

CHAPTER FIVE: YOU AND THE LAW

In 1998, musician **Sarah McLachlan** found herself the defendant in a lawsuit which alleged that songs from her first album were co-written by a studio musician. Ten years earlier, sculptor/writer Michael Snow sued to protect the integrity of his Canada Geese sculpture in Toronto's Eaton Centre. Both these dramatic cases attracted media attention, but they also impressed upon many artists and cultural workers the importance of understanding how the law affects their work and protects their interests.

Regardless of their work, the stage of their career, or where they live in Canada, every self-employed artist or cultural worker faces legal matters. This chapter provides a basic grounding in legal issues you are most likely to encounter, how to address them, and where to find valuable help. Remember, just as your work evolves, so too, does the law. Staying current with legal matters is a continuous process.

Every legal problem you confront is unique and requires a solution dependent on individual circumstance. It is always best to seek advice and assistance from trusted legal advisors familiar with these matters. That said, this general chapter is a guide that will help you recognize various legal issues and enable you to determine when and where to look for further assistance. This information is not intended to constitute or to replace any legal advice you should obtain.

HOW DO I MANAGE MY RELATIONS WITH LEGAL ADVISORS?

When Sarah McLachlan sat down in a Vancouver studio to record *Touch*, her first album, she was undoubtedly thinking more about her songs than the law. Yet her working relationship with studio musician Darryl Neudorf resulted in a legal battle over who composed four of the album's songs.

Like McLachlan, many self-employed artists and cultural workers may have difficulty identifying legal issues. Yet at some point, you may have wondered if you were stumbling into a legal minefield and should get help. At other times, you may have realized that you simply lacked sufficient information to be certain whether or not you faced a legal dilemma. This section will outline common legal situations and help you determine whether you require professional help. **Not every legal issue requires a lawyer**, so the section also provides direction on how to locate and work with legal advisors who are able to efficiently address your legal problems.

When do you need legal help?

The sections in this chapter examine several legal situations you may face as a self-employed artist or cultural worker.

| Legal Issue | Advisors |
|---|---|
| Starting a business | Professional arts/cultural association, business consultant, lawyer, accountant |
| Incorporating a business and registering a name | Provincial corporation/business name staff, business consultant, lawyer |
| Renting or purchasing an office or studio | Real estate agent, lawyer |
| Dealing with Income Tax and the Goods & Services Tax | Canada Revenue Agency and/or Revenu Québec staff and publications, accountant, tax lawyer |
| Acquiring insurance coverage | Insurance broker, professional association |
| Entering into engagement or work contracts | Professional association, agent/representative, entertainment or contract lawyer |
| Protecting and registering copyright (see following chapter for more detail on copyright) | Professional association, agent/representative, copyright licensing agency (i.e., CANCOPY, SOCAN, SARTEC, sociétés de gestion collective), Copyright Registry, intellectual property lawyer |
| Exporting artistic work | Customs broker, Canada Border Services Agency, accountant, lawyer, professional association for instance, in Québec, the Conseil des métiers d'art du Québec (CMAQ), public corporations such as SODEC in Québec) |
| Collecting fees payable | Collection agent, professional association, agent/representative, lawyer, Small Claims Court |

If you think you need help, you do.

Get professional advice the moment anything in your career presents you with a legal worry. Sometimes a legal advisor will just confirm you are on the right track and give you peace of mind. Other times an advisor will recognize, and help you deal with, serious issues. Although professional advice may seem expensive, it can often save you money in the end.

Get on top of a legal issue early.

It is usually true that the longer you delay addressing a legal problem, the more expensive the process will become. Failure to act early on a legal issue almost always makes finding a simple solution difficult.

Remember the following points:

- People with whom you do business look after their interests, not yours.
- Be wary about following the advice of friends and colleagues who lack expertise in legal matters.
- Realize that a legal problem will never “take care of itself.”

How do you choose a competent legal advisor?

Always know your needs.

What do you want from a specific advisor? Before starting your search:

- Sit down, analyze the problem, and identify what legal services you require
- Use the following material to determine what kind of professional you should approach first.
- Use your instincts; a legal advisor should inspire confidence and trust. Just as you shop for clothes that fit, look for the right lawyer, insurance broker, accountant, or agent. Ideally you seek a relationship that will last.
- Comparison shop and seek quality service for your dollar.

Ask people in the know for a referral.

The best way to find legal advisers like lawyers, accountants, insurance brokers, agents and artists' representatives is to ask other artists or cultural workers involved in your specialty or your

professional association for a referral. Seek out advisors who are familiar with the issues commonly faced in your particular artistic field. Remember, their learning curve will be at your expense when you pick the wrong person.

Here are some things to bear in mind with regard to specific sources of advice and the advisors who can help.

Professional associations

Every artistic or cultural sector has one or more professional associations – either national or provincial – that offer a variety of essential services. Such associations protect members' industry-wide interests and offer individualized member services.

They frequently provide information regarding legal trends in the association's artistic industry and advocacy representation to government, industry, and regulatory agencies. For example, SOCAN regularly represents musicians' rights at hearings of the Canadian Radio-television and Telecommunications Commission (CRTC) or the Copyright Board of Canada with regard to compensation for use of composers' works in various media. The Periodical Writers Association of Canada offers a grievance committee service, which mediates on behalf of writers having contract problems with periodical publishers. The A.F.M. promotes the interests of the performing musicians. Membership in relevant professional association are tax deductible. Consult them first – it's the most economical method of acquiring dependable legal advisory support.

In Québec, a professional association exists for each cultural discipline; they have a legal obligation to defend and promote the interests of artists, members as well as non members, working in the relevant discipline.

Lawyers

Look for a lawyer qualified to handle your specific problem. If you have a copyright issue, you want a lawyer who specializes in copyright or intellectual property law, and, if required, in the laws specific to Québec (S32.1 and S32.01). Taking a book contract to an estate lawyer could involve you in needless and expensive legal negotiations because he or she may not be familiar with industry conventions or new industry technology. Similarly, a ballet dancer negotiating a tour contract might be less well served by an entertainment lawyer experienced only in rap music touring contracts.

Canada has two legal systems, British Common Law, and the Code Civil in Quebec. Labour law is a provincial jurisdiction. However, the federal *Status of the Artist Act* applies to those artistic activities that fall under federal jurisdiction, even in the provinces.

Quebec, in addition to the Code Civil, has its own Status of the Artist legislation: LRQ S-32.1 is an *Act respecting the professional status and conditions of engagement of performing, recording and film artists*; and LRQ S-32-01 is an *Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters* (LRQ stands for les *Lois Refondues du Québec*).

Some jurisdictions offer a lawyer referral program and/or the law society may publish a list of lawyers in your area. If your legal issue and finances might qualify you for Legal Aid, seek out the nearest office for advice. Never decide on a specific lawyer until you have consulted several of them about the problem you face and the fees they charge.

Many lawyers offer basic advice in a short, free session (some provinces require that lawyers provide this service). Any lawyer should be willing to discuss relevant expertise and whether professional help is required or not. Do not hesitate to ask what his or her fee is, and obtain a total case fee estimate.

Artists' agents, representatives and consultants

Your relationship with an agent, representative, or consultant relies heavily on mutual trust and personal rapport. Trust your instincts.

Look for someone who has demonstrated both integrity and sensitivity to your artistic work. Most agents/representatives belong to professional associations. Many publish directories that set out member specializations. Check out the discipline-specific resources from *The Art of Managing Your Career* for a list of professional associations' websites (go to www.culturalhrc.ca/amyc, and click on your discipline specific resources).

Accountants

A competent accountant can be a valuable advisor, helping you with incorporation or partnership questions, income tax rules and deductions, the GST, the PST, HST or QST, banking, investments, and retirement planning.

Seek out an accountant well versed in your artistic or cultural sector, who is also used to working with the self-employed. In addition to colleagues and professional associations, various accountant institutes offer guidance in finding the right accountant for you.

Insurance brokers

Commonly called insurance “agents,” brokers link you with appropriate insurance plans that protect against possible damage or loss resulting from your artistic or cultural business activity. In the absence of such protection, you might find yourself sued if a courier falls in the driveway while delivering a business document.

Brokers can also help you attain necessary disability and extended medical, dental, prescription, and other insurance through plans designed for self-employed individuals.

All brokers must be licensed under provincial regulations. The national or local branch of the Insurance Brokers Association of Canada can help with finding a broker. Obtain competitive bids. Your professional association may carry a group- insurance policy for the benefit its members.

Government departments and agencies

When legal issues involve complying with federal, provincial/territorial, or municipal government regulations, immediately contact the government department or agency in question.

Contact your regional Canada Revenue Agency office or Revenu Québec for questions concerning your income tax or GST/PST/QST/HST obligations, your Land Title Registration Office for property purchase regulations, or Industry Canada for trade mark/patent copyright information. Government agency staff should be able to provide up-to-date information. Generally, fees will be limited to conducting records’ searches, obtaining documents, or filing documents with a registry.

Court offices

Every level of court, from Small Claims Court to the Court of Appeal, has an administrative office. If you are going before a specific court, consider visiting the appropriate office in advance. Office staff can provide you with information regarding court procedure, document filing requirements, and general points of law relevant to your court hearing. Most courthouse staff are very helpful; however, they cannot offer legal advice. For that, you must consult a lawyer. Most courts require qualified representation.

The exception is the Small Claims Court – specifically designed to be an informal venue for resolving a variety of legal matters. Step-by-step guidance in undertaking a Small Claims action is available from court staff, civil division. Not all cases can be taken there, even if the amount involved is below the maximum set for your province.

How do you establish and conduct a relationship with a legal advisor?

Fees

In your first meeting with any advisor, establish costs and the timing and means of payment. Will you pay by the hour or a lump sum for a specific service? Consider requiring regular legal invoices to avoid surprises. Investigate whether you qualify for a low-income discount or some form of legal assistance (i.e. legal aid).

Find out what disbursements or expenses you are expected to pay additional to fees and if any “up front” money is required. All these conditions of payment should be set out in a written agreement between you and your advisor, signed by both parties.

You will probably reduce your fees if you use as little of your advisor’s time as possible.

- Try to organize documents and other materials in advance of meetings.
- Be on time.
- Rigorously comply with all requests for written or interview information.
- Restrict conversations to the matter at hand.
- Substitute phone calls with faxes or e-mails.
- Ask for copies of all relevant correspondence and documents.
- Use assistant’s rather than advisor’s time where possible, and undertake to complete relevant tasks yourself whenever possible.

