# COPYRIGHT AND RELATED RIGHTS IN CANADA AND ABROAD: A VIEW TOWARDS A MORE GLOBALLY UNIFIED SYSTEM OF NEIGHBOURING RIGHTS

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*ABSTRACT*

Although the Rome Convention sets an international standard for the protection of music makers' neighbouring rights, performers from different countries or jurisdictions are afforded differing compensatory schemes for the public performance of their sound recordings. 2017 is mandated per section 92 of the Canadian *Copyright Act* as the year in which "a committee of the Senate, of the House of Commons, or of both Houses of Parliament is to be designated or established for the purpose of reviewing this Act." The challenge motivating this article is to identify areas of legal disparity, to suggest suitable approaches to institutional change, and to attempt to balance international differences to envisage a more coherent cross-border neighbouring rights framework. The article starts with an original overview of Canadian, American, and European neighbouring rights law. It proceeds to examine sources of differentiation between international neighbouring rights frameworks from a Canadian perspective. It then proposes some modest reform to Canadian copyright law based on the previously enumerated data and analysis. The article concludes by suggesting future research directives.



## *I. INTRODUCTION*

The recognition of the ownership of intellectual property occurs through the grant of state-sanctioned monopolies such as patents, trademarks, and copyright, and through the operation of the common law, as is

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the case, for example, with the law of passing off.[1] Copyright protects authors' speech by ensuring they have the exclusive right to the publication, dissemination, and copying of their original works with limited exceptions.[2] A classic way of justifying copyright law is to say that it provides incentives to create by enabling economic rewards to flow from an exclusive right to control and exploit the propagation of a protected work for a fixed term.[3] Copyright gives creators an incentive to produce works because it empowers them to exclusively collect payment in exchange for their works' dissemination in the marketplace.[4] Accordantly, the argument goes, without copyright incentives, "a socially optimal output of intellectual products would not exist."[5]

The economic incentive therefore purportedly encourages cultural activity while fostering broader economic growth through the monetization of artistic works that, without copyright, could be distributed, copied, and consumed freely by anyone in the public.[6] In that sense, copyright is a strategic industry right that has allowed and continues to allow key cultural institutions to develop and grow. It is a right which is recognized under the laws of most countries in order to stimulate human intellectual creativity, to make the fruits of such creativity available to the public, and to ensure that international trade in goods and services protected by intellectual property rights is allowed to flourish on the basis of a smoothly functioning system of harmonized national laws.[7]

Twentieth-century developments in music copyright can be organized into three different periods, each one associated with a different international agreement. First was a period in which the rights of composers were formally recognized, unified, and mandated through the Berne Convention for the Protection of Literary and Artistic Works, to which 172 countries have become party.[8] During the latter half of the century, a stronger

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1 Sunny Handa, *A Review of Canada's International Copyright Obligations*, 42 McGill L.J. 961, 963 (1997).

2 *See generally* Abraham Drassinower, What's Wrong With Copying? (2015).

3 Marta Iljadica, Copyright Beyond Law: Regulating Creativity in the Graffiti Subculture 33 (2016).

4 Lior Zemer, *On the Value of Copyright Theory*, 1 Intell. Prop. Q. 55 (2006).

5 Edwin C Hettinger, *Justifying Intellectual Property*, 18 Phil. & Pub. Affairs 31, 48 (1989).

6 *See* Ian Hargreaves, Digital Opportunity: A Review of Intellectual Property and Growth (2011); Andrew Gowers, Gowers Review of Intellectual Property 58 (2006).

7 Int'l Bureau of WIPO, Basic Notions of Copyright and Related Rights 2 (1997) (WIPO/IP/DUB/97/1).

8 Rasmus Fleischer, *Protecting the Musicians and/or the Record Industry? On the History of "Neighbouring Rights" and the Role of Fascist Italy*, 5 Queen Mary J. Intell. Prop. 327, 327 (2015); *WIPO Administered Treaties: Contracting Parties*

focus was put on the commercial significance of cultural industries as a matter of trade policy, which culminated in the Agreement on Trade-Related Aspects of Intellectual Property Rights ("the TRIPs Agreement") administered by the World Trade Organization.[9] In between the two was an era of increasing emphasis on the rights of "performers, producers of phonograms, and broadcasting organizations," which reached an apex with the signing of the Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations ("the Rome Convention") in 1961.[10]

This article will focus on the bundle of rights encompassed by the Rome Convention, a legal mechanism referred to as "neighbouring rights" for its position tangential to the copyright granted to original musical works.[11] While copyright subsists in musical compositions, neighbouring rights establish a right of exclusivity in the recordings of such compositions. That is to say, neighbouring rights protect the performances of musical compositions embodied within phonographic recordings commonly transmitted to the public through radio or other such broadcasting services.[12] The owner of the neighbouring right has the exclusive right to cause the sound recording to be heard in public, to cause the recording to be broadcasted, and to make secondary phonographs embodying the recording or any part of it.[13] Practically speaking, neighbouring rights tend to be collectively administered in order to allow rights holders the ability

> *Berne Convention*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=EN&treaty_id=15 (last visited May 26, 2017).

