versions of the standard contracts and agreements, and validated the later versions. A committee of professionals working in a variety of museums of different sizes and with different mandates then tested the contracts.

In the first part, we summarize and explain the fundamental principles of copyright and their application in a museum environment. This part serves as a reference for the different situations and copyright questions linked to museum practice. It is a significant challenge to summarize complex concepts and explain in lay terms law that, despite a number of amendments over the years, still bears many traces of the time when it was originally written (in the 1920s). We have created a number of hyperlinks to related sections, examples, and complementary information sidebars to facilitate comprehension. When possible, we used plain language to explain the concepts, rather than legal jargon. Finally, we provide references for those who want to learn more.

The second part includes standard contracts approved by the Regroupement des artistes en arts visuels du Québec (RAAV). These documents, listed bellow, will provide a framework for negotiations between museums and artists and ensure that practices comply with the statutes.

I. EXHIBITION CONTRACT

II. LETTER OF INTENT

III. **A.** REPRODUCTION LICENCE
B. PUBLIC COMMUNICATION LICENCE

IV. **A.** CONTRACT OF ACQUISITION BY PURCHASE
B. CONTRACT OF ACQUISITION BY DONATION

V. CONTRACT FOR COMMISSION OF AN ARTISTIC WORK

VI. **A.** PROFESSIONAL SERVICES CONTRACT
B. PROFESSIONAL SERVICES CONTRACT: CURATOR
C. PROFESSIONAL SERVICES CONTRACT: VISUAL ARTIST

CONTENTS

COPYRIGHT HANDBOOK FOR MUSEUMS IN QUEBEC

COPYRIGHT AND DISSEMINATION IN MUSEUMS

STANDARD CONTRACTS KIT

COPYRIGHT HANDBOOK FOR MUSEUMS IN QUEBEC

SOCIÉTÉ DES MUSÉES
DU QUÉBEC

INTRODUCTION

The current scope of copyright is much broader than the limited scope of the first French copyright law, written on the initiative of personalities such as Beaumarchais[1] and adopted in 1791, and the first British copyright law, which came into force in 1710 under the reign of Queen Anne. The former law targeted mainly protection of public performance of plays;[2] the latter, reproduction and publication of books.[3]

In a Canadian perspective, the term *copyright* can be defined as a group of rights and prerogatives, some transferable, that initially only an author, a performer, a producer, or a broadcaster can exercise, for a limited duration, with regard to a "copyright object."

In Short

The *Copyright Act* protects works, performances, sound recordings, and communication signals. For each, a first copyright owner is designated: the author of a work, the performer for his or her performance, the producer of a sound recording, and the broadcaster for a communication signal.

The *Act* confers on assigns[4] certain moral rights and prerogatives, intended for authors and performers, and economic faculties and prerogatives that assigns can exercise.

The *Act* sets out the period during which assigns can exercise the rights conferred on them by the statute. Although there is a general rule, the duration of rights varies depending on the type of object or the copyright owner.

Finally, both artists and promoters must know the rules specific to the rights that individuals may exercise with regard to their image and voice; these are called image rights.

In short, it is important not to confuse *intellectual property* and *copyright*. In Canada, intellectual property is the subject of several statutes that cover appropriation, distribution, and exploitation of certain immaterial (or intangible) assets, such as objects of copyright,[5] trademarks,[6] inventions,[7] industrial designs,[8] integrated circuit topographies,[9] and plant breedings.[10]

1- "In 1777, Pierre-Augustin Caron de Beaumarchais was one of the founders of the Société des auteurs et compositeurs dramatiques (SACD), which now has more than 48,000 author members [http://www.sacd.ca/]. He thus laid the basis for regulations that were formulated first by the Council of State in 1780 and then by the Constituent Assembly in 1791." Pierre Frantz, *Encyclopedia Universalis* (Paris: 1996 edition), vol. 3, p. 930 (our translation).
2- Act of 13 January 1791, France.
3- *Statute of Anne*, 8 Anne ch. 19, 1710.
4- The term *assign* designates authors, performers, producers, broadcasters, and their heirs.
5- *Copyright Act*, RSC 1985, c C-42 [http://canlii.ca/t/7vdz].
6- *Trade-Marks Act*, RSC 1985, c T-13 [http://canlii.ca/t/7vlw].
7- *Patents Act*, RSC 1985, c P-4 [http://canlii.ca/t/7vkn].
8- *Industrial Design Act*, RSC 1985, c I-9 [http://canlii.ca/t/7vhp].
9- *Integrated Circuit Topography Act*, SC 1990, c 37 [http://canlii.ca/t/7vpz].
10- *Plant Breeders' Rights Act*, SC 1990, c 20 [http://canlii.ca/t/7vpt].

1.
WHAT IS PROTECTED BY COPYRIGHT?

WORKS, PERFORMANCES BY PERFORMERS, SOUND RECORDINGS, AND COMMUNICATIONS SIGNALS

1.1 WORKS[11]

Museum professionals are regularly faced with copyright questions related to protected works and must have a good grasp of how the Act categorizes works and the restrictions that protect them.

1.1.1 CATEGORIES OF WORKS

In Canada, works are divided into four categories.

A. Literary works "includes tables, computer programs, and compilations of literary works."[12] The literary quality of the work is not important, as the statute protects all types of written materials: novels, telephone books, learning methods, instruction manuals for electronic devices, textbooks, doctoral dissertations, and so on.[13]

B. Dramatic works "includes any piece for recitation, choreographic work or mime, the scenic arrangement or acting form of which is fixed in writing or otherwise; any cinematographic work; and any compilation of dramatic works."[14] It should be mentioned that cinematographic works cover all media that integrate sound and image "by any process analogous to cinematography": videotape, DVD, digital audio-visual file, and so on.

C. Musical works are defined as "any work of music or musical composition, with or without words,"[15] without regard for the form used: piece of classical music, popular song with lyrics and music, instrumental piece, nineteenth-century orchestral composition, and so on.

D. Artistic works covers all works in the visual arts field. For instance, the Act states specifically that paintings, drawings, sculptures, architectural works, engravings, photographs, works of artistic craftsmanship, charts, plans, and compilations of artistic works are included in this category.[16] In addition, moulds and models are included in "sculpture";[17] "architectural work" designates all buildings and structures and models of buildings or structures;[18] and etchings, lithographs, woodcuts, prints, and other similar works are included in "engravings."[19] Finally, "photographs" include photo-lithographs and all other works expressed by any process analogous to photography.[20]

To read the sidebar *Works of artistic craftsmanship and objects with a utilitarian function*

11- Before Act C-32 came into effect, in 1997, the *Copyright Act* protected only authors' works, including cinematographic works. However, the legislature had already attributed to producers of sound recordings, by fiction of law, certain rights by including "records, perforated rolls or other contrivances by means of which sounds may be reproduced" among musical, literary, and dramatic works, depending on the nature of the works recorded.

12- Computer programs are found in this category because software source code is expressed in alphanumeric signs. See *Copyright Act*, section 2 (definition of literary work) and *WIPO Copyright Treaty*, (1996), section 4.

13- "Examination of the protected works draws attention to two points: the legislature protects all sorts of written works, whatever their value, whatever the author's merit." *Apple Computer Inc. v. Mackintosh Computers Ltd*, 1988, 1 FC 673, 693 (FCA) (our translation).

14- See *Copyright Act*, section 2 (definition of dramatic work).

15- See *Copyright Act*, section 2 (definition of musical work).

16- See *Copyright Act*, section 2 (definition of artistic work).

17- See *Copyright Act*, section 2 (definition of sculpture).

18- See *Copyright Act*, section 2 (definition of architectural work).

19- See *Copyright Act*, section 2 (definition of engravings).

20- See *Copyright Act*, section 2 (definition of photograph).

1.1.2 COMPILATIONS, COLLECTIVE WORKS, AND WORKS OF JOINT AUTHORSHIP

Under the Act, works resulting from the selection or arrangement of all or parts of literary, dramatic, musical, or artistic works may be protected by copyright.[21] Thus, a compilation of several literary works constitutes a distinct literary work, if this compilation meets the criteria for originality. This rule applies to each category of works. Furthermore, a compilation of data is protected by copyright even if each datum (e.g., an accession number) does not constitute a work in itself in the sense of the Act. A compilation of data (e.g., inventory file) is protected by copyright only if the data are organized and presented in a way that satisfies the criteria for originality.[22]

A compilation of works from different categories is deemed to fall into the category representing the most substantial part of the compilation.[23] For instance, a dramatic work that integrates the creation of an artistic work and the execution of a musical work, both integrated into a dramatic script, would be a "performance."