We all want to keep professional advice inexpensive. Just be sure to balance your thrift with acquiring the best advice possible.

Communication and confidentiality

Be completely honest with your advisor and disclose everything regarding the issues involved. Did you really cut the rope controlling the theatre curtain and cause the diva's untimely demise? Failure to disclose important information can seriously compromise your lawyer's ability to advise and assist you. Your lawyer and accountant are professionally bound to keep your affairs confidential.

Other advisors should also be informed that you expect them to treat your matters with complete discretion.

Your advisor's obligations

Most legal advisors are bound by a code of professional standards and obligations.

Your lawyer is bound by membership in a provincial Law Society to represent your interests in an ethical, confidential, and professional manner.

Your interests are not to be compromised by any other vested, or conflict of, interest the lawyer might have.

If you are uncertain about your advisor's ethical and professional obligations, ask for an explanation or contact the relevant governing body for details.

Your legal relationship

Working with a legal advisor may require formalizing one or more of the following types of legal relationships.

Contractual relationship – You and your advisor may set out your respective obligations in a contract that contains mutually acceptable terms and conditions. In Québec, specific categories of creators are required to have a written contract that complies with Act S-32.01, Section 31, when entering into agreements with an agent or advisor.

Agency relationship – You give the advisor legal authority to act on your behalf. The advisor is accountable and must act on your instructions. In principle, you are ultimately responsible for the actions of the agent, so beware.

Fiduciary relationship – Under provincial law society regulations, your advisor has a duty to represent you fairly, protect your interests, report regularly, and avoid conflicts of interest.

A literary or theatrical agent, for example, will usually enter into a contract with you based on agency law and a fiduciary relationship. Your accountant may only have a fiduciary relationship with you.

Who's in charge?

You are. The advisor, regardless of role, is working for you. You are the boss. Your advisor should give you understandable advice that enables you to plan a course of action and give competent and informed instructions.

Lawyers, for example, are duty bound to seek and follow a client's instructions, unless carrying out those instructions would mean committing an illegal or unethical act that contravenes the lawyers' Code of Professional Conduct or the lawyer's personal conviction. It is the same for most other professional legal advisors.

Problems with your advisor?

You have the right to receive competent, respectful, and efficient legal assistance. If your legal advisor has provided what you consider to be inadequate service or has acted improperly or unethically, do the following:

- First, try to solve the problem by meeting with the advisor and setting out your concerns.
- Should this fail, feel free to end the relationship if such an action is possible under the terms of the contract between you and the advisor.
- Secondly, you may wish to file a complaint with the advisor's professional association and/or seek financial compensation.
- Or bring a legal action against the advisor.

To end your relationship with a legal advisor, follow any termination clauses in your contract (if any) to the letter.

Termination of relationship

Usually most legal advisory relationships can be terminated by just saying you are taking your business elsewhere. In some cases, however, such action is more complex. If you have an agent/representative or a lawyer on retainer you may have to refer to, invoke the termination clause set out in your contract – if any – with the advisor. Such clauses are imperative to any continuing contractual relationship between yourself and an advisor. Beware of signing contracts that include exclusive representation clauses. Understand the implications of Power of Attorney.

Checklist

- Get legal advice whenever you are worried that you may face a legal issue.
- Your relevant professional association can often help you acquire legal advice.
- Be sure to consult advisors who have experience in areas of law relating to your work.
- Agree, in your first meeting, on the fees you will pay the advisor.
- Be honest with your advisor. Don't neglect to mention important information.
- Remember that you are in charge, but carefully consider all recommendations your advisor offers.
- When terminating a relationship with an advisor, meet all contractual requirements.

HOW DO I ESTABLISH AND ENFORCE CONTRACTS?

From buying paper clips to securing a large commission or playing at a wedding ceremony, as a self-employed artist or cultural worker you enter into contractual relationships with legal consequences every day. In Québec, artists in the fields of literature, visual arts, and arts and crafts have the legal obligation to require a written contract from any publisher, gallery, or other relevant distributor with whom they are entering into agreements (see Act S-32.01). Act S-32.1 prescribes collective agreements between professional associations, on behalf of their members, and producers.

Consider Toronto illustrator Thomas Dannenberg.

In 1998, Dannenberg accepted an assignment to draw several illustrations for a magazine. The magazine rejected the work and refused to pay. After trying unsuccessfully to negotiate a settlement with the publication, Dannenberg launched a Small Claims Court action. Undertaking a lawsuit was a new experience for the veteran illustrator, but he believed his contract with the publication entitled him to payment.

This chapter describes the basic elements of a valid contract or agreement and how to ensure that your interests are protected in contractual matters.

With what kinds of contracts am I likely to be involved?

Many kinds of contracts affect self-employed artists and cultural workers. Some affect almost everyone working in the cultural sector; others relate only to people working in specific fields. Here are some examples of contracts that are relevant to most artists and cultural workers.

- Contract to provide services.
- Loan agreements.
- Property or equipment leases.
- Agreements to purchase supplies or hire services.
- Commissioning agreements or agreements to publish or produce a play, book, video script, screenplay, opera, dance piece, musical work, or a work of visual art. Remember that, **under copyright law, in the case of engravings, photographs or portraits that are commissioned, the person that requested the work to be done is deemed to be the first**

owner of the copyright of such work; other types of artistic products considered under this clause may gradually be enlarged.

- Representation agreements with an agent, representative, manager, dealer, gallery owner, or promoter.
- Agreements to sub-contract your work or to hire an assistant.
- Permission for the inclusion of a person's picture in any work of art. This is compulsory in Québec and failure to do so could result in a suit for breach of privacy. Indeed, it may be risky to use pictures that may contravene either the Canadian or Québec charters of rights.
- Agreements that license or assign elements of the copyright to your work.

That's a promise

- A legally enforceable contract is a deliberate agreement between two or more competent parties, which is supported by mutual consideration, to voluntarily perform some legal act.
- Such a contract should be, but does not necessarily have to be, in writing.
- A contract is, then, really a promise, or set of promises, agreed upon by each person entering into the contract.
- The contract is considered breached if any of the promises of performance go unfulfilled or are unsatisfactorily fulfilled. If you breach a contract, the other party may be entitled to certain remedies by way of compensation. The same applies if another party breaches a contract with you.

In Québec, in the visual arts and crafts and literature sectors, any agreement between an artist and an exhibitor or a publisher must be in writing, with two signed copies. These contracts must contain the following clauses: the nature of the contract, a description of the works or products constituting the object of the contract, specifications relative to copyrights granted (license, assignment, duration, territory, goals, transferability of rights), and monetary and payment clauses. In other sectors, there are certain contract forms or collective agreements pertaining to services rendered by artists. For further information, contact your professional association.

However, a promise isn't worth the paper it is written on if one or more of the contracting parties are not "legal persons" under the law. For example, an unincorporated association may not enter into a contract since it has no "corporate capacity". If the name of an unincorporated association

appears on a contract and an individual signs below the name, it is the individual who is contracting and who will have personal liability. Also, if an artist has incorporated and intends his or her company to enter into a contract, it is critical to ensure that the correct corporate name is set out in the contract and that the individual signs as an officer or director of the company instead of personally.

Making a counteroffer means you reject the original offer.

- If you return a tentative promise or set of promises made to you with one or more of those promises modified, you are rejecting the offer.
- The modifications you request are considered a counteroffer.
- When you make a counteroffer, you have rendered the original offer null and void. The party having made the original offer, which has been altered, is not obligated to enter into a contract with you, not even on the terms contained in that original offer.
- A contract is entered into the moment that it is signed by all parties and distributed among the signatories.

Is an oral contract valid?

- Both oral and written contracts can be binding.
- Contracts in writing have more certainty and are easier to enforce. A written contract is not required to be in any particular form. It is sufficient to have a statement of the essential points and the signatures of the parties.
- Written contracts can be in the form of a letter, memorandum, hand-written note, standard form agreement, or lawyer-drafted contract. Most importantly, the document should state the terms clearly and capture all the elements of the contractual agreement.
- Certain agency agreements must be in writing; they cannot be oral. As previously mentioned, in Québec, a written contract is a legal obligation for several categories of creators. This obligation must conform with the terms of Act S-32.1 and Act S-32.01.

Get it in writing.

It is difficult, not impossible, to prove what was agreed to in a verbal contract.

As is often said, “An oral contract is worth the paper it’s written on.” Some artists believe that insisting on a written agreement implies that the other party is untrustworthy. So they prefer to do business on the basis of a handshake or “gentleman’s agreement” only. However, even in the best of relationships it is still possible that the parties might forget the terms of an oral agreement or they might have different perceptions regarding their agreement.

A written contract is a safeguard against later forgetfulness or misunderstanding and protects the goodwill between the parties.

Can I unwittingly enter into a contract?

A contract can be implied to exist where parties fulfill independent obligations as though they had an agreement.

Consider the following scenario: You call your regular supplier to order a quantity of canvas without discussing price and without expressly offering to pay for the canvas. However, the promise that you will pay is implied by virtue of your placing the order. In this situation, an implied contract exists, and you will be legally obliged to pay a reasonable price for the delivered canvas.

What are the elements of a valid contract?

To be valid and binding, a contract must contain five essential elements:

Offer

An offer exists when one party invites another into an agreement. An offer is not effective until it is communicated to the second party. Once the acceptance has been communicated to the other party, orally or in writing, the offer becomes a contract and cannot be unilaterally cancelled. If, however, you make an offer that is rejected, the offer ceases to exist. An offer lapses if unaccepted within the time specified. An offer is also terminated by a counteroffer.

The offer must be definite and clearly describe what each party is supposed to do to fulfill the terms of the contract.

Simply expressing a wish, such as “Wouldn’t it be great if you designed my next opera production set?”, is not an offer. Nor is expressing your intention to enter into a deal by, for example, saying, “I would like you to design my next opera production set, but let’s settle the price and details later.” Extending an invitation to deal by such means as issuing a call for audition or proposal is also not an offer.

Here’s an example of a valid offer:

You say, “I’m producing The Grand Opera next August and will pay you \$55,000 when you deliver an acceptable set design by next August 1”. An offer, containing essential terms, has been communicated. This offer can now be either accepted or rejected by the set designer. Once accepted, of course, such a major project would require the negotiation and agreement of the parties as to the specifics of the set design.

Acceptance

Acceptance occurs when the party receiving the offer agrees to all of its terms exactly as presented. You accept an offer by communicating your consent, for example, by simply saying “okay” or by doing so in writing.