9 Fleischer, *supra* note 8 at 328; Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

10 Fleischer, *supra* note 8 at 327; Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 43 [hereinafter WIPO Rome Convention].

11 George Howard, *Neighboring Rights: What They Are & Why They Matter*, TUNECORE BLOG (July 19, 2012), http://www.tunecore.com/blog/2012/07/neighboring-rights-what-they-are-why-they-matter.html.

12 *Id.*

13 *See, e.g.*, Law for the Protection of Copyright and Neighbouring Rights No. 633 of April 22, 1941, Pt. II, ch. 1, art. 72; ch. 1*bis*, art. 78*bis* (It.).

> Without prejudice to the rights granted to authors pursuant to Part I, the phonogram producer shall have the exclusive right, for the period and under the conditions laid down in the following articles . . . .
>
> a) to authorize the direct or indirect, temporary or permanent reproduction of his phonograms by whatever means, in whole or parts and by whatever duplication process;
> b) to authorize the distribution of the copies of his phonograms. The exclusive right of distribution shall not be exhausted within the Commu-

to monitor and control uses of their works that would be otherwise unmanageable due to the large number of users worldwide.[14]

Although the Rome Convention sets an international standard for the protection of music makers' neighbouring rights, performers from different countries or jurisdictions are afforded differing compensatory schemes for the public performance of their sound recordings. After all, while infringement of copyright is actionable by the copyright owner as an infringement of a property right, an infringement of music makers' rights is actionable by the person entitled to the right as a breach of statutory duty.[15]

This article proceeds from the baseline recognition that the need for a unified and optimized system of neighbouring rights legislation and ad-

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nity, except where the first sale of the carrier incorporating the phonogram is made by the producer or with his consent in a member State;

c) to authorize the rental and lending of the copies of his phonograms. This right shall not be exhausted by the sale or the distribution of the copies of the phonogram in any form;

d) to authorize the making available to the public of his phonograms in such a way that members of the public my access them at a time and from a place individually chosen by them. This right shall not be exhausted by any act of making available to the public.

[14] There are around sixty collecting societies around the world focused on sound recording performance royalties. Globally, sound recording performance rights are administered by music licensing companies or collecting societies. These organisations are responsible for negotiating rates and terms with users of sound recordings (e.g., broadcasters, public establishments, digital service providers) collecting royalties and distributing those royalties to performers and sound recording copyright owners. *See, e.g.*, Annabelle Gauberti, *Neighbouring Rights in the Digital Era: How the Music Industry Can Cash in*, LexisNexis Legal Newsroom: Intellectual Property (Oct. 26, 2015) (blog post), http://www.lexisnexis.com/legalnewsroom/intellectual-property/b/copyright-trademark-law-blog/archive/2015/10/26/neighbouring-rights-in-the-digital-era-how-the-music-industry-can-cash-in.aspx; Re:Sound Music Licensing Company, http://www.resound.ca (last visited May 16, 2017); SoundExchange, http://www.soundexchange.com (last visited May 16, 2017); PPL, http://www.ppluk.com (last visited May 16, 2017); Adami, http://www.adami.fr (last visited May 16, 2017); Sena, http://www.sena.nl (last visited May 16, 2017); Gramo, http://www.gramo.no (last visited May 16, 2017); GVL — Gesellschaft zur Verwertung von Leistungsschutzrechten, http://www.gvl.de/en (last visited May 16, 2017).

[15] Normand Tamaro, The Annotated Copyright Act, at xxxi n.7 (1997), *cited in* Kimberely Hancock, *1997 Canadian Copyright Act Revisions*, 13 Berkeley Tech. L.J. 517, 523 (1998) ("Infringement of copyright is treated as an infringement of property right actionable by the copyright owner. An infringement of performers' rights and of the rights of a person having recording rights is actionable by the person entitled to the right as a breach of statutory duty.").

ministration is evident.[16] First, a healthy body of neighbouring rights law is crucial considering more music is being consumed through Internet-based streaming services, which effectively operate as broadcasting services and thus directly implicate performers' neighbouring rights.[17]

Second, a unified and optimized system of neighbouring rights would prevent fragmentation between various jurisdictions with diverse legal norms and mandates. The structures and modes of organization behind the delivery of neighbouring rights monetization pose barriers for performers or for collective rights administration organizations by introducing inefficiencies, increasing costs, and minimizing net funds payable from music users to performers through unequal negotiation of applicable tariffs or inadequate licensing of music-using businesses, a more unified system of neighbouring rights could compensate for, or at least isolate, variables inherent to a non-integrated international system of collective rights administration. Fragmented international neighbouring rights frameworks impact the fairness afforded both to performers, whose music may be compensated differently dependent on the territory of the use, and music users, who may be required to pay neighbouring rights collectives different rates of compensation than their business colleagues in other jurisdictions.