The Act also contains certain rules with regard to works created jointly by two or more authors, when the contribution of one is not separate from those of the others, or when a work is the result of a collaboration among a number of authors.[24] It is similar for a collective work, composed of separate works created by different authors, such as encyclopedias and dictionaries, as well as newspapers, magazines, and other periodical publications.[25]

In addition to providing protection for certain types of works, the *Act* provides protection for these works only when certain conditions are met.

1.1.3 CRITERIA FOR COPYRIGHT PROTECTION

A. The work must be fixed in a tangible form of expression. If a work is not fixed and communicated with the aid of a machine or other device, it is not protected by copyright.

B. The work must be original. The term *original* is not used here in the sense of novel or unique. Originality in copyright is limited to the following three requirements:

- The work has an author
- It is not a copy of another work
- It is the product of an exercise of skill and judgment that must not be so trivial that it could be characterized as purely mechanical[26]

In addition, a work protected by copyright represents the "expression" of an idea and not the idea itself. All ideas – no matter how brilliant – are in the public realm. Ideas may take various forms: formulae resulting from a scientific discovery ($E=mc^2$), news of the day, historical events (Jacques Cartier arrived in Canada in 1534), and methods and procedures (a cake resulting from use of a recipe).[27] However, the text describing and explaining each of these pieces of information is protected by copyright, as a literary work, under the *Copyright Act*.

C. The author must be a citizen or subject of or residing in a country that is a signatory to one of the international treaties defined in the *Copyright Act*.[28]

To read the sidebar *Copyright and Intangible Heritage*

21- See *Copyright Act*, section 2 (definition of compilation).
22- See *Tele-Direct Inc. v. American Business Information, Inc.*, 1998, 2 FC 22 (FCA) [http://canlii.ca/t/4mzc].
23- Par. 2.1(1) *Copyright Act*.
24- This is the case, for example, for works by the trio BGL or an opera that requires the joint work of a composer and a librettist. *Copyright Act*, sec. 2 (definition of a work of joint authorship).
25- *Copyright Act*, sec. 2 (definition of collective work).
26- *CCH Canadian Ltd. V. Law Society of Upper Canada*, 2004, 1 CR 339, par. 16 [http://canlii.ca/t/1glp0].
27- See article 2 of the *WIPO Copyright Treaty* [http://www.wipo.int/treaties/en/text.jsp?file_id=295166]. The result of using the recipe is not protected, but the text of the recipe is protected as a literary work.
28- *Copyright Act*, sec. 5. There are additional rules if the author is not a citizen or subject of or residing in a signatory country.

1.2 PERFORMANCES[29]

The *performance* is to the performer what the work is to the author – that is, the representation of an artistic, dramatic, or musical work by a performer; the recitation or reading of a literary work; or a dramatic, musical, or literary improvisation, whether or not inspired by a pre-existing work.[30] The Act protects the artist's performance of the work and not the work itself. Performance covers both works protected by copyright and those in the public domain, without regard to whether or not they have already been fixed in a material form.[31]

1.3 SOUND RECORDINGS

A *sound recording* is protected by copyright when it consists of sounds, regardless of the origin of these sounds:[32] an artist's performance of a musical work, improvisation, the ambient sound of a large city, and so on. In contrast to the notion of performance, which is linked to the execution or improvisation of a work in the sense of the Act, a sound recording may integrate anything that a person can hear (e.g., birdsongs).

Recordings on any medium – disk, vinyl, cassette, compact disk, digital file on a computer disk, and so on – may be protected.

1.4 COMMUNICATION SIGNALS

A *communication signal* consists of radio waves transmitted through space, without any artificial guide, for reception by the public.[33] This "new" application of copyright was introduced into the *Act* in 1997 to benefit broadcasters, in order to comply with the *Rome Convention for the Protection of Performers, Producers of Photograms and Broadcasting Organizations*.

29- In some countries, rights covering performances, sound recordings, and communication signals are designated by the term *neighbouring rights*. In Canada, the federal government decided to integrate them under *objects of copyright* in order to comply with the exclusive constitutional jurisdiction that it has in this matter. See section 91(23) of the *Constitution Act, 1867*, 30 & 31 Victoria, c 3 (UK).

30- *Copyright Act*, sec. 2 (definition of performer's performance).

31- Ibid.

32- *Copyright Act*, sec. 2 (definition of sound recording: "recording, fixed in any material form, consisting of sounds . . .").

33- *Copyright Act*, sec. 2 (definition of communication signal).

2.
WHO IS THE COPYRIGHT OWNER?

THE AUTHOR OF A WORK THAT MEETS THE CONDITIONS FOR COPYRIGHT PROTECTION.

It is important to distinguish the *author* from the *owner* – or *holder* – of the exclusive rights listed in the Act.[34]

Although the author's name inevitably remains associated with creation of the work, the copyright owner is the physical or moral person who can exercise the rights associated with this work. For example, when a creator entrusts management of her copyright to a collective society, that entity acts as copyright owner, even though it is not the creator of her works.

Authors are the first copyright owners of their works. However, as for any principle, there are exceptions.

2.1 EXCEPTION FOR WORKS PRODUCED IN THE COURSE OF EMPLOYMENT

Contrary to the principle of the ownership presented above, an employer will be the first owner of exclusive rights in a work if:

- The employer retained the services of the author under the terms of an employment contract. This contract may have been made in writing or not, for a fixed or undetermined period.[35]
- The work was created in the course of this employment.[36] When an employee at a museum designs an exhibition as part of his or her work as a project manager, the museum will be the first owner of copyright on this exhibition even though other copyright-protected works may be shown in it (sculptures, photographs, scenography, and so on).[37]
- The employment contract does not provide that the author retains copyright ownership.

34- *Copyright Act*, sec. 13(1).

35- Service contracts used by self-employed workers and independent contractors are not covered by par. 13(3) of the *Copyright Act*. These authors retain copyright on their works.

36- For example, the employer is the first owner of copyright on plans and specifications prepared by an architectural technician employed by an architectural firm or on the source code for software designed by a programmer working for a computer company. As these salaried workers are hired to create a "work" in the sense of the *Copyright Act*, the creative act is integrated into the firm's operations. See the Superior Court decision in *Scott Saxon v. Communications Mont-Royal*, REJB 2000-21632.

37- The Court of Appeal decision in *Lachance c. Productions Marie Eykel Inc.*, 2014, QCCA 158 [http://canlii.ca/t/g2xqw] confirms that the designer of the program *Passe-Partout* is one of the authors of this program, qualified as a work of joint authorship, and that his employer, the Ministère de l'Éducation, owns the program's copyright.

2.2 EXCEPTION FOR WORKS PRODUCED BY THE CROWN

As per section 12 of the Act, copyright on works prepared or published by or under the direction or control of Her Majesty or any federal or provincial government department belongs – subject to any agreement with its author – to Her Majesty, and the copyright will subsist until the end of the fiftieth year following the year of first publication of the work.

2.3 EXCEPTION FOR ENGRAVINGS, PHOTOGRAPHS, AND PORTRAITS

The copyright rule for photographs, portraits, and engravings commissioned for remuneration differs depending on the date of the commission: before or as of 7 November 2012.[38]

2.3.1 SYSTEM APPLICABLE AS OF 7 NOVEMBER 2012

As of this date, the creator of a photograph, engraving, or portrait remains the first owner of copyright on the photograph, engraving, or portrait. Aside from the exceptions for creator-employees and works produced by the Crown, photographers, engravers, and portraitists now benefit from the same protection as that accorded to creators.

However, there is a new exception that reduces the impact of this rule. Clause 32.2(1)f) of the *Copyright Act* grants an exemption to those who commission a photograph or portrait.

Therefore, even if the photographer or portraitist is the copyright owner, the person who commissioned the photograph or portrait for remuneration is allowed to use it for private or non-commercial purposes, without the photographer's or portraitist's permission. However, photographers and portraitists do have recourse for any unauthorized commercial use.