A contract is also established when you make a return promise, such as offering to allow a friend to use your studio in exchange for his painting its interior.

One thing that is little understood is that your **behaviour** can imply acceptance. If you start performing an obligation set out in an offered contract it can be implied that you have accepted the contract, are now fulfilling its terms, and accept its conditions as offered.

For example, a band offered a contract to perform for three hours at a neighbourhood bar. The group shows up for the gig, but goes home after the first break. This could be considered a breach of a contract accepted by the band’s apparent willingness to perform in the bar, unless the bar owner breached the implied contract by withdrawing the promised free beer.

Consideration

The value exchanged in the contract is known as the consideration. Literally, consideration is what one party gets from the other by fulfilling his part of the contract. Usually both parties gain something of value from the contract.

Consideration may be tangible or intangible. The most common form of consideration is money paid for some service or product, such as a fee paid for a painting, a royalty offered for a book manuscript, or interest paid on a loan. In these cases, the consideration is based on the promise to do something in exchange for a negotiated fee. Sometimes consideration entails not doing something.

If a writer accepts an exclusive film option, the consideration offered by the writer to the option holder is a promise not to sell the movie rights to his best-selling novel to anyone else for a specified period of time in exchange for a sum of money.

Consideration can take the form of releasing one party from legal liability. Out-of-court settlements are an example of a release from legal liability: One party accepts a sum of money in exchange for a signed release that relieves the other party from any further legal responsibility in the dispute. Consideration can also entail an exchange of favours, such as one person lending lighting equipment to a theatre company in exchange for advertising space in the company's newsletter. In Quebec, artists who fall under the Act regulating the production of works of art are not deemed to have signed a legally valid contract unless such a contract includes the provisions that are required by law.

Both parties should receive acceptable benefit from a contract.

Capacity to contract

Both parties to the contract must be: mentally competent and authorized to sign; sane; unimpaired by drugs or alcohol; and of the legal age of majority. Minors can be engaged in a contract only indirectly by a parent, guardian, or authorized adult signing the contract on the child's behalf. In Québec, the negotiation of a contract must comply with the applicable provincial legislation. In some cases under the Québec Civil Code, certain contracts are considered *contrats d'adhésion*. For instance, if you elect to use Bell as your telephone service provider, you

have agreed by that selection to adhere to the company's lengthy and complex contract, which is not individually negotiable.

Legality

A contract for an illegal purpose is invalid and legally unenforceable.

If you contract with an importer to provide rhinoceros horns, which are illegal to import into Canada, the contract is invalid, but can be used against you as evidence of intent.

How do I protect my rights under a contract?

Negotiate. It's professional and expected.

Each contract you enter into should be beneficial to you and should protect your rights and interests. This usually requires negotiation. Like many artists and cultural workers, you may fear losing a contract if you negotiate. Have no fear. You can usually win more favourable contract terms by negotiating. People in business are used to negotiating and usually expect to do so. Don't be afraid to ask for better terms if you feel they are warranted. Your goals in negotiating should be to achieve a fair deal that you are capable of fulfilling. So determine these goals before entering into negotiation.

When you start discussions with the other side, make sure that the negotiator has authority to make an agreement with you which binds the other side. Otherwise that party will be able to back out.

When you reach agreement in principle, it is wise to enter into a Memorandum of Agreement that outlines the salient terms of the contract that will be finalized at a later date.

Don't hesitate to involve a lawyer, colleague or knowledgeable professional to help you with any element of the negotiation process, particularly if you feel the bargaining power between you and the other party is unequal.

Be clear, explicit, and include all necessary terms.

Don't wait until the deal is set in stone before going to a lawyer. Your lawyer may point out other terms which require negotiation. To be effective, a written contract need not be complicated. The best contract is one written in plain language that both parties can understand. Each of the contract terms should be stated very clearly, so that there is no uncertainty about their meaning.

Include definitions if necessary.

Make sure the contract contains the following essential terms:

- Date and place of the agreement.
- Identification of the parties to the agreement; detailed description of the consideration each party is bringing to the contract.
- Any locations, dates, and times essential to describing the terms of the contract (i.e., a performance date and the exact location).
- The nature of the relationship being established (i.e., artist-agent, employment arrangement, independent contract arrangement).
- The rights and obligations of each party; contract term.
- Materials to be supplied and by whom.
- Electrical power requirement.
- Payment schedule.
- The signatures of the parties. If the contract is being made in Québec, see the clauses described herein as pertaining to Acts S-32.1 and S-32.01.

Be aware of the consequences of entering into a contract of employment, and its impact on the copyright of the works produced during that employment.

Other contract terms (not all will apply)

| Timeframes | Insurance | Integrity rights | Indemnification | Notice clause |
|---------------------------|---------------------------------|---------------------------|----------------------------------|----------------------------|
| Deadlines | Copyright | No terms outside contract | Liability | Failure to perform |
| Delivery / shipment dates | Authentication | Royalty / licensing fees | Rejection of work conditions | Work breaches no copyright |
| Contract breach terms | Guarantee artist is the creator | Exhibiting rights | Artist has title to work | Conservation terms |
| Overdue payment terms | Artist's right to benefit | Dispute solving mechanism | Preservation of work's integrity | Termination conditions |

The most common contractual problems arise out of misunderstandings over terms of payment.

- Be clear on how much you will be paid and when.
- If you accept a long-term, ongoing contract or one that constitutes actual employment, you want regular payment – most likely every two weeks.
- If you enter into a contract with someone you don't know, think about getting a deposit up front. This is a good way to check a person's ability and intention to pay. A deposit is particularly important if you have to purchase materials or incur other costs to complete the contract.
- If the contract is going to last more than 60 days, arrange to be paid in a series of timed lumped sums.
- Schedule each payment to correspond with the delivery of a certain stage of the project. Then you can refuse to go further on the project, if the latest payment due isn't made on time.

For example, a sculptor agrees to create a statue to stand outside a civic building for a fee of \$50,000 plus material costs. A \$5,000 deposit is due on contract signing, \$10,000 on completion of design sketches, \$10,000 on design acceptance, \$15,000 when the sculpture is completed, and \$10,000 upon delivery to the civic building. Regardless of how you are paid, ensure all applicable taxes or benefits attached to each payment are paid at the same time.

- Be careful with form contracts or those issued by whoever is engaging your services or work. You might feel that you don't have the time, energy, money, or expertise to draft a new contract every time you make a deal with someone. In many situations, the other party may have a standard contract for doing business with an artist.
- However, you should be wary of signing a form contract because it will almost always be one-sided with terms in favour of the drafting party.
- The same is true with non-form contracts issued by the other party.

Always read the fine print of a contract.

If you are asked to sign a form contract, consider having your lawyer, agent, or professional association look at it first. Compare it with examples of relevant standard contracts. Your professional arts association or various specialized books are good sources of such contracts. Although every contract or agreement must usually be tailored to fit the circumstance and your needs, standard contracts will give you a place to start. They also provide a way to judge whether a contract is fair and similar to those offered to others in your artistic or cultural sector.

Additional terms can be incorporated as an addendum to a standard contract. Make reference to the inclusion of the addendum in the main body of the contract.

In Québec, contracts must respect the minimal conditions specified in collective agreements negotiated by relevant professional associations.

If you aren't given a contract or letter of agreement

Consider issuing one yourself (your professional arts association will probably have a standard contract to use as a model) that includes all the relevant terms negotiated verbally.

Provide two signed copies of the contract and ask that the other party sign, date, and return one copy to you, while retaining the other.

In Québec, compulsory written contracts must, in order to be valid, be produced and signed in two official copies. It is only from this moment that the artist is "bound" to the contract, so you should make sure that the timeframe and dates specified in both copies are identical.

Some artists and cultural workers feel uncomfortable issuing a formal contract

If you feel this way, a legally acceptable alternative is to send a letter of understanding.

You should set out all the terms negotiated earlier. For example, a librarian accepting a 90 days contract with a music library to construct an electronic index and retrieval system for the library's holdings might write the following as a letter of understanding.

Dear _____,

It was good to speak with you yesterday. This letter will confirm my understanding of the terms of my engagement by Rough Cut Music Library.

The contract is for a term of ninety consecutive days, beginning June 1, 2009. During the contracted period, I will create an electronic index and retrieval system for your collection. This system will be operational upon the expiration of the ninety-day term or earlier. I will report only to you, and be directly and exclusively responsible to you for direction. You will ensure that all staff give me the support required for the project's timely completion.

All necessary computer equipment and existing hard-copy index and retrieval materials will be in place and ready for my use at 9:00 a.m. on June 1, 2009 and will remain so for the term of the contract.

[Other specific terms of how the contract will be completed, materials required, etc. should go here.]

My fee for this work will be \$10,000 plus GST, payable in instalments of \$3,333.33 each, plus GST. The first instalment is due and payable to me upon your receipt of this letter. The second is due not later than July 15, 2009, and the third on or before September 10, 2009. All related expenses I incur will be reimbursed by you upon my submission of receipts and an invoice citing the expenses. **[Any additional benefits, remuneration terms, and other conditions of your contract should be spelled out here.]**

Please return the enclosed copy of this letter, signed by you, together with the first instalment, as an indication of your acceptance of the terms and conditions contained in this letter.

I am looking forward to receiving the documentation and to working with you on this project.

Yours truly,

Enforce the contract's terms

Should someone involved in a contract with you fail to fulfill an important obligation in the contract, be sure to say you want the breach remedied. Failing to take action could result in your silence being considered as an implied consent to the breach.

Taking action could entail renegotiation of the contract's terms if conditions have significantly changed since the agreement was entered into. You may also be entitled under the law or under the contract's terms to terminate the contract.

If the other party refuses to correct the problem or to negotiate with you, then your next step is to take advantage of whatever dispute-resolution methods are outlined in the terms of the contract. Engaging in mediation or arbitration involves far less trouble, time, and money than going to court.

Sometimes the seriousness of the breach or the lack of viable alternatives will require you to bring in your lawyer and/or go to court.

Be sure not to wait too long to take action. Each province has limitation periods within which you must commence legal action.

Checklist

- Read all agreements fully before signing, including all fine print.
 - Never think the law will help you get out of contracts you don't intend to fulfill.
 - Check the business reputation of the other parties before entering into contracts with them.
 - Request and keep copies of all offers, contracts, and related correspondence.
 - For evidence, keep notes about your discussions and dealings with the other party.
 - Periodically review the contract terms and conditions to ensure they are being fulfilled.
 - Both parties must initial any changes you make to the language of a contract.
 - If in doubt, seek advice from a lawyer, professional association, or trusted advisor.
 - Get a retainer or deposit.
 - Do not deliver the next stage of a commission when the previous one has not yet been paid.
- The contract should contain all the terms and conditions, and should say so.

