The Protection of Neighboring Rights of Performers in Canada in the Light of the 1996 WIPO Treaty
(Translation)

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The protection of the neighboring rights of performers, that rights that resembles the rights of authors granted in the legislation concerning literary and artistic property, is a recent phenomenon in the Canadian law. In spite of its British origin, the Canadian copyright law has never included such kinds of measures as those which were born on the basis of the English law of a penal nature in 1925.[39] In fact, it was only with the implementation of the TRIPS Agreement of 1994 that performers were granted a "neighboring-rights" type statutory protection.[40] The efforts to obtain such protection, however, began earlier: from the beginning of the 1980s, submissions were made on this issue to the government.[41] However, taking into account the wide scope of the necessary reform of copyright, priority was accorded to other domains during the first phase of revision in 1987,[42]

[39] *Dramatic and Musical Performer's Protection Act,* 15 & 16. Geo. 5, c. 46. This law is the ancestor of what is called the *Performers' Protection Act* 1958–1972.

[40] *Law to implement the Agreement on the World Trade Organization,* L.C. 1994, ch. 47.

[41] See Government of Canada, *From Gutenberg to Télidon – White Book on Copyright,* Ottawa, Consumption and Corporations Canada, 1984, pp. 11–12; Canada, Chamber of Communes, Permanent Committee on Communications and Culture, *Report of the Subcommittee on the Revision of Copyright: A Charter of Creators,* Ottawa, Procurements and Services Canada, 1988 (Chairman: G. Fontain), pp 57–61.

[42] *Law to amend the Copyright Law and to bring related and correlated modifications,* L.C. 1988, ch 15. See S. Gilker, "Une nouvelle loi sur les droits d'auteur. 19504 days and 19 studies later." (1988–1989) 1 C.P.1. 31; D. Vaver, "The Canadian Copyright Amendments of 1988", (1989) 4 I.P.J. 122.

postponing this way the question of neighboring rights to the second phase of the exercise,[43] which was then somewhat advanced by the TRIPS Agreement. Nevertheless, even before the application of the Agreement, certain legislative events took place which did not relate directly to the neighboring rights of performers, but still were aimed at improving their working conditions. The first part of this text will be devoted to this era before the introduction of neighboring rights, while its second part will examine the statutory regime of neighboring rights.

A. The era before neighboring rights

It would be wrong to believe that performers had no legal means to protect their interests before the introduction of neighboring rights. As individuals, they certainly were able to use some of the positions of the Civil Code of Quebec, for example, when their performances were used in an inappropriate way.[44] As members of a profession, they formed various professional associations to represent their viewpoints. The rejection of their demand for neighboring rights in Phase I of the revision of the *Copyright Law* in 1987 may explain why the artists of Quebec turned to the provincial government in trying to promote their cause. This was a reaction quite normal on the part of performers: the cultural dimension of their activities corresponds to the political interests of the Quebec government, which is ready to appear as an enthusiastic ally and make its presence felt in this field.

The *Loi sur le status professionel et les conditions d'engagement des artistes de la scène, du disque et du cinéma*[45] was adopted in 1987. For those who might believe that the neighboring rights, perhaps because it is not at the same level as copyright, are in the competence of regional legislators[46], it should be noted that this "loi sur le statut de l'artist" – as it is known – is a law that concerns labor relations[47] for autonomous workers who, not having the status of employees,

[43] *Law to amend the Copyright Law,* L.C. 1997, ch 24. See Y. Gendreau, "Nouveau visage pour la loi canadienne sur le droit d'auteur", (1997) 76 Rev. Bar. Can. 384 [1987] GRUR Int. 643; D. Vaver, "The Copyright Amendment of 1997: An Overview", (1997) 12 I.P.J. 53? E. Lefebre, "Les droits des artistes-interpretes sur leur prestaion: de la Convention de Rome au projet de loi C–32", (1998–1999) 11 C.P.I. 33.

[44] See *Pagliaro v. Pantis,* (1997) 84 C.P.R. (3D) 149 (C.A. Qué.).

[45] L.R.Q., ch. S–32.1.

[46] See J.A. Léger, "Protection des artistes – droit d'auteur – drit voisin – une autre approche constitutionelle", (1992–1993) 5 C.P.I. 7.