2.3.2 SYSTEM APPLICABLE BEFORE 7 NOVEMBER 2012

When an engraving, photograph, or portrait was commissioned before 7 November 2012, the old rule continues to apply.[39] The copyright on this type of work is owned by the person who commissioned the work, as long as the following conditions are met:

- The engraving, photograph, or portrait was made for remuneration.
- The engraving, photograph, or portrait was made as a result of this commission.
- The remuneration was paid.
- There is no stipulation indicating that the engraver, photographer, or portraitist owns the copyright.

The courts have not interpreted these requirements uniformly,[40] and this has led to certain difficulties with application. Some of these difficulties were resolved when the Act was amended in 2012 to enable photographers to benefit from the same protection as other creators.

38- See sections 6, 7, 59, and 60 of *An Act to Amend the Copyright Act*, LC 2012, c 20.

39- Sec. 60 of *An Act to Amend the Copyright Act*, LC 2012, c 20.

40- For example, the Quebec Court of Appeal considered that the potential sale of photographs constituted remuneration, even though the legislature had amended the *Copyright Act* to specify that the remuneration had to be "paid." See *Desmarais v. Edimag Inc.*, REJB 2003-3956 (CA).

3. WHAT ARE MORAL RIGHTS?

THE RIGHT OF AUTHORSHIP AND THE RIGHT OF INTEGRITY

The Act confers certain prerogatives on authors for works and, as of 7 November 2012, on performers for sound performances executed live or fixed through sound recording.[41] These prerogatives are separate from economic rights. For instance, an author who assigns her economic rights to a third party retains the moral rights in her work.[42]

Moral rights are integrally linked to the author or the performer and cannot be assigned to someone else, although they may be renounced.[43] When the author or performer dies, his or her estate inherits these rights for a period equivalent to the duration of copyright.[44]

Moral rights are composed of two major rights.

3.1 RIGHT OF AUTHORSHIP

This is the right to claim authorship of works and, as of 7 November 2012, of sound performance executed live or fixed on a sound recording.[45] This right becomes active when certain rights associated with the work or the sound performance are exercised – for example, the obligation to indicate the author's name when the work or performance is reproduced or published.

The right to claim authorship of a work includes the right to preserve anonymity or to use a pseudonym.[46] Exercise of the right to claim authorship of the work or sound performance may also give rise to different legal recourses, depending on whether the alleged infringement involves, for example, having omitted the author's name or having associated a work with another person during the marketing process (usurpation).

3.2 RIGHT OF INTEGRITY

The right of **integrity** applies to works or sound performance executed live or fixed on a sound recording as of 7 November 2012.[47] This right enables authors or performers to object to any distortion, mutilation, or other modification of the work or sound performance.[48]

The right of association, the second component of the integrity right, makes it possible for authors and performers to take legal action against anyone who uses their work or performance without authorization in association with a cause, service, product, or institution.[49]

However, the author or performer must prove that the infringement of the right of integrity creates a prejudice to his or her honour or reputation. In the specific case of engravings, paintings, and sculptures, any distortion, mutilation, or modification is deemed prejudicial;[50] proof of damage to the honour or reputation is thus unnecessary. Finally, a change in the location, the physical means by which a work is exhibited, or the physical structure containing a work, and any steps taken in good faith to restore or preserve the work do not, on their own, constitute an infringement of moral rights.[51]

41- See *Copyright Act*, sections 14.1, 14.2, 17.1, and 17.2.
42- *Copyright Act*, par. 14.1(3) and par. 17.1(3).
43- *Copyright Act*, par. 14.1(2) and par. 17.1(2).
44- *Copyright Act*, sec. 14.2 and sec. 17.2.
45- *Copyright Act*, par. 14.1(1) and par. 17.1(1).
46- Ibid.
47- Ibid.
48- *Copyright Act*, par. 28.2(1).
49- Ibid.
50- *Copyright Act*, par. 28.2(2).
51- *Copyright Act*, par. 28.2(3).

4. WHAT ARE ECONOMIC RIGHTS?

EXCLUSIVE RIGHTS ALLOWING FOR ECONOMIC EXPLOITATION OF WORKS PROTECTED BY COPYRIGHT

These rights, which are at the core of the Act, can be subject to monetary evaluation and are part of their owner's assets. That is why they are called *proprietary or economic rights*.

4.1 LICENCE OR ASSIGNMENT?

Economic rights may be exploited through:

- A "licence," considered to be an authorization for a person other than the copyright owner to exercise a right (comparable to a rental), OR
- An "assignment," considered to be a transfer of property (comparable to a purchase).

The Act indicates that copyright owners may assign their copyright:

- In whole or in part
- Generally or subject to limitations related to territory, medium, or market sector, or scope of the assignment
- For all or part of the copyright term[52]

The same rules apply to exclusive licences.

As a consequence, the owner of a copyright has great latitude with regard to the acts that he or she intends to assign or license. For example, an artist may assign to one museum the right to reproduce a work in Canada for a four-year period, and to another museum the right to reproduce the same work in the United States for a three-year period. Also, an author may assign an exclusive licence to one publisher for distribution of a literary work in digital format, and to another publisher permission to reproduce and publish the same work in French on paper.

However, assignment of a copyright or of an exclusive licence is valid only if it is in writing and signed by the owner of the right in question, or by the owner's duly authorized agent.[53]

To read the sidebar *Assignment and Reassignment*

In addition, in Quebec, licence (exclusive or non-exclusive) and assignment contracts concluded between a promoter and an artist are subjected to a legal framework, including obligatory clauses, set out in the *Act Respecting the Professional Status of Artists in the Visual Arts, Arts and Crafts and Literature, and Their Contracts with Promoters*. Under this statute, museums are considered promoters; as a consequence, all collaborations with artists in the visual arts, arts and crafts, and literature must be set out in a contract in proper and due form. More precisely, the law provides,

"The contract must be evidenced in a writing, drawn up in duplicate, clearly setting forth

(1) the nature of the contract;

(2) the work or works which form the object of the contract;

(3) any transfer of right and any grant of licence consented to by the artist, the purposes, the term or mode of determination thereof, and the territorial application of such transfer of right and grant of licence, and every transfer of title or right of use affecting the work;

(4) the transferability or nontransferability to third persons of any licence granted to a promoter;

(5) the consideration in money due to the artist and the intervals and other terms and conditions of payment;

(6) the frequency with which the promoter shall report to the artist on the transactions made in respect of every work that is subject to the contract and for which monetary consideration remains owing after the contract is signed".[54]

52- *Copyright Act*, par. 13(4).

53- Ibid.

54- See sections 30 to 42 of the *Act Respecting the Professional Status of Artists in the Visual Arts, Arts and Crafts and Literature, and Their Contracts with Promoters*, CQLR c S-32.01 [http://canlii.ca/t/kffr].

4.2 EXCLUSIVE RIGHTS

Rights associated with acts that necessitate authorization by the copyright owner are called *exclusive rights*.[55] For instance, the owner of the exclusive reproduction right on a work is the only person who can reproduce the work or authorize someone else to exercise this right. As a consequence, the copyright owner also holds the right to prevent anyone from reproducing the work in a different medium. This exclusive right also enables the owner to obtain financial compensation in return for the permission granted.

The exclusive rights apply with regard to all or a substantial portion of a work, performance, sound recording, or communication signal. This right therefore cannot be exercised for a non-substantial portion. But what is a substantial portion? A court called upon to settle a dispute will examine whether the infringement involves a significant part of the work protected by copyright. This exercise is not limited to a quantitative assessment of the borrowing, expressed in percentage, duration, or length of the excerpt concerned.[56] Rather, the court will apply a "qualitative test" to decide whether the borrowing is significant according to the criteria for originality.[57]

To read the sidebar *Copyright and Exceptions*

55- The *Copyright Act* uses the term *copyright* to designate exclusive rights benefiting authors, performers, producers, and broadcasters. However, this definition may create confusion, as the term *copyright* refers generally to all of the rules covering the objects of copyright, and not just the privileges resulting from exclusive rights.

56- *Cinar Corporation v. Robinson*, 2013, SCC 73, par. 26.

57- Ibid.