HOW DO I PROTECT MYSELF AGAINST LOSS AND DAMAGE?

In 1997, two theatre companies – one in Vancouver, the other in Victoria – planned to stage an updated version of **Bertolt Brecht's** *The Three Penny Opera*. Midway through the Victoria run, the theatre company was notified by Brecht's estate that legal action would be taken unless the company deleted what were alleged to be changes to some lyrics and lines to reflect various Canadian and British Columbian political and social issues. The media reported that an agreement was negotiated to enable the theatre run in Victoria to conclude without modification, but the Vancouver production featured only the original material. It had never occurred to either the theatre company or the playwright that amending Brecht's original play crossed a legal line. Luckily, the Brecht estate was sympathetic. It sought no damages. This example touched on the moral rights of the creator as represented by the estate.

Every artist or cultural worker faces risks of loss and damage that have legal implications. You may inadvertently cause loss or damage to another party. Or you may be the one on the receiving end. In either case, the effect of such loss or damage could have a major impact on your work, your career, and your livelihood.

This section will help you determine what types of loss and damage pose a real risk to you and what measures should be taken to protect yourself.

What tools do I need to protect to successfully carry out my work?

Every self-employed artist or cultural worker must acquire and maintain certain tools of the trade. These can include personality traits, internal personal skills, learned knowledge, experience, equipment necessary to pursue a relevant artistic career, money, basic equipment required of anyone engaged in a self-employed undertaking, and, above all, talent. On the high end of such tools are such things as artistic skill and good mental and emotional health. At the low end fall such usually necessary items as a desk and chair for doing essential office work and a shoebox that contains your tax records.

Do an inventory of the tools of your trade.

Completing a list that details everything you require for your artistic or cultural career can help identify those things that, were they lost or damaged in some way, could negatively impact your ability to work.

Don't just consider tangible items, like musical instruments, stage sets, computers, promotional material, portfolios, or career archives and records.

Equally important are your health, personal and professional reputation, having time to pursue your career, and the ability to access information necessary for making informed choices.

What types of loss and damage should you be concerned about?

Once you know which tools of the trade are relevant to you, it is easier to identify the types of loss or damage that might affect your artistic or cultural career. The following can be affected by damage or loss.

Physical property

Physical property includes everything in the way of possessions required to do your work.

- If you work at home, that is a relevant physical property.
- An artist's studio and all its contents are physical property necessary to the artist's career.
- The work you produce is also part of your physical property, whether it be sculptures, songs, or proposals seeking funding on behalf of the theatre you manage.
- Musical instruments.
- Photographic negatives and digital records.

Any of these items are at risk of being stolen, vandalized, damaged by careless handling, burned, or destroyed by exposure to various hazards.

In 1998, for example, a number of priceless paintings were lost forever when Swissair 111 crashed off Nova Scotia. While perhaps not on the same scale as that catastrophe, an artist or cultural worker who loses all past samples of her work in a fire faces a devastating personal and professional loss.

Intellectual property

When you express yourself through the creation of an original work, whether it be a musical score, book manuscript, screenplay, painting, webpage, CD, DVD, or other electronic media, you then possess an item of intellectual property.

To retain its value and integrity you want to ensure that it is protected from theft, unauthorized use, copying, sampling, or alteration.

Another concern here is to protect your work from loss or damage resulting from corruption of data stored on computers, loss of works during shipping, and other such problems.

Keep duplicates of all your records at a separate location.

Losses resulting from interruptions in services and supplies

You have deadlines and need to know that the things required to meet those deadlines are available when you need them, both in terms of services and supplies. Suddenly finding that your local art shop has no canvas or that the photo studio failed to process your slides on time for you to meet a deadline can cost you money, injure your reputation, and result in your failing to fulfill a contractual obligation.

Breach of contract

Any time someone with whom you have a contract breaches its terms, you automatically suffer loss. Sometimes this is not very serious.

Your newspaper carrier, for example, has contractually promised to deliver a paper. Failing to do so constitutes a loss for you, but probably not one that is too serious. If, however, a composer promised a new classical score for your symphony and fails to deliver, the loss suffered might be very serious, especially if the concert must be cancelled and the tickets refunded.

Monetary loss

Money can be lost in many ways. Cash can be stolen and the monetary value of physical property can easily be reduced. Loss of money can occur by other less immediately recognizable means.

Probably the most common monetary losses artists and cultural workers face result from being unable to collect money owed to them.

Money can also be lost through receiving poor valuations of your work and entering into bad financial deals with partners, agents, and clients.

Personal health

Your ability to create, perform, communicate, and concentrate can be seriously affected if your physical, mental, or emotional health is impaired by accident, illness, injury, or stress. Good health is essential for self-employed people, who seldom have paid leave, disability benefits, or extended health-care protection enjoyed by many who work as employees.

Your reputation

If someone makes false or malicious statements about you in public, this could damage your professional reputation.

Loss of opportunity

Loss of opportunity can occur when an artist or cultural worker is subjected to censorship, discrimination, or any unfair exclusion that prevents pursuit of a career.

Causing loss to others

Like most things, the world of loss or damage has many two-way streets. You can cause others loss or damage and consequently suffer legal repercussions. The results could cost you money and have a devastating impact on the future of your chosen career and your relationship with others in your discipline. The arts community is very small and tight.

How do I protect myself from loss or damage?

Often protection from loss or damage simply involves using common sense.

It is sensible to properly store art work, to back up computer files, and to confine your business dealings to people you trust and with whom you maintain good personal and contractual relationships.

For some types of loss or damage, protective solutions are more complex and costly. Here are some solutions that apply to certain forms of loss or damage.

Insurance

You buy insurance to protect yourself in the event of a loss. The basis of insurance is that both the person buying the insurance and the insurer hope the loss will not occur. In that sense, insurance is a remedy rather than a real form of protection. When you need to make a claim, you have already suffered the loss or damage that led you to seek the protection of insurance.

A painter who loses her latest work in a fire will never have the real value of that work replaced by the money realized through her fire-insurance policy.

Make sure any insurance you buy is tailor-made for artists or the self-employed.

There is insurance for almost everything and each insurance need should be discussed with a reputable insurance broker or agent.

- Be specific and detailed in describing your needs and particular circumstances.
- Make sure the insurance you buy covers the risks you are most likely to face.
- Don't under-insure.

Your professional association may offer some or all of the types of insurance you require. Rates in this case are usually more favourable than would be the case if you were buying coverage independently.

The following types of insurance might relate to your work:

| | |
|-----------------------|-------------------------------------|
| Air cargo liability | Libel |
| Automobile | Life insurance |
| Business interruption | Non-appearance & non-performance |
| Commercial property | Product liability |
| Disability | Risk |
| Extended health | Travel |
| Household | Weather |
| Liability | |

Contracts

Earlier in this chapter, we discussed how to protect your rights and interests by establishing contracts. Contracts also should provide some protection against damage or loss. Every contract should provide for compensation if the other party breaches the contract. Although monetary compensation is common, other forms of compensation also exist.

You may want the right to terminate the contract in the event of a breach.

Protect yourself from claims of loss or damage by the other party by including clauses that limit your own liability, especially where failure to fulfill the contract was outside your control. A contract requiring an outdoor performance should, for example, always have a clause protecting the performer and equipment from loss or damage caused by inclement weather forcing the performance's cancellation.

Include terms that cover the cancellation of a performance for any reason.

Incorporation

Although running your self-employed career through an incorporated business is more expensive to set up and operate, it reduces your personal financial risk resulting from doing business. When you incorporate, you set up a business entity that is separate from yourself and which shields you from most types of liability. This means that should your business be sued or go bankrupt, all your private assets, which are not part of the business, are protected. You will, however, still have some liabilities as you are a director of the corporation, which imposes on you a standard of care. If you act negligently you can still be sued. There are also some tax advantages that can be realized through incorporation, such as income splitting among non-working family members.

Artists and cultural workers involved in a collective often incorporate. Doing so enables them to distribute more equally the financial responsibilities among all the members, reducing individual liability.

In reality, very few artists incorporate.

For advice on whether you should or not, consult a lawyer or accountant or your province's corporations branch.

If you do incorporate, be sure that in all business dealings you clearly represent your business as a corporation. Any contracts you enter into must be signed in the name of the corporation rather than your own name. Failure to do so will eliminate the benefits of being incorporated with regard to those contracts.

Be proactive

Never ignore the potential for suffering loss or damage by saying, “It won’t happen to me.” That is a formula for trouble. Deciding what forms of protection you require and how best to achieve that protection can be a daunting task. But it is one that you probably don’t have to undertake alone.

Consult with colleagues, your professional association, and relevant legal advisors, such as your lawyer, accountant, or insurance agent.

If you suffer loss or damage, what do you do?

There are many ways that loss or damage can occur.

For example, a graphic artist may find his images being posted on the Internet and downloaded by others without his permission; a filmmaker’s latest release might be banned by a provincial Censor Board; a composer may have her new symphonic work panned in a review as a plagiarized work created by a no-talent fraud, or a museum creator might contract to stage an internationally-renowned exhibition that is cancelled at the last minute.

When you find yourself in a case where the damage is already done, the course of action you take largely depends on the facts of the situation and the terms of the contract, if there is one.

Decide what remedy you want

Do you just want the graphics taken off the Internet, or the Censor Board to let your film run? Do you want a public apology from the music critic? Do you want compensation or damages paid to replace the revenue your museum lost when the exhibition was cancelled?

Decide how to achieve your objective

You may be able to negotiate with the person posting your graphic work on the Internet and get it removed without further fuss.

You might successfully lobby the Censor Board by enlisting the support of your professional association, groups who would like to see your film, and groups opposing censorship. In some cases the Board's action may create welcome publicity.

You might be able to convince the music critic's publisher to allow you to publish a reply to the critic's allegations about your symphony.

In the case of the museum administrator, enlisting a mediator might resolve the dispute between the museum and the exhibition's organizing body.

Mediation is an increasingly popular dispute-resolution mechanism because it is less costly and time-consuming than formal legal action. Many professional associations offer mediation services to members. Private mediators also offer such services.

Court action should be your last recourse

Sometimes the only way to remedy a conflict is to launch a court action. In all the above examples, failure to resolve the dispute by other means could lead to a courtroom.