[47] J.A. Léger, "Lois sur le staut de l'artiste – Une approche constitutionelle ou l'art de l'ubiquité", (1992–1993) 5 C.P.I. 267.

cannot enjoy the conditions foreseen in the Labor Code. The *Loi* created the *Commission de reoconnaissance des assotiations d'artises et des associations de producteurs* (Committee of recognition of associations of artists and associations of producers)[48] which, as its name indicates, is in charge to recognize the associations that may negotiate collective agreements on behalf of their members. These collective agreements concern the working conditions of performers, including their remuneration. Thus the *Union des artistes* and the *Guilde des musiciens* are recognized as such associations, but they are not collective management societies in spite of the financial dimension of some of their activities.

This law on the status of artists did not remain an isolated phenomenon. About a year after its adoption another provincial law was adopted for the same objectives: the *Loi sur le status professionel des artistes des arts visuels, des métiers d'art et de la littérature et sur leurs contrats avec les diffuseurs.*[49] It concerns certain sectors of activities that relate more to copyright than to neighboring rights. However, no other Canadian province followed this example.

In fact, the reaction outside Quebec came from the federal government, at the proposal of which, in 1992, the *Law on the Status of the Artist* was adopted.[50] This law copies the solution contained in the Quebec laws in the sense that it provides for the accreditation of associations of artists and producers, which then negotiate framework agreements with federal institutions, including those which are regulated by the Council of Broadcasting and Telecommunications of Canada.[51] The institutions were created to implement the objectives of the law: the Canadian Tribunal of Professional Relations of Artists and Producers (corresponding to the Commission in Quebec) and the Council of the Status of the Artist, which has not operated since 1996. Until now four associations have been accredited by the Tribunal: the Union of Artists, the Guild of Musicians, ACTRA Performers Guild and the American federation of Musicians of the USA and Canada. On the occasion of the accreditation of an association of writers, it was clearly recognized that the process applied on the basis of the *Law on the Status of the Artist* may have impact on the questions of copyright.[52]

[48] Originally the competence of the Commission covered the associations of artists, but in 1997 it was extended to the associations of producers.

[49] L.R.Q., ch. S-32.01.

[50] L.C. 1992, ch 33; L.R.C., ch. S–19.6. See the Legal Service of the Canadian Tribunal of the Artists-Producers Professional Relations, ed. *Law on the Status of the Artist Annotated,* Toronto Carswell, 1999.

[51] *Law on the Status of the Artist,* ibid., art. 6(2)(a).

[52] *Re Writers' Guild of Canada Certification (Application),* (1996) 69 C.P.R. (3d) 553. See C. Matteau & E. Lefebvre, "Les décisions du Tribunal canadien des relations professionelles artistes-producteurs visant le drit d'auteur", (1997–1998) 10 C.P.I. 461.

In the same way as the two provincial laws[53], the federal law was also subject to formal evaluation.[54] Since the results of the federal evaluation are the most recent, it may be considered that they are the most representative of the perception of the actual situation of performers in Canada. The conclusions of the evaluation indicate that the law has attained its principle objective, namely to offer legal framework for the collective negotiations between the associations of artists and producers. Nevertheless, several points have been mentioned that indicate that still further progress is desirable for really improve the status of artists. In fact, it is believed that the law practically has not modified the social-economic conditions of performers and their working conditions. Of the measures that are regarded beneficial for the artists, the right of collective negotiation is considered as the less important one. The measures that are of a more individual nature are more favored: the calculation of revenues, the status of deductions for professional expenses, the treatment of subsidies, etc. Among the recommendations, it is particularly interesting to mention the need for further studying the relationship between the *Law on the Status of the Artist,* and the *Copyright Law.*

The legislative framework offered by the laws – both the federal law and the laws of Quebec – on the status of the artist is quite unique. These laws provide a structure that takes into account the various aspects of the professional life of artists where neighboring rights, in fact, are only one of the components among others. The introduction of a regime of neighboring rights in the 1990s, thus, was not only a part of the reform of copyright, but in a way a the result of the continuation of the movements of the artists that had led to the adoption of the laws on the status of the artist.

B. The statutory protection of neighboring rights of performers

As already mentioned, Phase I of the amendments to the *Copyright Law* in 1987, did not include a regime of neighboring rights for performers. The decision on this issue was postponed to the second phase of amendments. In reality, the application

[53] Direction de la recherche, de l'évaluation et des statistiques, *Loi sur le status professionel et les condition d'engagement des artistes de la scene, du disque et du cinéma (Projet de loi 90/L.R.Q. c. S-32.') – Rapport d'évaluation,* Quebec, Ministere de la Culture et des Communications, December 1995; Direction de la recherche, de l'évaluation et des statistiques, *Loi sur le status professionel des artt visuels, des métiers d'art et de la littérature et sur leurs contrats avec les diffuseurs (L.R.Q. c. S–32.01/Projet de loi 78) – Rapport d'évaluation,* Quebec, Ministere de la Culture et des Communications, December 1995.