4.3 MAIN ACTS COVERED BY OWNERSHIP RIGHTS

4.3.1 PRODUCING OR FIXING A WORK PROTECTED BY COPYRIGHT ON A MATERIAL SUPPORT

The expression of an idea is first conceived in the author's mind and then materialized in a work. The Act protects this fixation by specifying that the author holds the exclusive right to produce a work in any material form whatsoever.[58]

4.3.2 TRANSLATING OR ADAPTING A WORK, OR TRANSFORMING IT INTO ANOTHER FORM OR ANOTHER MEDIUM

The Act protects certain works that are derived from an existing work. In this regard, the statute provides that copyright on a work includes the exclusive right:

- To produce, reproduce, perform, or publish a translation of the work[59]
- To adapt or convert the work into another form or another medium – that is, the adaptation:
  - of a dramatic work into a non-dramatic work[60]
  - of a non-dramatic work into a dramatic work[61]
  - of a work into a cinematographic work[62]

58- Like authors, performers have the exclusive right to fix their performance on any material medium. The goal of this fixation is to have a permanent recording of the performance, which otherwise no longer exists after it is presented. Finally, just as performers have the right to fix to their performance, broadcasters hold the right to fix a communication signal.

59- *Copyright Act*, clause 3(1)a). In general, the author of a literary work or his or her publisher will authorize a translator to write a translation, which will constitute a new work. This work will be copyrightable by the translator separately from the source work (for example, an original work may be in the public domain but the translation is not). However, the author of the original work remains the owner of the right to reproduce, perform, or publish a translation of the work. It is therefore important to set out in a contract the rights and obligations of each party to prevent possible future disputes among the author, the translation, and the publisher.

60- *Copyright Act*, clause 3(1)b).

61- *Copyright Act*, clause 3(1)c).

62- *Copyright Act*, clause 3(1)e).

4.3.3 REPRODUCING A WORK PROTECTED BY COPYRIGHT

Long synonymous with the right to copy a work and closely linked to the development of printing, the reproduction right remains one of the main exclusive rights. Under the principle of "media neutrality" confirmed by the Supreme Court,[63] the reproduction right covers the transfer of a work onto all media. Thus, it applies to the reproduction of all or part of a work onto a medium of the same nature (e.g., photocopy), reproduction onto a different medium (e.g., digitization of an artwork), and synchronization of one work with another work on a single medium (e.g., synchronization of a musical work and a cinematographic work).

To be considered a reproduction, the work must still exist on the original medium after reproduction.[64] The method and the media used are not important: printing, photocopying, digitization, copy of a digital file to an external hard drive, reproduction of a sound recording on CD, and so on.

4.3.4 PUBLIC ACCESS TO COPIES OF THE WORK

The exclusive rights to publication, rental, and property transfer are the acts aimed at providing public access to copies of the object of copyright.

Publication

The Act specifies that "publication" means, in relation to works and sound recordings, the making available of copies of these works or sound recordings in sufficient quantities to satisfy reasonable public demand.[65] It is important to note that reproduction and publication are two separate acts, as the latter involves copies that have already been reproduced. The sale of a number of copies of a book or sound recording is an example of publication in the sense of the Act. In this regard, the right to publish can be exercised only once, at the time of the "first" publication.

4.3.5 PUBLIC COMMUNICATION OF A WORK PROTECTED BY COPYRIGHT

These exclusive rights cover the following acts:

- Public performance and exhibition
- Communication to the public by telecommunication

A. Public performance

The public performance of a work protected by copyright is characterized by the site where it is performed and the nature of the audience. For instance, the dissemination of musical works in an exhibition gallery or cafeteria falls into this category of acts. Although the term *public* is not defined in the Act, a performance that takes place in front of a group that is larger than the family circle and close friends, even in a private place,[66] is considered public.[67]

Furthermore, communication to the public by telecommunication and performances are not reserved solely for events that require the physical presence of musicians, actors, or other performers. In fact, the Act definition specifies that performance with the assistance of a mechanical instrument, a radio receiver, or a television receiver constitutes public performance for the purpose of copyright protection.

B. Public exhibition

The public exhibition right, reserved for artistic works, provides that the copyright owner holds the exclusive right to present to the public during an exhibition, for purposes other than sale or rental, an artistic work – other than a map, chart or plan – created after 7 June 1988.[68]

IN SHORT

The public exhibition right does not apply if the artistic work:

- was created before 8 June 1988
- is a map, chart or plan
- is exhibited in order to be rented or sold

When an artistic work is acquired (whether by purchase or by donation), only the material property is transferred. The copyright owner's authorization thus remains necessary for all uses of the work (exhibition, reproduction, and so on).

63- *Robertson v. Thomson Corp.*, [2006] 2 SCR 363, 2006, SCC 43, par. 49 [http://canlii.ca/t/1pqw1].
64- *Théberge v. Galeries d'art du Petit Champlain Inc.*, 2002, SCC 34, par. 42 [http://canlii.ca/t/51tn].
65- *Copyright Act*, par. 2.2(1).
66- It goes without saying that private performance does not require permission and does not generate royalties.
67- With regard to this, see art. 1721(2) of the North American Free Trade Agreement.
68- *Copyright Act*, clause 3(1)g).

C. Communication to the public by telecommunication (CPT)

As defined in the Act, *telecommunication* covers all transmission of signs, signals, writing, images, or sounds or intelligence of any nature by wire, radio, visual, optical, or other electromagnetic system.[69] Therefore, it includes, among other things:

- The broadcasting of a television or radio program by communication signals, cable, or satellite system
- The broadcasting of musical works on an analog, digital, or wireless telephone line
- The reception and transmission of information on the Internet

The *Act* was amended in 2012 to integrate a new concept, "making available to the public by telecommunication" – that is, making available to the public, by telecommunication, a work or other object of copyright in such a way that individuals can have access to it from the place and at the time of their choosing.[70]

Thus, it is understandable that CPT, omnipresent due to the development of communications tools, remains one of the most important rights.

In addition, "communication to the public" differs from the public performance right. In effect, CPT is characterized by the use of a transmission or reception apparatus that may be found in a private venue, such as an apartment or a house. The characterization of the place (private or public) and the people who are found there (family and friends) is thus irrelevant. Furthermore, CPT does not concern transmission and reception of information between single individuals, such as sending a private e-mail, which constitutes, in this case, a private communication.

Finally, as an exclusive right, CPT covers all categories of works.

IN CONCLUSION

- Proprietary rights involve a long list of acts allowing for economic exploitation of works protected by copyright.
- The most common economic rights in museums are exhibition, reproduction, and public communication by telecommunication, especially on the Web.
- All of the exclusive rights reserved for authors, performers, producers of sound recordings, and broadcasters include the right to authorize. Aside from the fact that the "right to authorize" confirms the possibility of granting licences, it enables its owner to take legal recourse against a person who authorizes, without the right to do so, another person to exercise an exclusive right set out in the Act.

To read the sidebar *Copyright, the Web, and Social Media*

69- *Copyright Act*, sec. 2 (definition of telecommunication).

70- *Copyright Act*, par. 2.4 (1.1). This is how the legislature defines transmission of content on the Internet. Although this question has already been the object of a Supreme Court decision, confirming that the transmission of content on the Internet constitutes CPT, the legislature introduced this new concept in order to respect its international commitments resulting from Canada's signing of the World International Treaty Organization treaties on works, performances, and phonograms. See, in this regard, *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004, SCC 45, par. 30 [http://canlii.ca/t/1hddf].

71- Sections 3, 15, 18, and 21, at the last clause of each of these provisions.

5. HOW LONG DOES COPYRIGHT LAST?

GENERAL PRINCIPLE IN CANADA =
AUTHOR'S LIFE + 50 YEARS

The term of the protection set out in the Act varies depending on the type and category of the work. Exclusive rights can be exploited by their owner during the term of protection. What is more, royalties may be collected during the protection period; the royalties varies depending on how the work is used.

At the end of the copyright term, works, performances, sound recordings, and communication signals enter the *public domain*. Once this happens, copyright owners can no longer prevent another person from any use that had been exclusively reserved for them.

In addition, moral rights have the same term as copyright.[72] As a consequence, the heirs of a deceased author have the same time frame to take legal action for infringement on moral rights as they would for exclusive rights.

5.1 THE TERM OF COPYRIGHT PROTECTION

5.1.1 GENERAL PRINCIPLE

In Canada, copyright protection continues for the life of the author and until the end of the fiftieth year following the year of his or her death – or, as it is often called, "life plus fifty years."[73] This period always starts on 1 January of the year following the author's death. In a number of European countries and in the United States, the term has been extended to seventy years following the author's year of death.