Before you start a court action, consider consulting a lawyer on the best course to pursue and the costs involved. Damages are often difficult to prove in a court setting. Litigation is almost always costly, stressful, and time-consuming. Even if you are able to obtain a favourable judgement, there is no guarantee that you will collect the award.

Mitigation of losses

If you go to court looking for monetary compensation for losses suffered you will be asked whether you have "mitigated your losses." This means you must show that, despite what the other party did to cause you monetary loss, you did not increase or compound this loss through your own actions or inactions.

Take the aforementioned museum exhibition example. Let's say the museum administrator initially contracted with another museum to bring the exhibition Bold Etruscans to her museum. At the last minute, Bold Etruscans cancelled. The museum had expected to earn \$1 million in

revenue from hosting the show. Seeking redress, the museum sues for \$1 million. Meanwhile, hearing of the cancellation, the well-worn exhibition Graves of Ethiopia offers to step in and fill the space. The exhibition guarantees minimum revenues of \$400,000. The museum administrator refuses. It could be argued that the museum did not reduce its losses and should only be awarded \$600,000 – the amount that it would have lost had it proceeded with the Graves of Ethiopia exhibition.

Ensure you have evidence to support your case

Always collect information that will help “make your case.”

Keep notes detailing the date and substance of both events and conversations, so you won’t have to rely on memory later.

Retain all correspondence, documents, and other materials relevant to the dispute. These may ultimately be vital to building a convincing case.

Protect from loss or damage whatever you would find hard to repair, replace, pay for, or live without.

Checklist

- What steps you take to protect yourself from potential loss depend on:
- Probability a loss will actually happen.
- Potential monetary size of a loss, including loss of time.
- Other possible consequences resulting from a loss.
- Effort, time, and personal morale required to deal with the effect of a loss.
- Cost, complexity, and effort required to protect against a loss.
- Degree of protection and peace of mind each protective measure provides.

HOW DO I PROTECT MY COPYRIGHT?

In 1996, Victoria author **Barbara Hager** conducted an extensive half-day interview with country-music superstar Shania Twain. Hager published much of this interview in a book on 16 outstanding First Nations Canadians called *Honour Song*. The following year, Hager published a biography on Twain herself, *On Her Way: The Life and Music of Shania Twain*. A few months earlier, another writer, Dallas Williams, also published a Twain biography entitled, *Shania Twain: On My Way*. Multiple books about superstars are not uncommon. What was newsworthy was the fact that Williams had used about 1,200 words from Hager's *Honour Song* chapter on Twain without getting permission. Hager sued for copyright violation. A Vancouver court awarded her \$12,400 in damages.

No aspect of law is as important to self-employed artists as copyright protection. Understanding how copyright law works in Canadian and international law is essential for all artists and cultural workers. This section introduces you to the general principles of copyright law, including how to protect this most basic and valuable claim to your work.

What is copyright and how does it apply to your work?

Copyright law is fundamentally simple. You create an artistic work and a bundle of legal rights automatically protects your ownership of that work. Your copyright means only you, and nobody else, have the right to produce, reproduce, and publish your work in any form or medium, provided that the work was not created during the course of employment. Otherwise, your employer is the owner of copyright in the work.

This protection is based on the *Copyright Act*, a federal statute. Copyright law is the same in every Canadian province. Canadian law is reinforced through a series of international copyright treaties to ensure your copyright is protected in more than a hundred other nations.

The copyright holder has the sole and exclusive right to do, or authorize others to do, the following:

- Reproduce the work, whether by photocopying, scanning, digitizing, putting the work on a website, or accessing the work via a website.

- Prepare derivative works based on the copyrighted work.
- Adapt the work - for example, converting a novel into a dramatic work.
- Perform the work in public, either live or by electronic transmission.
- Broadcast the work on radio or television, or to transmit the work via cable, satellite, and telephone wires.
- Display or exhibit artistic work in public.
- Publish the work, whether electronically or in print.
- Distribute the work to the public by sale, rental, lease, or lending.
- Translate the work.
- Rent computer programs and sound recordings for commercial gain.
- Make an audio recording of the work (“mechanical reproduction right”).
- Synchronize sound recording with a film or television picture (“synchronization right”).
- Prevent anyone doing any of the above with your work without your permission.

Each of these rights is independent of the others. Authorizing someone to do one of these things does not automatically entitle that person to use any other of these rights.

In addition to what can be broadly considered direct rights of ownership, the *Copyright Act* provides a couple of other important protective rights. These are moral rights and neighbouring rights.

Your **moral rights** with regard to a work or a body of work refer to rights that protect your personality, honour, and reputation as an artist. Your moral rights guarantee the right to:

- Attach your name to your work, to use a pseudonym or pen name, or to remain anonymous.
- Prevent any use, modification, or distortion of your work which compromises your reputation or integrity.
- Prevent someone from using your work in association with a product, service, cause, or institution.

A few years ago, the downtown Toronto Eaton Centre dressed up its public Canada Geese sculpture with large red Christmas bows. The sculptor, **Michael Snow**, was not amused. He sued on the grounds that his moral rights were infringed by this modification of his sculpture. The bows

came off. The fact that the mall owned the sculpture did not strip Snow of his moral rights to the work.

Moral rights cannot be surrendered or assigned by the creator. You may, however, agree to waive or not to enforce your moral rights. Do so only on a case-by-case basis and even then, for a limited time period. Only the creator has the moral right in a work. Also, unlike copyright, a moral right can never be sold.

As copyright and moral rights protect the creator of an artistic work, **neighbouring rights** protect the users of copyrighted works. They include performers (actors, singers, musicians, etc.), record producers, theatrical companies, and broadcasters.

When a work is performed, that performance is considered a “neighbouring work,” a performer’s performance. **The law grants the performer four neighbouring rights:**

- The right to make an audio recording of the performance.
- The right to prevent someone else making an unauthorized recording of the performance.
- The right to broadcast the performance by radio, television, and cable transmission.
- The right to authorize someone else to exercise any of these rights.

Applications have been made to the Canadian Copyright Board for tariffs that apply to web-based broadcasts. Although the United States is not a signatory to the Rome Convention on neighbouring rights, they do charge fees for web-based simulcasting and broadcasting. Canadian musicians are entitled to those U.S. benefits.

Copyright protects the expression of an idea (i.e., the physical embodiment or representation of the idea), **not the idea itself.**

This distinction leads to much confusion in various areas of artistic work. It is, however, actually very simple. You have an idea for a screenplay or a sculpture. If you were to give a rough outline of the premise of your screenplay to a movie mogul or your mind’s-eye view of the sculpture to a rival and the next thing you know, a movie is released or a sculpture is created based on your idea, copyright law offers you little protection. However, if you were to express your idea in a tangible form and then show it to the movie mogul or sculpting rival, copyright would offer you some protection. That expression need not be the final product. For a screenplay, a film treatment

(brief summary) would suffice. A sketch of the sculpture would serve the same purpose. Copyright would be infringed if the whole or a substantial part of the film treatment were copied or if a statue were made mimicking the sketch.

What kinds of work are protected by the *Copyright Act*?

The *Copyright Act* protects works organized into four categories:

- Literary.
- Dramatic.
- Musical.
- Artistic.

And compilations of such works

Literary works include books, letters, memoranda, lectures, speeches, translations, data bases, computer programs, and games.

Dramatic works include scripts, plays, audio-visual works, operas, musicals, and comedies.

Musical works include sheet music, all forms of sound storage technology, musical arrangements, and adaptations.

Artistic works include paintings, drawings, engravings, works of artistic craftsmanship, photographs, sculptures, sketches, illustrations, architectural works, and comic strips.

To be eligible for protection under Canada's *Copyright Act* a work must be **original, fixed, and created** by an artist who is either a **Canadian/landed immigrant or a citizen of a nation with reciprocal copyright legislation**.

Originality

This means that some independent skill or effort must have gone into creating the work. In other words, the piece cannot be a copy of another creator's work.

Remember the Shania Twain biographies? Both were original. The one writer did not violate the copyright of the other author by the act of having written a book about Shania Twain. He violated the other writer's copyright by using her material verbatim in his book.

Fixation

The work must be expressed in some material and relatively permanent form.

The movie script is copyrighted when a treatment is written, the choreography of a dance work becomes copyrighted when its movements and general characteristics are sketched or the performance is videotaped.

Nationality

On the date a work is created, the artist must be a citizen or resident of Canada or any of the countries that participate in reciprocal copyright treaties with Canada.

How do you protect your copyright?

Copyright is automatic. If you create a work that is covered by the legislation and which meets the three criteria of originality, fixation, and nationality then the work is immediately copyrighted in your name.

Your copyright exists from the creation of your work until the end of the 50th year after your death. If the copyrighted work has never been published, copyright lasts perpetually, unless the work is later published. Once published, copyright will persist for 50 years from publication.

In some European countries, the term in both cases is 70 years rather than 50. Generally, in the United States, copyright in a work is in force 70 years after the author's death or, in the case a work that was created by a number of collaborators, 70 years after the last surviving author's death. In the case of work for hire, the term is 95 years or 120 years from the date of creation, whichever is shorter. That application does not exist in Canada. In 2009, Germany and France have extended the copyright protection from 50 to 95 years. The U.K. is considering an extension as well.

You can retain your copyright interest in a work while assigning limited uses to others.

No one but you can own the copyright to your work, unless you have agreed to transfer some or all of the rights to another party and have done so in writing (for transfers in Québec, consult the Status of the Artist legislation: S-32.01 & S-32.1).

A book writer, for example, may assign only the translation rights to her book in exchange for a percentage of royalties earned on the sales of the translated version of her book, but retain all other rights.

If the work is a collaboration between you and other creators, you share the copyright equally unless other terms have been agreed. Decisions regarding copyright matters pertaining to the work will have to have the concurrence of all the copyright holders involved. This aspect is very important in the case of members of a band who collectively write songs. Decide, while you are still friends, what percentage of copyrighted material belongs to each band member. Register those songs in that fashion with an organisation such as SOCAN.

Members of bands and other musical ensembles should know the difference between copyright, patents and trademarks, especially when it involves the name of a musical group. Decide who owns that name, and in which geographical area(s) is its use exclusive. Name-related branding is a very important aspect of marketing your music and product. Visit www.ic.gc.ca, and go to the copyright or trademarks sections of the website.