[54] Government of Canada, Ministry of Canadian Patrimony, *Evaluation of the Provisions and the Operation of the Law on the Status of the Artist,* 2002, http:www.pch.gc.ca/progrs/em-cr/eval/2002/2002_25/tdm_f.cfm.

of a really Canadian approach to the protection of performers, with the regulation of the ensemble of neighboring rights[55], had to be accelerated in view of the need to implement the trade agreements to which Canada was about to adhere. This was translated into the development of the rights for performers in a way that it started first on the basis of the TRIPS Agreement, but than was transformed into a regime structured according to the approach applied in the Rome Convention.

Canada is a member not only of the World Trade Organization which administers the TRIPS Agreement; it is also a member of the North American Free Trade Agreement (NAFTA) which was negotiated in the same period as the TRIPS Agreement and whose provisions similar.[56] The obligation of Canada following the NAFTA concerning the rights of performers is minimal: there is no provision on conventional rights. The ensemble of intellectual property is subject to the clause of most favor nation, but the rights of performers with respect to the secondary use of sound recordings are covered by the principle of reciprocity.[57] The implementation of the NAFTA did not lead to the adoption of any new provisions on the rights of performers. At the same time, when the *Law* was to be amended in their favor, either on the occasion of the implementation of the NAFTA or as a part of Phase II, it was necessary to foresee certain arrangements for the citizens of the countries of the NAFTA.[58]

The NAFTA was followed soon by the Agreement on the WTO the implementation of which took place through a law of 1994.[59] It entered into force on January 1, 1996, but the regime of rights foreseen in it for performers corresponding to the TRIPS Agreement only existed for a short while since Phase II of the revision of the *Copyright Law* was concretized by a law of 1997.[60]

[55] It should not be forgotten that, of the ensemble of neighboring rights, the rights of producers of phonograms had been ensured since 1924 according to a regime similar to the one which existed in Great Britain, and which "assimilated" the phonograms to protected works. The intention to reconsider the question of neighboring rights in their ensemble meant non only the introduction of new rights, but also the reevaluation of the regime of phonograms in the law.

[56] See Y. Gendreau, *"La propriété intellectuelle dans le cadre de l'ALÉNA"* in Centre Jacques-Cartier, éd., *La régulation juridique des espaces économiques: interactions GATT/OMC, Union européenne,* ALÉNA, Lyon, Université Jean-Moulin Lyon III, 1996, p229; V. Nabhan, "L'accord de libre-échange nord-americain et sa mise en oeuvre en matiere de droit d'auteur", (1993-1994) 6 C.P.I. 9.

[57] NAFTA, art. 1703.

[58] See the *Copyright Law, art.* 17(4) and 20(3).

[59] *Law on the Application of the Agreement on the World Trade Organization,* L.C. 1994, ch. 47.

[60] *Law to Amend the Copyright Law,* L.C. 1997, ch. 24. See the references, supra, note 5.

One of the characteristic of Phase II of the revision of the *Law* was the establishment of a structure of neighboring rights corresponding to the Rome Convention.[61] This meant, in addition to the introduction of rights for broadcasters, also the changing of the "style" of rights of producers of phonograms and performers. This does not correspond anymore to the British model of 1911 as regards the former or to that of the TRIPS Agreement as regards the latter. In fact, the level of protection has become higher than that required by the Rome Convention, since performers, for only speaking about them, have also been integrated into a special regime concerning the rental of phonograms embodying their performances and the private copying of musical works.[62] The term of protection of their rights is also much longer than under the Rome Convention.[63]

The fact that the Rome Convention has not been integrated into the TRIPS Agreement has led to a differentiated treatment of foreign performers. For example, the rights of those performers who are citizens of countries that are only members of the WTO are defined by article 26 of the *Law,* while those for whom the Rome Convention applies have more extended rights under articles 15, 16, 17, 19 and 20. The status of the American performers is a delicate question. In fact, since Mexico is party to the Rome Convention and the NAFTA includes the principle of most favored nation, is not it an obligation of Canada to apply this principle in favor of the American performers? The views are divided about this. Some experts consider that the exclusion of American performers has the risk of conflicting with the requirements of the NAFTA,[64] while others believe that the clause of cultural exceptions in the free trade agreement between Canada and the United States which has priority in relation with the NAFTA, permits to Canada to exclude the American citizens from the application of the Canadian provisions on the rights of performers.[65] In addition to these questions concerning the relationship between the various treaties, it should be equally noted that the regime of private copying foreseen in Part VII of the *Law* is subjected to the principle of reciprocity.[66]

Phase II of the revision of the *Copyright Law* was presented to the Parliament in 1997, that is in the year after the adoption of the 1996 WIPO treaties. At that

[61] See E. Lefebrve, *supra,* note 5.