2017 is mandated per section 92 of the Canadian Copyright Act as the year in which "a committee of the Senate, of the House of Commons, or of both Houses of Parliament is to be designated or established for the purpose of reviewing this Act."[18] The challenge facing Canadian copyright reformers, and the challenge motivating this article, therefore, is to identify areas of legal disparity, to suggest suitable approaches to institutional change, and to therefore attempt to balance international differences to create a more coherent cross-border neighbouring rights framework. That challenge is a reflection of broader trends in the shifting context of modern governance, including those of globalization and resulting modernization of the administration and organization of government,[19] and is particularly evident through the example of the music industry, which has been profoundly, and in some ways, uniquely, affected by the global im-

16 Adapting the language of Lorne Sossin & Jamie Baxter, *Ontario's Administrative Tribunal Clusters: A Glass Half-Full or Half-Empty for Administrative Justice?*, 12 Oxford U. Commonwealth L.J. 157, 158 (2012).

17 *See* Part II *infra*, for an overview of increasing industry trends toward Internet-based streaming services.

18 Copyright Act, RSC 1985, c C-42, s 92. 2012 was the last year in which a major review of the Canadian *Copyright Act* was undertaken; the amendments resulting therefrom are reflected in Copyright Modernization Act, SC 2012, c 20.

19 Andrew Gamble & Robert Thomas, *The Changing Context of Governance*, *in* Administrative Justice in Context 6 (Michael Adler ed., 2010).

pact of the so-called "digital revolution."[20] A neighbouring rights framework that meets the standards of other large music markets is crucial for the success of the Canadian music industry.

This article is divided into three sections. First, it offers an overview, from a Canadian perspective, of Canada's, the United States', and European neighbouring rights law as it stands today, including the statutory establishment of copyright collectives and administrative tribunals for the certification of neighbouring rights tariffs. Second, it examines instances of each jurisdiction's differentiation from established international norms by analyzing discrepancies between the legal frameworks of the three respective jurisdictions, and critically examines the effect of the law on localised music economies. Finally, it briefly proposes modest reforms to the Canadian Copyright Act ahead of its five-year legislative review in 2017. By examining the ongoing evolution and economic effects of neighbouring rights law abroad, the article argues that both the possibilities and limits of neighbouring rights may be better understood at home.

## *II. OVERVIEW OF LAWS*

Neighbouring rights were established in order to ensure that individuals auxiliary to the creation or production of musical content could have similar control over their creative endeavours to that which is granted to composers of musical works through copyright.[21] Such auxiliary persons include artists, performers, music producers, non-featured instrumentalists or vocalists, and those otherwise in control of the phonographic "masters" embodying those individuals' performances, including record companies.[22] While those individuals — hereinafter referred to as "music makers"[23] — may be considered merely auxiliary to the creation of musical works by law, their role in the production of music is vital to the consumption and enjoyment of music by the general public, and is thus vital to the health of the music industry generally. Sound recording performance rights represent the bulk of all neighbouring rights collected worldwide, and they are a continuously growing source of global revenue for music makers.[24]

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[20] GORDON BROWN, REVIEW OF THE CANADIAN MUSIC INDUSTRY: REPORT OF THE STANDING COMMITTEE ON CANADIAN HERITAGE 1 (2014).

[21] Gauberti, *supra* note 14.

[22] *Id.*

[23] The term "music maker" is used herein to refer to the conglomerate of performers, producers, record labels, and any other proprietor of the neighbouring right in sound recordings, in contrast with the employment of the term "music maker" used in some instances to refer solely to record labels.

[24] Gauberti, *supra* note 14.