Generally, unless agreed otherwise, any work created during employment is the property of the employer, who consequently owns the copyright. This can also apply in some cases to commissioned works of art. However, the person commissioning a work of art never holds a moral right in the work. Moral rights always remain with the creator.

Protect your copyright by putting the © symbol on the face of all your work.

Many copyright violations occur through ignorance rather than deliberate intent. If possible, put a copyright notice on the face of your work. This notice should have the following three elements:

- The copyright symbol © or the word “Copyright” or the abbreviation “Copr.”
- The year of creation or first publication.
- Your name.

Example: © John Smith, 2009

If you feel greater copyright protection is desirable, you may wish to follow a procedure often called the “poor person’s copyright registration.” **To do this, send a copy or reproduction of**

your work to yourself by registered mail, put it in a safe place, and do not open it under any circumstances unless and until required to do so in a court of law. The envelope and its contents can be taken as evidence by a court that the work existed at least as early as the date on the registration slip.

Some arts service organizations or artists' unions offer copyright registration services. The Writers' Guild of Canada, for example, offers a screenplay registration service. More formal registration can be achieved by submitting the required forms and fees to the Copyright Office. A certificate of registration creates a presumption under the law that copyright exists in the work and that the person whose name appears on the certificate is the owner of the copyright in that work. The same kind of protection can be achieved in the United States by registering with the United States Copyright Office.

At some point you may decide you want to allow others to use your copyrighted work in some manner. You do this by one of two means – **assignment** or **licensing**.

Assignment occurs when you permanently give someone else one or more aspects of your copyright. This is akin to selling or transferring the right to someone else. Licensing is a temporary arrangement, whereby you permit someone to use one or more aspects of your copyright for a specified purpose and usually for a limited period of time.

Licensing can take one of three possible forms – sole, exclusive, and non-exclusive. A sole licence means that only you and the licensee can do with the work what has been licensed. An exclusive licence means that only the licensee (exclusive of all others, even you) can do with the work consistent with the license. A non-exclusive licence means that you can license others to use the work pursuant to the terms of the license.

When one of William Kinsella's novels was transformed into a movie called *A Field of Dreams*, the film rights to his book were assigned to the film's production company in exchange for a specific negotiated fee. This was a permanent transaction necessary because the film exists permanently. Therefore, the production company needed the film portion of the copyright assigned to it on a permanent basis.

The magazine industry has traditionally obtained required copyright to publish an article through a license with the writer. The license the magazine publisher obtained from the writer was known as “First North American serial rights.” This allowed the publisher to produce the article in print one time only. The moment the article appeared in a magazine, all copyright in the work reverted entirely back to the writer, who could then license other uses of the article to other magazines or in other media.

In 2008, Google decided to go into the e-book business by digitizing millions of books, many still under copyright protection. The creation of this “googleopoly” will drastically change the future of book publishing and marketing, as well as the application of copyright.

If you want to assign or license rights to another party be sure to use a written agreement. When the transfer takes place in Quebec, it is a requirement to do so in writing, pursuant to LRQ S–32.01 and S–32.1.

You should take the following steps when licensing or assigning some or all of your copyright in a work to another party.

- Get legal advice from a lawyer or your industry association.
- Leave no contractual provisions open-ended in terms of rights granted or duration of the assignment or license.
- Ensure your agreement takes into consideration possible related electronic and other existing or future technology uses of your work.
- Limit the license’s duration.
- Clearly define the media in which you are allowing your work to be reproduced.
- To emphasize that your work has value, always ask for reasonable compensation for granting the license or assignment.
- To ensure protection of your artistic integrity and reputation, never waive the enforcement of your moral rights on a permanent basis.
- Make sure that you understand all of the provisions in the written agreement, and that it states everything which has been agreed to by the parties.
- The agreement should contain language that states that there are no other terms or conditions, either implied or expressed, than those contained in the agreement.

What should you do if your copyright is violated?

Always rigorously protect your copyright. It is essential to your livelihood.

If you discover your copyright has been violated, you have a variety of remedies. Under Canadian law, you can seek the following:

An injunction – a short-term or permanent court order stopping the offending behaviour.

General damages – payment of monetary compensation by the offending party to cover your losses or obtain remuneration.

Punitive damages – payment of monetary compensation designed to punish or deter the offending party or other parties who might commit a similar violation.

Accounting of profits – a payment to you of any profits made as a result of the unauthorized use of your work.

Return of your work – requires the return to you of your work, or delivery to you of any product produced from your work, or seizure and delivery to you of imported goods which violate your copyright.

Costs – the payment of some or all of your legal costs and court expenses required to defend your copyright and/or secure remuneration.

Criminal consequences – the offending party could face fines or a jail sentence.

Sometimes taking action to defend your copyright is difficult because the violator has more financial resources than you do. In such cases, artists are increasingly choosing to take collective actions. Collective action usually takes one or more of the following forms.

- Several artists may join together as a collective group and seek standing as a class for initiation of a class-action lawsuit against the offending party. P.E.I., Nova Scotia and the territories do not have class action legislation on their books. However the Supreme Court of Canada has ruled that representative actions can be interpreted so as to allow for class action proceedings.
- Artists may also, by forming a rights-licensing or copyright-defence non-profit collective, take the offending party before the Copyright Board of Canada. The remedy sought here is a tariff that will be binding on, and payable by, the users of relevant copyrighted works.

- Have a copyright licensing agency (e.g., CANCOPY or SOCAN or SODRAC) or an arts advocacy group (e.g., CARFAC, UNEQ, or RAAV) sue on the artists' behalf. In Québec, certain professional associations have standing under the Status of the Artist legislation (S-32.01 & S-32.1). They do not systematically represent creators in courts, even though the law entitles them to do so.

Checklist

- Your work is copyrighted the moment you create it.
- You are the copyright owner unless you assign or license copyright to someone else.
- You can assign or license individual aspects of your copyright.
- Any assignment or license of copyright should be done in writing.
- You should receive fair remuneration for any assignment or license of copyright.
- You cannot surrender or assign your moral right in a work. However, you can agree not to enforce it.
- Keep abreast of new technologies and how they might infringe your copyright.
- If in doubt, seek professional advice.

HOW DO I RESOLVE A LEGAL DISPUTE?

The November 1985 cover of *Saturday Night Magazine* bore a photograph of then opposition member of parliament **Sheila Copps** dressed in motorcycle leathers astride a Harley-Davidson. The photo was taken by freelance photographer Jim Allen. On March 11, 1990, the *Toronto Star* newspaper published an article about Copps. The article was illustrated in part by a reproduction of Allen's *Saturday Night* cover. Allen sued and on October 13, 1995 was awarded \$900 general damages for copyright infringement. The *Toronto Star* appealed that decision and on October 2, 1997 the earlier judgement was overturned. Allen was ordered to pay the newspaper \$3,000 in fixed costs. When Allen took the *Saturday Night* photo he was fulfilling the terms of a contract and could never have imagined that something so straightforward would embroil him in a seven-year legal dispute.

In Québec, however, the outcome might have been different, because in 'la belle province' a written contract is required under Act S-32.01.

At some point in your career as a self-employed artist or cultural worker, you may well face some form of legal dispute. This section provides information on the more common legal disputes that might affect you. It also suggests alternatives to court proceedings and ways to avoid altogether becoming mired in costly legal actions.

In what kinds of legal action might you become involved?

The term "legal action" technically refers to a lawsuit commenced in a court system by a person or party seeking compensation for loss or injury caused by someone else's action or inaction. The person or party launching the action is known as the "plaintiff" and the person defending against the action is the "defendant." Such court actions are known as civil suits and can be heard in a variety of civil courts.

In criminal cases, the equivalent to the plaintiff is the Crown (the state) represented by the "Crown attorney" or "prosecutor" and the defendant is known as the "accused."

The following is a list of some of the more common legal actions a self-employed artist or cultural worker might face. Except for criminal cases, you could find yourself being either the “plaintiff” or “defendant.” Your approach with regard to each type of legal action will vary depending on your legal standing in the proceeding.

Breach of contract claim

If someone entering into a contract with you fails to perform his or her obligations, then you may be entitled to receive financial compensation (known as “damages”) in an amount that places you in the same position as if the contract were completed. If the breach is serious enough, you may also have the right to terminate the contract. The court may give you other remedies when money is not the only appropriate compensation. Should you fail to perform your obligations under a contract, a breach of contract claim may be filed against you.

Breach of privacy claim

Increasingly, laws are protecting the right of individuals to privacy. The federal *Personal Information Protection and Electronic Documents Act*, PIPEDA, received Royal Assent on April 13, 2000. In Québec, the right to privacy is protected under the Civil Code, par. 35 to 41. While all Canadians are covered by PIPEDA, Canada surrenders its jurisdiction to those provinces that have “substantially similar” legislation, such as Alberta, British Columbia and Quebec. In the latter province, two other Acts apply, LRQ A-2.1, public sector, and LRQ P-39.1, private sector. However PIPEDA applies to those activities in all provinces that fall under federal jurisdiction. Ontario has a *Personal Health Information Protection Act*. For additional information see www.privcom.gc.ca, and consult “Your Privacy Rights: A Guide for Individuals.”

Collection of an outstanding debt

If someone owes you money and does not respond to your requests for payment, you can hire a collection agency to collect the debt, take the debtor to Small Claims Court, or take the action to a higher court. If you get a judgement, you may be allowed to seize the assets or garnishee the wages of the debtor. These actions may be taken against you if you fail to pay a debt owing.

Proceedings in bankruptcy

Failure to pay debts over a long period of time could result in a creditor forcing you into bankruptcy. In this case, the creditor would file a claim against you in court. If successful, a

bankruptcy trustee is given control over most of your property – except basic tools of your trade and assets essential to enable you to make a living. The seized assets will be sold to pay your creditors. You can stop all court proceedings by filing a proposal for payment of debts that is acceptable to your creditors, or, if you qualify, by petitioning the court under the *Company's Creditors Arrangement Act*. In addition to the federal law pertaining to bankruptcy, Québec's LRQ Act S-32.01 specifies that a contract is nullified if the contractor of a work produced by a creator becomes bankrupted, the object of an arrest warrant, has his or her assets seized, or, in the case of a moral entity, the assets belonging to that entity are liquidated. In these instances, the law specifies that these "goods" (the work) are reassigned to the author/creator.

Copyright infringement claim

The Canadian *Copyright Act* allows you to take legal action against someone who copies, uses, publishes, or alters your work without your permission. You should be concerned both with the violation by others of your copyright and with the possibility that you could be violating copyright in how you use or access the work of others. A variety of approaches can be taken if you encounter a legal dispute in this area (see "How do I protect my copyright?").