EXAMPLE: In Canada, copyright protection on works by an artist who died on 10 July 2000 will expire on 31 December 2050.

5.1.2 WORK OF JOINT AUTHORSHIP

When a work was created collaboratively (two or more authors), copyright lasts until the end of the fiftieth year following the death of the last surviving author.[74]

EXAMPLE: Tristan and Isolde jointly wrote the novel *À l'eau de rose*. Tristan died on 1 March 1970; Isolde, on 11 November 1985. Copyright protection on this work will last until 31 December 2035 for the heirs of both Tristan and Isolde.

72- *Copyright Act*, sections 14.2 and 17.2.

73- *Copyright Act*, section 6.
74- *Copyright Act*, par. 9(1).

5.1.3 ANONYMOUS AND PSEUDONYMOUS WORKS

When the identity of the author of a work is not known, copyright protection lasts until whichever of these two dates comes first:

- The end of the fiftieth year following the year of the work's first publication
- The end of the seventy-fifth year following the year of the work's creation[75]

If the identity of the author becomes known during this period, the general copyright rule takes precedence: protection lasts until the end of the fiftieth year following the year of the author's death. However, if the author's identity becomes known after the copyright period set out in the Act has expired, protection is not reactivated and the work passes into the public domain.

EXAMPLE 1: In 2010, a publisher publishes a work by an unknown author. It is impossible to find out when the work was written. Copyright protection will end on 31 December 2060, as the author's identity will remain unknown for the entire term.

EXAMPLE 2: In 2010, a publisher publishes a work by an unknown author. On 10 July 2035, the author suddenly recovers from amnesia and can prove that he is the author of the work that was published. He dies on 27 September 2040. Copyright protection on the work therefore lasts until 31 December 2090.

EXAMPLE 3: In 2010, a publisher publishes a work by an unknown author. However, the manuscript is dated 10 July 1960. Copyright protection will expire on 31 December 2035, the seventy-fifth year following creation of the work, as this date precedes that of the end of the publication period, which, in the absence of a known date of creation, would be 31 December 2060.

5.1.4 ANONYMOUS AND PSEUDONYMOUS WORKS OF JOINT AUTHORSHIP

The rules for an anonymous or pseudonymous work also apply when the work was created collaboratively (two or more authors).[76] However, if the identity of one or more of the co-authors becomes known during this period, copyright lasts until the end of the fiftieth year following the death of the last surviving author. Thus, the identification of a single author suffices to apply the general protection period.

75- *Copyright Act*, sec. 7.1.
76- *Copyright Act*, sec. 7.2.

5.1.5 POSTHUMOUS WORKS

An unpublished work is one that was not published or performed in public or communicated to the public by telecommunication during the life of the author. The term of protection on a work that was unpublished before the author's death depends on:

- The nature of the work
- The date of death
- The date of the work's publication, execution, public performance, or communication to the public by telecommunication

With the exception of engravings, the term of copyright for an unpublished artistic work always complies with the general rule: life plus fifty years **(rule 1).**[77]

Similarly, unpublished literary, dramatic, musical, and engraving works created by an author deceased after 31 December 1998 are protected for life plus fifty years **(rule 2)**.[78]

Unpublished literary, dramatic, musical, or engraving works by an author deceased before 31 December 1998 are protected for a term that varies according to the following conditions:

A. If the literary, dramatic, musical, or engraving work was published or performed in public or communicated to the public by telecommunication after the author's death but before 31 December 1998, copyright lasts for fifty years following the year of its publication, public performance, or communication to the public by telecommunication **(rule 3).**[79]

B. If the literary, dramatic, musical, or engraving work was published or performed in public or communicated to the public by telecommunication for the first time:

- after the author's death, and
- after 31 December 1998, and
- the author died between 31 December 1948 and 30 December 1998,

copyright protection expires on 31 December 2048.[80]

Similarly, unpublished works by an author deceased between 31 December 1948 and 30 December 1998 are protected until 31 December 2048 **(rule 4).**[81]

77- *Copyright Act*, sec. 6.
78- *Copyright Act*, par. 7(2).
79- *Copyright Act*, par. 7(1).
80- *Copyright Act*, par. 7(3).
81- Ibid.

C. If the literary, dramatic, musical, or engraving work was presented for the first time:

- after the author's death, and
- after 31 December 1998, and
- the author died before 31 December 1948,

copyright protection expires on 31 December 2003.[82]

Similarly, unpublished works by an author deceased before 31 December 1948 are protected until 31 December 2003 **(rule 5).**[83]

EXAMPLE 1: A famous sculptor died in 1997. He had carved a monumental artwork out of stone and left it on the peak of a mountain. This work was never exhibited in public. Because it was an artistic work other than an engraving, copyright protection will last until the end of the fiftieth year following the year of the author's death, 31 December 2047 (**rule 1**).

EXAMPLE 2: A well-known poet dies on 14 December 1996. In July 1997, a collection of her previously unpublished poems is published by her publisher, with the agreement of the heirs. Copyright on these poems will last until 31 December 2047, or the end of the fiftieth year following the year of publication (1997). Because the poet died before 31 December 1998 and the previously unpublished work was published before this date, copyright protection will last until the end of the fiftieth year following the year of publication (**rule 3**).

EXAMPLE 3: The well-known poet's heirs discovered new poems in 2010. A complete collection of previously unpublished works was published that year. Because the poet died on 14 December 1996, the copyright protection on her poems will last until 31 December 2048, because the death occurred before 31 December 1998 and the unpublished work was published after 31 December 1998 (**rule 4**).

EXAMPLE 4: In 1999, the heirs of a well-known early-twentieth-century singer-songwriter find a new song, written on staff paper. The song has never been published or executed in public. The singer-songwriter died in 1941. In 2001, his heirs agree to have the score of the song published. In this case, the copyright protection will last until 31 December 2003, as the singer-songwriter died before 31 December 1948 and the work was published after 31 December 1998 (**rule 5**).

5.1.6 PHOTOGRAPHS

The general rule for copyright protection applies to a photograph taken or fixed on 7 November 2012 or later, except for a photograph that was taken or fixed after 7 November 2012 in fulfilment of a commission made before this date.

As a consequence, under the general rule, copyright protection lasts for the photographer's life plus fifty years.

EXAMPLE: A professional photographer signs a service contract on 1 December 2012 to take photographs, for the purpose of publishing and marketing a calendar. A photography session takes place on 15 December 2012. On 22 December 2012, the photographer submits the digital files of the photographs to the person who ordered them. She owns the copyright on the photographs, as the commission was made after 7 November 2012. Her copyright protection will last until 31 December 2062.

A. Photographs commissioned before 7 November 2012

Primary rule: copyright protection that has expired as of this date is not reactivated,[84] even if application of the current rules would give a different result.

In the rules in effect before 7 November 2012, paragraph 10(2) of the Act, now repealed, provided that the owner of the initial photographic print or negative was considered the creator of the photograph. It was thus possible for the photographer and the owner of the picture or negative to be two different people.

82- *Copyright Act*, par. 7(4).
83- Ibid.

84- Par. 59(1) *An Act to Amend the Copyright Act*, SC 2012, c 20.

To add to the complexity of this provision, the term of copyright protection was affected by whether the owner of the initial print or negative was a physical person or a legal entity (for example an advertising agency).

- When the owner was a legal entity, copyright protection on the photograph lasted until the end of the fiftieth year following that of the making of the initial picture or of the original, when there was no picture or plate.
- When the owner was a physical person or a legal entity with the majority of voting shares held by a physical person, the general rule applied with regard to the owner of the picture, negative, or original, who was considered to be the author of the photograph. In this case, copyright protection lasted for the life of the owner of the picture, negative, or original, and then until the end of the fiftieth year following the year of his or her death.

EXAMPLE: In 1960, a professional photographer is employed by a Montreal newspaper, which supplies him with a camera and negatives. The newspaper is an incorporated company with shares held by the members of the board of directors. During a press conference, the photographer takes pictures that are published in the newspaper. Since the owner of the negatives is a legal entity, the copyright protection on these photographs will last until 31 December 2010 – that is, until the end of the fiftieth year following that when the initial picture was made.

B. Photograph still under copyright as of 7 November 2012

The term of copyright on a photograph that is still protected by copyright as of 7 November 2012 (that is, whose protection has not yet expired) varies depending on the characterization of the author.