[62] *Copyright Law,* art. 15(1)(c) and Part VIII.

[63] *Copyright Law,* art 23. Essentially, it means a 50-year term.

[64] B. Clermont, "Parties II et VIII de la Loi sur le droit d'auteur: le Canada respecte-t-il ses obligations internationales?", (1998-1999) 11 C.P.I. 287, at p. 320.

[65] I. Bernier & A. Malépart, "Les dispositions de l'Accord de libre-échange nord-américan relatives a la propriété intellectuelle et la clause d'exemption culturelle", (1993–1994) 6 C.P.I. 139. See also Clermont *ibid.*

[66] *Copyright Law,* art. 85.

time, the government chose not to take into account those treaties in order to not to delay further the process of revision. Nevertheless, it knew that it only postponed dealing with the issues raised by the treaties. How do look like then the rights of performers in the face of the WIPO Performances and Phonograms Treaty?[67]

The study of the situation permits to identify two types of legislative interventions that may be necessary: those which only relate to the rights of performers and those which concern both neighboring rights and copyright. In the first category, of course, we can find the obligation to extend national treatment to the nationals of the countries party to the WIPO Treaty. Nevertheless, it is probable that Canada will make use of the possibility foreseen in Article 15(3) of the Treaty to make a reservation in respect of the right of remuneration for the retransmission of phonograms. As far as the substantive provisions are concerned, it is necessary to revise everything concerning the right of reproduction of performers for granting an exclusive nature of that right as required by article 7 of the Treaty. In the framework of such a revision, it is possible the, among other things, the idea of modifying the present regime of performances included in cinematographic works may also emerge: while, for the time being, the inclusion of performances into such works entails the lost of performers' rights, it may be envisaged that as a result of a revision a right to remuneration will be provided with respect of such performances. A modification particularly awaited will be the introduction of moral rights for performers. As regards the issues also related to copyright, the performers should also be integrated into the regime that follows from the application of the right of distribution, the right of making available to the public, and the obligations concerning technological protection measure and rights management information.

Seven years after the adoption of the WIPO Treaties, Canada has not presented yet a draft law to implement those treaties which it has signed. The question related to the treaties is, however, the object of studies in view of the possible adhesion by Canada.[68] The most recent report permits to identify those problems of performers the solution of which would require the greatest priority: settle a

[67] A study on this theme has been commissioned by the government: J. Daniel & L.E. Harris, *Working Document on the Application of the WIPO Performances and Phonograms Treaty,* http://strategis.ic.gc.ca/epic/Internet/inippd-dppi.nsf/vwGeneratedInterF/ip01039f.html, Industry Canada, July 1998.

[68] Government of Canada, *Framework of the Revision of Copyright,* http://strategis.ic.gc.ca/eoic/Internet/incrp-prda.nsf/vwGeneratedInterF/rp01101f.html, June 22, 2001; Government of Canada, *Stimulate Culture and Innovation: Report on the Provisions and the Application of the Copyright Law,* http://strategis.ic.gc.ca/Internet/incrp-prda.nsf/vwGeneratedInterF/rp00863f.html, October 2002.

certain problem concerning the term of protection, to recognize moral rights and the exclusive nature of the right of reproduction, and to revise the system of private copying. The schedule foreseen for action concerning the treaties, however, raises some doubts. A priority of short term is granted for the implementation of the WIPO treaties (one or two years); however, the rights of performers, as well as those of broadcasters, are classified among the long-term priorities, which may mean more than four years. This allows believing that there will be further studies on these issues.

If the past is a guarantee for the future, we cannot hope that the fate of the Canadian performers will be settled very soon. Certainly, we have to admit, that no matter the actual status of rights, their regulation may be made more perfect. From this viewpoint, Canada seems to be in a more advances position with respect to the rights of performers in contrast with certain member countries of the WCT: its neighboring rights regime is already structures according to the concept of the Rome Convention which, to a certain extent was extended also to the WIPO Treaty. In this respect, Canada has a special position among the countries of "copyright", but along with the others, it should confront with the same contemporary problems.