Negligence claim

Under Canadian law, everyone has a duty not to carelessly cause physical harm or property damage to others. Someone is considered legally "negligent" when he or she fails to use the care that a reasonable person would use in the same circumstances.

For example, if a theatre company allows the floor in a rehearsal space to fall into disrepair, it could be ordered to pay damages to any actor injured when the boards break under her feet. The compensation will cover only injury or damage that is "foreseeable" or which could be expected to flow from the negligent action. If the engagement is covered by the Workers' Compensation Act, you may be precluded from taking any civil action against the employer.

Since Canadian society is becoming more litigious, performers, especially those who are self-employed, should carry liability insurance. Some professional associations have negotiated agreements with insurance companies to provide such coverage at reasonable cost.

Misrepresentation claim

If you suffer loss or damage from having acted in good faith on the basis of a false statement or misrepresentation provided to you by another party, you can seek compensation.

Defamation claim

You can sue someone for defamation if that person makes a false statement that discredits you publicly or damages your reputation. If the defamation is committed verbally, it is known as “slander.” If conveyed in print or electronic media, it is called “libel.” Defamation law places definite restrictions on freedom of expression. The consequences of publishing defamatory statements can be extremely serious. In a civil action, damage awards can run into the millions, and if the matter is pursued in a criminal court, imprisonment is possible. It is important to be aware of the very strict provincial limitation periods that apply to defamation proceedings.

Criminal charges for obscenity

The *Criminal Code* recognizes a series of criminal offences in relation to the dissemination of written, printed, drawn, photographed, filmed, modelled, or recorded matter considered by the courts to be “obscene.” If charged, you will have to attend court and justify whether the work in question has sufficient “artistic merit” to warrant its free expression or that it does not offend community standards.

How can you protect or defend yourself?

There is a general rule that all parties who end up in a civil court action lose. Court actions are usually long, tedious, expensive, physically and emotionally taxing, and a serious distraction to your work.

If you end up in a dispute that seems headed toward court, always remember that your first goal should be to resolve the problem.

Keep a cool head; don’t give into the temptation to adopt an inflexible attitude. Compromise can often quickly and inexpensively resolve a legal issue and avert a costly court action.

Here are some basic strategies for protecting or defending yourself against legal actions.

An ounce of prevention

The best way to avoid a court action is to conduct your business affairs so that you avoid becoming involved in a legal dispute in the first place. Consider the following preventative measures:

- Try to recognize potential legal pitfalls. The moment you start wondering if you are facing a possible legal issue, consult your lawyer or other trusted advisor.
- Trust your instincts. If someone seems untrustworthy or a contract appears either unfair or too sweet, consider not getting involved.
- If you find yourself in what seems a bad legal situation, don't be afraid to "bail out" before the matter becomes a serious legal issue. The losses you suffer by leaving at an early stage may prove minor compared to the consequences that might arise later. (See "How do I protect myself against loss and damage?")
- Get all of your contracts in writing. Make sure your contracts include all the terms of your agreement, are clearly written and unambiguous, and set out how to resolve any disputes that may arise from the contract. Even if a dispute does proceed to court, the matter is more easily settled when the terms of the contract are clear. (See "How do I establish and enforce contracts")
- Keep reliable notes and records of conversations and agreements you make prior to finalizing the contract. Confirm in writing everything that is agreed and also set out your expectation of what is to happen in the future. Your notes and letters could be valuable as evidence or serve to jog your memory if you later end up in court. In addition, keeping records can give you more clout with the other party by showing that you are concerned about your rights and are staying on top of the situation.

Negotiation

A relatively quick and inexpensive way to avoid court action is to approach the other party and negotiate a solution.

- Sometimes you can handle such negotiation yourself, other times you may want a lawyer, agent, or some other representative to negotiate on your behalf.
- Engaging a representative is usually a good idea if your relationship with the other party has deteriorated to a point where dispassionate discussion is no longer possible. A representative

can lend objectivity and sometimes add knowledge on the subject at issue. Your goal in any negotiation should be to maintain constructive discussion aimed at resolving the issue.

- If the other party appears unwilling to negotiate, consider having your lawyer send a letter stating that you are prepared to take legal action if necessary. Don't take this action too quickly. Sometimes it will bring about speedy resolution, other times it might cause a party to break off any further attempt to negotiate a settlement. Remember, resolution is always your primary goal.

In Québec, there is a provision under its Status of the Artist legislation that makes mediation or arbitration available, unless the parties have agreed in writing to adopt different methods of solving potential contractual disagreements.

Mediation

Mediation is an increasingly popular formal system for conflict resolution. Mediation works best when the parties are dealing in good faith, seek a quick resolution, and simply need help attaining it. A mediator acts as a facilitator, helping the parties to focus on their common interests to reach a solution that is mutually satisfactory. The discussion centers on interests and goals, rather than fault. Before the mediation process begins, the parties involved decide whether the final decision reached in the mediation session will be binding or not.

Many arts organizations or unions provide mediation services, either as a benefit of membership or for a small fee. Others offer mediation referral services. Because it is so much cheaper than court action, mediation is a growing business. Most provinces, however, have no governing body to ensure acceptable levels of training and standards for mediators. So be careful in selecting a mediator. Relying on the recommendations of others is probably your best option.

Arbitration

Like mediation, arbitration is a problem-solving process. Arbitration occurs when both parties agree to engage in the process, when their contract stipulates that it be used to solve disputes, or when it is ordered by a court. Two parties may agree on the rules of arbitration or they may agree to let a province's Arbitration Act govern the process.

In Québec, arbitration is compulsory in contractual agreements pertaining to the visual arts and crafts and literature sectors, unless all parties contractually relinquish this right.

An arbitrator functions somewhat like a judge, but in a less formal way than in a court proceeding. The arbitrator hears the facts and evidence from both sides and makes a decision on how the case should be resolved. Arbitration procedures usually allow either party to object to an appointed or suggested arbitrator who is perceived to be biased or hostile. Depending on how the matter first came to arbitration, the decision of the arbitrator may or may not be binding on the parties.

Québec's Status of the Artist Act S-32.1 empowers certain professional artists associations to negotiate collective agreements on behalf of self-employed artists, and will intervene in the case of resistance by engagers or producers. The resulting agreements should include dispute resolution language on the basis of which the Act will provide mediation or arbitration services.

Membership in those and other professional associations can be of considerable advantage in protecting artists right across Canada.

Alternative measures in the Courts

In response to an overload of cases and the public expense of conducting trials, the civil and criminal courts in each province have developed a number of alternative dispute-resolution procedures that the parties must engage in before proceeding to trial. Parties in a civil dispute must attend a pre-trial conference with a judge to see if the matter can be settled or if essential facts can be agreed on before going to trial. The criminal courts have preliminary hearings and plea bargaining procedures which encourage the Crown and the defence to agree on facts, the plea, or the sentence before a trial occurs. The courts can also order parties to go to mediation or arbitration instead of resorting to a trial.

Your last resort: Going to Court

If it becomes clear that your legal dispute will not be resolved using any of the methods outlined above, then you may have no choice but to proceed to a trial. The first question is which court should hear the dispute. Where you go to trial will determine what series of steps will be required and from whom you should seek help.

Here's a very brief primer on the various courts in which you might have your hearing.

Small Claims Court – This is usually the quickest and least expensive court in Canada. It awards only monetary compensation. There is an upper limit on the amount of money a Small Claims Court can award. That limit differs from province to province (in Québec, the limit was \$7,000 in 2009). People who sue in this court are normally encouraged to represent themselves on the basis that the claim is usually too small to justify hiring a lawyer. The absence of lawyers on both sides levels the playing field. The rules of evidence and procedure tend to be more relaxed in this type of court.

Civil Courts – In Canada's legal system, several civil courts are devoted to resolving private disputes or lawsuits, with each province and territory using different names for their courts or organizing them in a slightly different fashion. In most provinces, these courts can be roughly divided into three levels: trial courts, the intermediate appeal courts, and the court of final appeal – the Supreme Court of Canada. There is an old saw that only a fool represents himself in court and for any civil court hearing hiring a lawyer to represent you is a wise idea. Your lawyer will guide you through the process.

Criminal Court – If you are charged with a criminal offence, the legal procedures and options open to you are quite different than in civil court. If you face a criminal charge, it is wise to immediately retain a criminal lawyer. Having a lawyer with you is particularly important when the charge or investigation involves your physical arrest and detention, a search of your premises or studio, or the attempt by police to take a statement from you. You are entitled to the services of a legal counsel before you need to make any statement to the police. The seriousness of the alleged crime determines which criminal court will hear the matter, whether or not you are entitled to a jury, possible penalties on conviction, and other procedures.

Special courts and tribunals – A variety of special courts, boards, commissions, and licensing bodies exist to handle issues relating to government business or legislation. For example, disputes concerning certain forms of discrimination are handled by your provincial Human Rights tribunal; the Official Languages Tribunal investigates alleged breaches of the Official Languages Act; the Canadian Radio-television Telecommunications Commission regulates and supervises Canadian broadcasting and telecommunication; and Canadian Artists and Producers Professional Relations Tribunal (CAPPRT) is an arm of the federal *Status of the Artist* legislation that provides mediation or arbitration services. In Québec, disputes regarding artists "targeted" by Act S-32.01

are handled by the *Commission de Reconnaissance des associations d'artistes et des associations de producteurs*; the province is considering transferring this task to La Commission des Relations du Travail. Each of these agencies has its own procedures and areas of authority. Whether you will need to be represented by a lawyer or other professional will depend on the complexity of your case and the seriousness of what is at stake for you.

Checklist

- Avoid legal issues by being selective about with whom you do business.
- Get all contracts in writing and include a dispute resolution mechanism.
- Always approach legal disputes calmly, with reason rather than passion.
- Focus on resolving the problem, not on getting even.
- Carefully consider alternate methods to resolve the problem.
- Court action should be considered a last resort.
- Don't hesitate to hire a lawyer if you have to go to court.

HOW DO I FULFILL STATUTORY OBLIGATIONS?

What are statutory obligations?

Canadian law sets out certain obligations to which all citizens must conform. These obligations come into being via two different means: legal precedent and codified law. Legal precedents are decisions made by the Courts which interpret existing law or establish new law. Codified law are the laws passed as acts or statutes of Parliament, the Provincial legislatures, or the Québec National Assembly. Codified law also includes bylaws passed by cities or rural municipalities.