If the author – the owner of the initial picture, negative, or original – is a physical person, the copyright term set out in the former version of the Act – the life of the owner of the initial picture, negative, or original plus fifty years – continues to apply.[85]

If the author is a legal entity, a fiction of law makes it so that the photographer is considered the author of the photograph in lieu of the legal entity, solely for the purpose of determining the term of copyright. This provision does not have the effect of transferring the copyright protection held by the legal entity to the photographer, but is used only to set the term of that protection. As a consequence, the term of copyright for a legal entity considered to be the creator of a photograph according to the former provisions is governed as follows:

- If the photographer is known: the copyright will subsist during the photographer's life plus fifty years.[86]
- If the photographer is unknown or used a pseudonym, the copyright will subsist until whichever of these two dates comes first:
  - The end of the fiftieth year following that of the first publication of the photograph
  - The end of the seventy-fifth year following that of creation of the photograph, which can be defined as the taking of the picture or the original[87]
- If the photograph is the result of a joint authorship of two or more authors, the rules with regard to a work of joint authorship apply with regard to both known and unknown authors (see point 1.1.2).[88]

It must be remembered that the legal entity is still considered the author of the photograph, even though the photographer is the reference for determining the term of copyright protection.

EXAMPLE: In 1976, a professional photographer is hired by a Montreal newspaper, which supplies her with a camera and film. The newspaper is an incorporated company with shares held by the members of the board of directors. The photographer is asked by her employer to take a photograph of a gathering of supporters at the Paul Sauvé Arena after the Parti québécois is elected. The photographer dies in 2010. As of 7 November 2012, the photographs are still copyright protected. Under the transitional rules, the copyright on the photographs will last until 31 December 2060 – that is, until the end of the fiftieth year following the photographer's death – to the benefit of the newspaper.

85- Par. 59(3) *An Act to Amend the Copyright Act*, SC 2012, c 20.

86- Par. 59(2) *An Act to Amend the Copyright Act*, SC 2012, c 20.
87- Ibid.
88- Ibid.

5.2 TERM OF COPYRIGHT ON CROWN WORKS

Copyright on works prepared or published by or under the direction or control of Her Majesty or any government department lasts until the end of the fiftieth year following the first publication of the work.[89]

5.3 TERM OF COPYRIGHT ON PERFORMANCES

The term of copyright on a performance expires at the end of the fiftieth year following the year of its performance.[90] However, if the performance is fixed in a sound recording before expiry of its copyright protection term, copyright protection lasts until the end of fifty years following the year of the first fixation.[91]

Furthermore, if the sound recording is published before the copyright protection expires, the protection lasts until the first of these two dates:

- The end of the fiftieth year following the year of first publication of the sound recording
- The end of the ninety-ninth year following the year of the performance of the work[92]

5.4 TERM OF COPYRIGHT ON SOUND RECORDINGS

Copyright protection on sound recordings expires at the end of the fiftieth year following the year of their first fixation. However, if a sound recording is published before copyright protection expires, the protection lasts until the end of the fiftieth year following the year of its first publication.[93]

89- *Copyright Act*, sec. 12.
90- *Copyright Act*, par. 23(1).
91- *Copyright Act*, clause 23(1)a).
92- *Copyright Act*, clause 23(1)b).
93- *Copyright Act*, par. 23(1.1).

6. WHAT ARE IMAGE RIGHTS?

THE CONSENT NEEDED TO USE A PERSON'S IMAGE OR VOICE

As an issue related to copyright, image rights may become an area of concern to museum professionals. This is because sometimes a person who is still alive can be recognized in an artistic work. The very legitimate question then arises: can an artist photograph a recognizable person, draw his or her features, or incorporate his or her portrayal into an artistic work? This is even more relevant because it bears on freedom of expression. The answer to this question varies depending on a number of factors arising from the rules covering the right to privacy.

First, section 35 of the Civil Code of Québec (CCQ) specifies, "Every person has a right to the respect of his reputation and privacy. No one may invade the privacy of a person without the consent of the person unless authorized by law." The right to privacy is also protected by section 5 of the Quebec Charter of Human Rights and Freedoms.

Second, section 36 of the CCQ adds that the following acts may be considered infringements on privacy:

- "appropriating or using his image or voice while he is in private premises
- using his name, image, likeness or voice for a purpose other than the legitimate information of the public"

These provisions are relevant to museums because of the dissemination activities that they perform. It is therefore necessary to explore this notion with regard to both works in the visual arts and sound recordings reproducing the voice of a person who is still alive – someone recounting a legend, for example.

As a component of the right to privacy, the owner of image rights may take legal recourse against actions that infringe on those rights. However, in Quebec, the estate of a deceased person may not take the recourses that had been available to that person during his or her lifetime involving the use of that person's name, image, or voice,[94] although this does not prevent a deceased person's relatives from taking legal action under the rules of civil liability for personal damages that they may have suffered. Here, one must make a distinction when it comes to the name of a deceased well-known personality (such as Marilyn Monroe), which remains protectable in the sense of a trademark under the rules of law that prevail in this regard.

A person's consent is therefore required if his or her voice or a clearly identifiable image is found in a sound recording or artistic work, including a photograph, published or disseminated as part of an exhibition. It is true that, in certain cases, one could claim to have the implicit consent of a person hired and paid as a "model." To avoid any ambiguity, consent in writing is strongly recommended, even from a person who was hired as a model.

In some cases, it is difficult, or even impossible, to obtain authorization from a person incorporated into an artistic work. It should be recalled that the problem raised is not so much the portrayal of this person in an artistic work, but the use that is made of that artistic work: public exhibition, reproduction, and so on.

94- Édith Deleury and Dominique Goubau, *Le droit des personnes physiques*, 4th ed. (Cowansville: Éditions Yvon Blais, 2008), par. 176.

What is the opinion of the courts?

In 1998, the Supreme Court of Canada established certain rules in its *Aubry v. Éditions Vice-Versa* ruling.[95] Although freedom of expression is a right guaranteed in article 3 of the Charter of Human Rights and Liberties, the Supreme Court indicated, with regard to image rights, that:

> . . . freedom of expression must be defined in light of the other values concerned. . . . An artist's right to publish his or her work cannot include the right to infringe, without any justification, a fundamental right of the subject whose image appears in the work.[96]

Nevertheless, the accidental presence of an individual appearing in a photograph of a crowd at a public event and a person who appears incidentally in a photograph of a public site would be exceptions to the principle of the right to privacy, based on the public's right to information.[97] However, the public's right to be informed does not override the taking of a photograph of a public personality in a private place, without his or her authorization.

The nature of the information to be transmitted and the situation of the interested parties (visibility, positions held, public or private, and so on) are elements that colour the general rule. For instance, a politician cannot object to the dissemination of a photograph of him or her taken during a press briefing.[98]

95- [1998] 1 SCC 591 [http://canlii.ca/t/1fqt7].
96- Ibid., pars. 62 and 63.
97- Ibid., par. 59.
98- See the examples given by the Court at par. 58.

THEMATIC SIDEBARS

I. WORKS OF ARTISTIC CRAFTSMANSHIP AND OBJECTS WITH A UTILITARIAN FUNCTION

Many museum collections contain jewellery, garments, or objects with a utilitarian function such as religious objects that were not fundamentally conceived as artistic works, such as a sculpture or painting. These objects may incorporate a design or have characteristics denoting an undeniable artistic contribution by the craftsperson or creator. The designs reproduced on these objects might be called *artistic works,* and the objects themselves are *works of artistic craftsmanship* to the extent that they meet the criteria for originality. Consequently, they can be protected under the Act.

Furthermore, the legislature enacted a particular rule for when more than 50 copies of an object with a utilitarian function are made. Paragraph 64(2) of the Act indicates that having applied a copyright-protected design or performing an act reserved for the copyright owner on a utilitarian object of which more than 50 copies are made is not an infringement of copyright, unless it involves:

- Graphic or photographic representations applied to an object
- Trademarks, or their labels
- Fabric with a woven or knitted pattern or usable as piece goods, a surface covering, or for making garments
- Architectural works that are buildings or models of buildings
- Portrayals of real or fictitious beings, events or places, as a feature of configuration, pattern, or ornament
- Objects sold by the set, as long as there are not more than fifty sets[99]

If one of these situations is found to be true, the reproduction is an infringement of copyright.

99- *Copyright Act*, pars. 64(2) and 64(3).

II. COPYRIGHT AND INTANGIBLE HERITAGE

The conditions for copyrighting works raise a sensitive question with regard to "intangible heritage," which has been recognized, notably, in the *Cultural Heritage Act* adopted by the Government of Quebec in 2012. Under this law, intangible heritage includes "the skills, knowledge, expressions, practices, and representations handed down from generation to generation and constantly re-created, in conjunction with any cultural objects or spaces associated with them."[100]

The concept of intangible heritage is characterized by a community's collective sharing of its acquired knowledge, whereas the Act is the result of an individualistic system of private ownership. Although pure knowledge is considered to be "ideas" that cannot be copyrighted, some acquired knowledge (such as the use of certain medicinal plants that make it possible to patent a medication), as well as certain practices, expressions, and representations, may constitute patentable inventions or works protectable under the Act.

Take the example of a story transmitted orally from generation to generation. To date, the few rulings made by British and Canadian courts have confirmed the central role of the person who transcribes a conversation when the conversation is published in a literary work.[101] This person would be considered the author of the resulting literary work, and not the person interviewed. However, the facts specific to each of the rulings examined would indicate that caution should be exercised when it comes to the requirements for the criterion of originality. To comply with the rules aiming for respectful use of works, it is recommended that authorization be obtained from the person who tells a story orally, to the extent to which the writer is only faithfully reproducing in writing the words heard and that these words, once transcribed, are original in the sense of the Act.

Furthermore, the physical or moral person who records interviews (testimonials, stories, and so on) on a material medium is the owner of the copyright on this fixation as producer of a sound recording.[102]

100- Section 2, *Cultural Heritage Act*, CQLR c P-9.002.
101- John McKeows, *Fox on Canadian Law of Copyright and Industrial Designs*, 4th ed. (Toronto: Carswell), p. 17-3.
102- *Copyright Act*, sec. 2 (definition of producer).

III. ASSIGNMENT AND REASSIGNMENT

When the author of a work assigns a copyright or grants an exclusive licence to a physical person or a legal entity (museum, publisher, producer, and so on) "in perpetuity" or "for the entire term of copyright protection," the assignment or exclusive licence is valid for this person during the life of the author and for 25 years following the date of his or her death.[103] At the end of this period, the copyright is reserved for or reassigned to the author's estate. As public policy, this rule makes impossible any stipulation, by contract or other means, of a condition contrary to this principle. The only exception to this principle is the assignment or exclusive licence provided in a will. In this case, the physical person or legal entity designated in the will may exercise the copyright assigned or reassigned by exclusive licence for, generally, a period of 50 years following the year of the author's death.

Applicable only when the author is the first owner of copyright on the work, the reassignment rule covers neither author-employees nor assignment of copyright on a compilation or a licence to publish a work, in whole or in part, as a contribution to a compilation.

IV. COPYRIGHT AND EXCEPTIONS

The Act sets out a number of major exceptions to copyright. For instance, it is permitted to photograph or film a sculpture or a work of artistic craftsmanship that is permanently installed in a public place.[104] However, this exception covers solely the act of reproducing such a work; all other use – such as dissemination on the Web – requires the authorization of the copyright owner. In general, it is best to be cautious about any interpretation of exceptions to copyright.

With regard to museums, the Act sets out exceptions covering mainly:

- Management and conservation of permanent collections[105]
- Reproduction for scholarly and research purposes[106]
- Use of a photocopier[107]

These exceptions are subject to terms of application spelled out in the statute and the regulations.

The concept of fair dealing and its exceptions have also been interpreted in various ways; yet again, caution is called for.[108] The Act provides an exception for fair dealing for the purpose of research and private study,[109] criticism and review[110] (for example, of an exhibition or art event), and news reporting.[111] In 2012, this exception was extended to education, parody, and satire.[112] Some may be tempted to invoke the educational mission of museums to take advantage of this exception. However, the jurisprudence does not yet make it possible to decide on the circumstances under which museums would be affected by this exception.

103- *Copyright Act*, par. 14 (1).

104- Section 32.2 (1).
105- *Copyright Act*, sec. 30.1.
106- *Copyright Act*, sec. 30.2.
107- *Copyright Act*, sec. 30.3.
108- The guiding principles for fair dealing were set out in 2004 by the Supreme Court in *CCH Canadian Ltd. v. Law Society of Upper Canada*. 2004, 1 SCC 339 [http://canlii.ca/t/1glp0].
109- *Copyright Act*, sec. 29.
110- *Copyright Act*, sec. 29.1.
111- *Copyright Act*, sec. 29.2.
112- Sec. 21 of the *Act to Amend the* Copyright Act, LC 2012, c 20.

V. COPYRIGHT, THE WEB, AND SOCIAL MEDIA

The proliferation of social media and their enormous promotional potential – notably in a context of financial restrictions – is raising alarm with regard to copyright. In fact, any dissemination on the Web of a protected work requires prior authorization by the copyright owner. But given the communicational principles of the Web (especially Web 2.0), based on instantaneity and speed of dissemination, how can a balance be struck between the tendency to want to make everything accessible and compliance with copyright? In addition, social media have brought to the fore the notion of personality rights and issues concerning confidentiality and respect for privacy. Section 3 of the Civil Code of Québec provides, "Every person is the holder of personality rights, such as the right to life, the right to the inviolability and integrity of his person, and the right to the respect of his name, reputation, and privacy." That is why it is important, before uploading images to the Web, to have some idea about the legislative framework for access to information, information technologies, and protection of personal information,[113] as well as a basic knowledge of personality rights.

In addition, good understanding of the conditions of use for any Web-sharing site proves essential to anyone who hopes to use these digital platforms. Indeed, some licences that one signs by accepting the conditions of use may prove more permissive than one would hope, especially because exponentially expanding transmission of content sometimes makes a loss of control by the initial content supplier inevitable.

Finally, like a number of activities involving copyright, everything is a question of risk management and taking precautions. We cannot overemphasize the importance of formulating a code of conduct and strict ethical principles with regard to use of social media and institutional communications. In addition, any policy on this subject must be updated regularly and sent to all staff members to ensure that there is no doubt with regard to the use of social media and compliance with the various rights covering them.

113- *Access to Information Act*, RSC 1985, c A-1 [http://laws-lois.justice.gc.ca/eng/acts/A-1/]; *An Act to Establish a Legal Framework for Information Technology*, CQLR c C-1.1 [http://canlii.ca/t/x6x]; *An Act Respecting the Protection of Personal Information in the Private Sector*, CQLR c P-39.1 [http://canlii.ca/t/xpm].

SOME REFERENCES

Chaire L. R. Wilson sur le droit des technologies de l'information et du commerce électronique [http://www.chairelrwilson.ca/en/]

Copyright Board of Canada [http://www.cb-cda.gc.ca/home-accueil-e.html]

Management of Quebec government copyrights [http://www.droitauteur.gouv.qc.ca/en/]

Guide des droits d'auteur sur Internet [http://www.droitsurinternet.ca/question.php?question=117]

WIPO guide to Museums and Copyright [http://www.wipo.int/copyright/en/museums_ip/]

Canadian Intellectual Property Office [http://www.opic.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/home]

World Intellectual Property Organization [http://www.wipo.int/portal/en/index.html]

COPYRIGHT AND DISSEMINATION IN MUSEUMS STANDARD CONTRACTS KIT

SOCIÉTÉ DES MUSÉES DU QUÉBEC

regroupement des artistes en arts visuels du Québec

A SINGLE SET OF CONTRACTS RECOMMENDED BY THE SMQ AND RAAV

This set of contracts is part of a project of major importance for which the Société des musées du Québec (SMQ) received financial support from the Department of Canadian Heritage and the generous contribution of many experts. It goes without saying that a single standard contract that covers all eventualities is almost impossible to write: every situation requires adaptations. From the start, it seemed, one of the biggest challenges would be to distinguish between elements dealing specifically with copyright and those that fall under contractual relations – especially because practices are usually marked by a combination of these aspects.