Every statute defines three things:

- To whom it applies.
- Legal obligations that must be met (“statutory obligations”).
- Penalties for non-compliance.

The *Canadian Income Tax Act*, for example, applies to all residents and citizens of Canada who earn qualifying taxable income. Taxpayers are obliged to keep proper receipts and records, file income tax returns by certain annual deadlines, and pay taxes owing. Failure to conform to the Income Tax Act might result in financial penalties, an audit of books, and, in extreme cases, even imprisonment for tax evasion.

A City of Victoria bylaw prohibits drumming on the downtown streets by buskers or any others. This bylaw imposes the statutory obligation on buskers and others not to play a drum and imposes fines if they do so.

Here are some statutes that may impose legal obligations on you as a self-employed artist or cultural worker:

Goods and Services Tax Act

Excise Tax Act

Retail Sales Tax Act (in most provinces)

Sale of Goods Act

Cultural Property Export and Import Act

Human Rights Act (in each province)

Copyright Act

In Québec, two other laws are in force:

The Act Respecting the Professional Status of Artists in the Visual Arts, Arts and Crafts and Literature and Their Contracts with Promoters (S-32.01)

The Act Respecting the Professional Status and Conditions of Engagement of Performing, Recording and Film Artists (S-32.1).

How do you identify and fulfill your obligations?

Ignorance of a statutory obligation offers no legal defence. It is your responsibility to be aware of statutory obligations that pertain to you personally and to your artistic or cultural activities.

The following is a five-step process for identifying and fulfilling the statutory obligations that apply to you:

Consult your relevant professional association to determine your statutory obligations and responsibilities. Your association or fellow professionals can also usually help you to find professionals who can advise you in a general way about your obligations and who can be available to answer your specific questions as they arise. These advisers may include an accountant, lawyer, artist representative, or union representative. It is important to choose professionals who understand how the law applies to the self-employed, specifically to artists who work for themselves. (See “How do I manage my relations with legal advisors?” for hints on finding competent legal advisors.) Also consult government departments and agencies that administer the various statutes. It is important to find out about your obligations when you first set out on an artistic or cultural enterprise by consulting with the appropriate government office. Knowing your responsibilities at the outset will help you avoid running afoul of the law. Use information to stay out of trouble.

Identify your status and obligations. If a statute or law applies to you it will usually be by virtue of your status. For example, important consequences flow from your status as “self-employed.” Your self-employed designation affects how your income tax is calculated and paid under the *Income Tax Act*, restricts your access to social benefits under EI, and determines who makes the required contributions to the Canada Pension Plan or the Québec Pension Plan. That status also limits your protection in the workplace under the *Workers’ Compensation Act*.

Identify your activity and obligations. A statute may apply to you because of the artistic or cultural activities in which you are engaged.

For example, if your activity is to import artistic materials into Canada, you should be aware that you will be subject to the provisions of the Criminal Code which prohibits the importing of materials deemed by Canada Customs to be “obscene.” Importation of certain raw materials, such as ivory, may not be allowed.

Set up a system. Once you have determined the statutory obligations that apply to you and your artistic activity, set up whatever systems and procedures you need to gather and organize information, keep records, keep track of and meet deadlines, get help as needed, communicate with officials, and submit required documentation to appropriate government departments.

Keep up to date. The law is always changing, and so are your resulting obligations. Remember, ignorance of the law is no defence. It is your responsibility to know which statutes apply to you and your artistic or cultural activities, and to comply with these statutory obligations. You can keep pace with the details by reading information that you receive from government agencies and by asking these agencies about changes as they occur.

What kinds of statutory status might apply to you?

Many people working in the cultural community want or need to supplement their artistic income by taking on additional employment. In this way, you might find yourself working simultaneously as a self-employed artist and as an employee, or you might spend periods of time alternating between full-time self-employment and employment.

Because you have very different statutory obligations when you are self-employed versus when you are an employee, to operate under a “dual status” can create complexity and confusion in managing your legal and business affairs. To complicate matters further, you may at some point work for an organization as a manager or you may contract someone to work for you personally. In either of these cases you must be aware of your obligations as an employer.

The following examples of legal statutes and corresponding statutory obligations may apply

Self-employed individuals are generally most concerned with **obligations set out under the *Income Tax Act***. If you have a “reasonable expectation of profit” from your self-employed business, you can claim certain tax advantages that allow you to deduct business expenses from your income. This reduces the overall tax you have to pay by lowering your net income. The taxable portion of income is determined as follows: gross income minus business expenses equals net income. To claim business expenses, however, you must keep financial records that detail income, expenses, and relevant inventory. Your accountant can help you set up a workable system (see “What’s the best way to keep financial records?”). Note that you do not charge GST on your employment earnings.

If you register under the *Goods and Services Tax Act*, you must charge GST on goods you sell or services you provide, keep relevant records, and remit payable GST (GST collected less GST paid on business expenses). In Québec, Revenu Québec grants a tax credit on revenues derived from copyrighted works. Book, record, and film publishers and producers can also benefit from other tax credits granted by SODEC (*Société de développement des entreprises culturelles du Québec*).

When you work as an employee you are subject to the protection and benefit of a variety of federal and provincial laws dealing with employment standards, workplace health and safety, and employee benefits (e.g., employment insurance, pension). You also have the statutory obligation to not abuse any of these employee benefits, such as by filing false employment insurance claims or workers compensation claims.

Any time you engage a person to work for you as an employee, you are required to comply with both federal and provincial statutes concerning maximum work hours, overtime pay, minimum wages, public holidays, vacations and vacation pay, equality of treatment, employee benefit plans, pregnancy leave, notice of termination of employment, severance pay, and pensions. The *Income Tax Act* requires you to regularly deduct from the employee’s pay amounts for Canada Pension Plan, Employment Insurance, and income tax. You may be required to register with your provincial Workers’ Compensation Board. You may also be subject to provincial workplace health and safety legislation, which requires you to provide a safe workplace and protect the health and

safety of your employees. Your provincial *Human Rights Act* will require you to treat employees fairly and equitably.

You may be operating as a sole proprietor. Suppose you have a consulting firm called Rapid Act Consulting. You are the only person involved in this firm and it is unincorporated. In most provinces you are required to register this business name with the province's corporations and business names office. Many municipal or regional authorities also require such sole proprietorships to have a business license and to pay business taxes.

If you are engaged in a business that involves other co-owners, then you are engaged in a partnership and obliged to follow provincial statutes with regard to partnerships. You will also have the same business name registration requirements as a sole proprietor.

If you have incorporated your business or collective, then you must comply with the Corporations Act in your province. This Act requires you to set up the corporation in a certain way, appoint directors, keep records, file annual documents, and so on. Your obligations and benefits under the *Income Tax Act* will differ according to whether you file as an individual or sole proprietor.

What activities might carry statutory obligations?

Various artistic or cultural activities in which you engage will carry related statutory obligations. Here are a few examples:

Retail sales

If you operate a retail outlet, such as a commercial gallery, you must have a retail license from your local municipal or city authority. If you sell your work retail, whether from a gallery or your own studio, you must register and charge the appropriate taxes under the federal *Goods and Services Tax Act* and the Retail Sales Act of your province. Many works of art produced in Canada are not subject to federal sales tax, so these might be excluded. It is your responsibility to know what is and what is not taxable.

Public performances, exhibitions, and screenings

Across Canada, visual and performing artists are restricted by the provisions of the *Criminal Code* regarding content that is defined by the Code as obscene. Video and film work may be subject to the provincial statutes, which establish censorship boards to monitor video and film content.

Noxious or dangerous substances and noise

You must restrict your activities or the nature of your work to observe local and provincial “nuisance” laws, which limit or prohibit noise, smoke, odours, and the keeping or using of noxious or dangerous substances.

Lessee or occupant

Whether your studio is in a separate location from your home or is a part of your home, you must ensure that the activities you carry on in your studio – including any retail sales – comply with local municipal or city zoning regulations. If you plan to build your own space or renovate an existing space, you must obtain a building permit from the local building inspection department.

Exporting

If you sell your work outside the country, you must comply with federal customs and excise regulations. A knowledgeable customs broker can help you with the numerous documents required for the shipping, tracking, customs clearance, delivery, and receipt of goods across the border. Your ability to export your work may also be affected by the *Cultural Property Export and Import Act*, which restricts exportation of works of art considered of “national importance.”

How do you set up a system for fulfilling statutory obligations?

Most artists and cultural workers hate keeping records. It is tedious, time-consuming, and requires retaining a great deal of documentation for many years. However, there is no alternative.

The first thing you should do is develop a list of all statutory obligations and their deadlines that pertain to your activities. Put important deadline dates in your diary and on the calendar.

Set up files based on each obligation. You should have a file containing information that summarizes each statutory obligation and in which you file all updates regarding those obligations.

You will then need a file for all records relevant to proving you are fulfilling each obligation. Keep another file in which you put all correspondence and communication from the relevant statutory body.

How complicated your filing system will be depends on the complexity of the statutory obligations you are fulfilling. Many artists find a shoe box satisfactory for storing receipts for tax deductions. Others require complex computer-based accounting systems. You may want to retain professionals to help you set up and maintain these records and submit reports or you might be able to do it all yourself. How you comply with statutory obligations is not important. What is important is that you actually ensure that you do fulfill the obligation and do so correctly.

What if you violate a statutory obligation?

If you find yourself in violation of a statutory obligation, don't panic. The best immediate action to take is to contact a relevant professional and explain the situation.

An accountant, for example, can help you work with Canada Revenue Agency to resolve an *Income Tax Act* violation or to work through an audit. A lawyer might be able to help you counter the accusation by Customs Canada staff that the painting you wanted to import for a gallery showing is obscene.

An important point to remember is that authorities enforcing statutory obligations are seldom deliberately malicious.

- So don't be intimidated. They are fulfilling the responsibility of their job.
- Avoid engaging in emotional argument with them.
- Seek professional assistance instead, or contact your professional association for advice on how best to proceed.

Checklist

- It is your responsibility to know what statutory obligations apply to you.
- Statutory obligations vary from one part of Canada to another.
- Statutory obligations change from time to time, so keep up with changes.

- Most statutory obligations are fulfilled by keeping good records.
- If you violate a statutory obligation, seek professional advice on how to best proceed.

GENERAL REFERENCES

Recommended resources are available online in the ***Art of Managing Your Career*** section of our website, under each specific discipline.

www.culturalhrc.ca/amyc

We welcome your questions or comments.

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