The contracts initially written by the SMQ contained:

- Standardized conditions in order to meet the applicable legal standards of the Canadian and Quebec statutes
- Provisions that could be adapted to meet the needs of individual museums

Because most of the contracts were intended for visual artists, the SMQ was hoping that the Regroupement des artistes en arts visuels du Québec (RAAV) would give them its stamp of approval. Exchanges took place between the two associations, and the Ministère de la Culture et des Communications instituted a facilitation process as part of the steps that it is taking to improve artists' socioeconomic conditions.

The exchanges between the SMQ and RAAV, which took place in the spring of 2014, revealed a desire to change the paradigm regarding exhibitions and to acknowledge the work that visual artists do involving production of exhibitions of their works. This led us to pay particular attention to the exhibition contract and also to formulate a contract for provision of professional services specific to visual artists.

Aware of the difficult financial situation faced by both artists and the museum network, the SMQ and RAAV agreed to work together to jointly produce a set of contracts. These documents will provide a framework for negotiations between museums and artists and also ensure that practices comply with the statutes.

We are confident that this set of contracts will encourage best practices by serving the interests of both visual artists and museums.

Michel Perron
Executive Director
SMQ

Christian Bédard
Executive Director
RAAV

I. EXHIBITION CONTRACT

This contract is used when a museum is mounting an exhibition of works, created after June 7, 1988, to which the artist holds copyright and for which no other contract has been concluded between the artist and the museum. If the artist has entrusted management of his or her copyright to an organization such as the Société du droit de reproduction des auteurs compositeurs et éditeurs au Canada (SODRAC) or the Canadian Artists Representation Copyright Collective (CARCC), the museum cannot use this contract and must obtain a licence from the organization concerned.

This contract contains both a copyright licence (for exhibition, reproduction, and public communication for the purpose of promoting the exhibition) and the obligations of both parties related to the exhibition. In addition, when mounting an exhibition of works involves provision of professional services by the artist, the artist and the museum must agree on the tasks, separate fees from copyright royalties, and fill out Annex B.

Finally, if the museum wishes to exhibit one or more works (coming, from example, from a loan to another museum) without any contribution by the artist, use of Annex B is not required.

II. LETTER OF INTENT

This document is aimed at facilitating practices when an artist and a museum wish to produce a joint project. Because the contribution of each is essential to production of the project, this letter may prove very useful in the various individual stages. It sets down in writing the participation and expectations of both sides.

Subsequently, a contract will have to be signed once the main parameters are known, at least three months before the project is presented. The artist should make no expenditures linked to preparation of the project before the contract is signed, as production of the project may be conditional on obtaining sufficient financial resources.

III. LICENCE CONTRACTS

A. REPRODUCTION LICENCE

This licence is used by a museum that wishes to reproduce a work, in print or digitally, in any type of publication (catalogue, pamphlet, poster, etc.). To use this licence, copyright on the work must be held by the artist and not be the object of an existing contract between the artist and the museum. If the artist has entrusted management of his or her copyright to an organization such as SODRAC or CARCC, the museum will have to obtain a licence from the organization concerned.

B. PUBLIC COMMUNICATION LICENCE

This licence is used by a museum that wishes to disseminate a work on the Web or on television, for example. To use this licence, copyright on the work must be held by the artist and not be subject to an existing contract between the artist and the museum. If the artist has entrusted management of his or her copyright to an organization such as SODRAC or CARCC, the museum will have to obtain a licence from the organization concerned.

IV. ACQUISITION CONTRACTS

A. BY PURCHASE

This contract is used for direct sale to a museum by the artist of one or more works that he or she has created. If the artist holds copyright – that is, has not assigned copyright to a collective society – the museum may integrate Annex B, which is a non-exclusive, non-transferable licence that enables the museum to use the work thus acquired for its purposes. Royalties (which may be calculated, for example, as a percentage of the sale price) and the term of the licence must be negotiated before the contract is signed. If this annex is not used, the museum will have to produce a licence every time it wants to use the work acquired (exhibition, reproduction, communication to the public, etc.). In Quebec, creators may deduct copyright royalties when they fill out their income tax return, and it is therefore advantageous for them to distinguish royalty income from income produced by sales of works.

B. BY DONATION

This contract is used when an artist donates one or more works that he or she has created to a museum. If the artist holds copyright – that is, has not assigned copyright to a collective society – the museum may integrate Annex B, which is a non-exclusive, non-transferable licence. This licence enables the museum to use the work thus acquired for its purposes. Royalties (which may be calculated, for example, as a percentage of the market value) and the term of the licence must be negotiated before the contract is signed. If this annex is not used, the museum will have to produce a licence every time it wants to use the work acquired (exhibition, reproduction, communication to the public, etc.).

V. CONTRACT FOR COMMISSION OF AN ARTISTIC WORK

This contract is used when a museum commissions an artwork, whether for acquisition or not. If there is to be an acquisition, the usual procedures will be followed under the policies adopted for this purpose. From the beginning, a copyright royalty (for example, a percentage of the commission amount) and the term of the licence must be negotiated; then Annex B, a non-exclusive, non-transferable licence, must be signed. This licence enables the museum to use the work commissioned for all of its activities linked to its mission and to museum operations. If this annex is not used, the museum will have to produce a licence each time it wants to use the work (exhibition, reproduction, communication to the public, etc.).

VI. PROFESSIONAL SERVICES CONTRACT

Service provision contracts A and B are relevant to one or more works protected under the *Copyright Act*. As a consequence, the service provider will be the first holder of copyright on these works. Given that the museum wishes to be the main contractor for the project for which it has called upon a service provider, the contract includes an exclusive licence transferring copyright to the museum, thus enabling it to retain complete responsibility for the project and full latitude for action.

Contract C has no impact on copyright and bears solely on a visual artist's professional services, whether or not that artist is a member of RAAV.

A. PROFESSIONAL SERVICES

This contract is used for all professional services aimed at producing works on which the service provider may hold copyright. Such services include, for example, documentary photography, writing of texts, formulation of an exhibition concept, exhibition scenography, research, and translation. The proposed exclusive licence provides the museum with all copyright on its project, enabling it to retain full control of and complete responsibility for it.

B. PROFESSIONAL SERVICES: CURATOR

This contract is used when the museum hires an independent curator – that is, someone who is not a salaried employee – for an exhibition project that it is producing. Given the copyright that the curator will hold on his or her work (texts, concept, etc.), it is essential to set out copyright ownership in a contract. The proposed exclusive licence provides the museum with all copyright on the exhibition, enabling it to retain full control of and complete responsibility for it.

C. PROFESSIONAL SERVICES: VISUAL ARTIST

This contract proposes a new approach to the contractual relations between artists and museums. It provides a framework for the artist's contribution to production of an exhibition of his or her works. This contract therefore represents an advance toward recognition of the professional work of visual artists when their artworks are disseminated. Before signing, the parties must agree on the amount allocated to professional fees, which may be calculated on the basis of a percentage of the fee provided for the exhibition right or at an hourly rate agreed to between the parties.

Finally, we would like to remind you of the importance of filling out and signing a loan agreement every time an artist lends a museum one or more of his or her works for an exhibition. To use the model offered by the SMQ (in French only), please download the following document in Word format: Modèle de convention d'emprunt de la SMQ.

USEFUL LINKS:

CARCC [http://www.carcc.ca/contactF.html]

SODRAC [http://www.sodrac.ca/oeuvresArtistiques.aspx]

To find the judicial district of your museum [http://www.justice.gouv.qc.ca/francais/sujets/glossaire/district.htm]

I) EXHIBITION CONTRACT (PDF)

II) LETTER OF INTENT (WORD)

III. A) REPRODUCTION LICENCE (PDF)

III.B) PUBLIC COMMUNICATION LICENCE (PDF)

IV.A) CONTRACT OF ACQUISITION BY PURCHASE (PDF)
Supplementary Annex A (WORD)

IV.B) CONTRACT OF ACQUISITION BY DONATION (PDF)
Supplementary Annex A (WORD)

V) CONTRACT FOR COMMISSION OF AN ARTISTIC WORK (PDF)
Supplementary Annex A (WORD)

VI.A) PROFESSIONAL SERVICES CONTRACT (PDF)
Supplementary Annex A (WORD)

VI.B) PROFESSIONAL SERVICES CONTRACT: CURATOR (PDF)
Supplementary Annex A (WORD)

VI.C) PROFESSIONAL SERVICES CONTRACT: VISUAL ARTIST (PDF)
Supplementary Annex A (WORD)