Neighbouring rights revenue contributed $2.09 billion (U.S.) to the global recorded music industry in 2015, a year-over-year growth of 4.4%.[25] Although the neighbouring rights sector's growth has slowed slightly from the 10.9% and 11.0% increases seen in 2013 and 2014, neighbouring rights comprise one of the most consistently growing music industry revenue sources.[26] As a revenue stream, neighbouring rights account for 14% of the music industry's yearly $15 billion (U.S.) global revenue, up from 10% in 2011.[27] This growth reflects the substantial contribution music makes to third party businesses including radio, television, and the hospitality sector, the increase in proliferation of music streaming and other such broadcast services, and a correlative reduction in music piracy. Global revenues to music makers resulting from the triggering of their neighbouring rights have more than doubled in the last decade.[28]

The neighbouring rights market is mainly concentrated within ten countries, the group of which contribute 82% of worldwide royalties.[29] Within that group, the United Kingdom, France, Germany, the Netherlands, and Norway contribute 43% of royalties, and the United States and Canada contribute 37%. The remainder of neighbouring rights revenue is rounded out by Japan, Brazil, and Argentina, who collectively contribute 21%.[30] Both Europe and North America have recorded revenue growth in recent years and have delivered increases in a variety of ways. Europe, whose recorded music industry grew by 2.3% in 2015 following a 0.3% increase in 2014, is a highly diverse region with a number of individualized markets adapting to new formats and channels at different rates. In Sweden — the birthplace of the world's largest music streaming service, Spotify — streaming revenues accounted for 67% of recorded music revenue

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25 Int'l Fed'n of the Phonographic Indus., Global Music Report: State of the Industry Overview 2016 9 (2016) [hereinafter IFPI].

26 *Id.*

27 *Id.*

28 *Id.*

29 Gauberti, *supra* note 14.

30 *Id.* The calculations resulting in the 43%, 37%, and 21% figures were adapted from the following numbers such that each figure, rounded to the nearest 1%, comprises a portion of the 82% of worldwide royalties.

> Out of a total of €2.034 billion of neighbouring rights collected in 2013, 48.9% originate from Europe (€1.101 billion), 30% from North America (€681 million), 11.9% from South America (€268 million) and 8.6% from Australasia (€192 million). . . . The market of neighbouring rights is mainly concentrated in 10 countries, which control 82% of worldwide royalties, with a strong concentration in Europe. Apart from the U.S., the United Kingdom (12%), France (11%), Japan (7%), Brazil (7%), Germany (7%), Argentina (3%), the Netherlands (3%), Canada (2%) and Norway (2%), are the top 10 worldwide markets.

Gauberti, *supra* note 14.

in 2015.[31] In Germany, however, the sale of physical CDs accounted for 60% of revenue, nearly double the global average and in sharp contrast to market trends in many regions worldwide.[32] Throughout Europe, streaming revenue drastically increased by a rate of 43.1% in 2015 alone.[33] Streaming revenue similarly grew by 46.6% in North America in 2015, correlated to and compensating for a 12.0% decrease in digital downloads over that same period, and contributory overall to a reported digital revenue growth of 4.3%.[34] In the United States, the world's largest music market, streaming became the largest source of revenue for the first time in 2015.[35]

Streaming revenue, which is derived partly from sources including subscription fees and advertising revenue, is distinct from neighbouring rights revenue, which is derived from the licensing of music users per tariffs set by administrative bodies such as the Copyright Board of Canada. Because music streaming implicates the neighbouring right in each streamed sound recording, though, a drastic increase in music streaming has correlated with increases in neighbouring rights revenue. Such increases will likely continue as the streaming model exemplified by services such as Spotify, Apple Music, Google Play, and Pandora continues its dramatic upward trend. The increasing popularity of music streaming, which has expanded so substantially in large part due to the increase in Internet-connected smartphone usage and the growth of high-quality, wide-ranging, and competitive subscription-based services, has contributed to an increase in revenue flowing to music makers through their neighbouring rights, and has thus helped the recorded music industry experience in 2015 its first year-over-year growth in two decades.[36]

While treaties like the Rome Convention and the WIPO Performances and Phonograms Treaty protect music makers' rights internationally, there is no single recognized definition of neighbouring rights to inform the legislative application of neighbouring rights law within specific jurisdictions. Neighbouring rights therefore tend to vary more widely in scope between different countries than do the relatively entrenched notions of authors' rights or copyright. The means through which neighbouring rights are administered are also varied between countries: some, as I out-

31 IFPI, *supra* note 25, at 11.

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.*

36 Hugh McIntyre, *For the First Time in 20 Years, The Global Music Industry Gained Ground in 2015*, FORBES (Apr. 13, 2016), http://www.forbes.com/sites/hughmcintyre/2016/04/13/for-the-first-time-in-20-years-the-global-music-industry-gained-ground-in-2015/#4d0199396b1a.

line below, have taken a more collectivist approach, while others take a more individualistic or ad hoc approach.[37]

With a few notable exceptions, however, the question of whether or not the neighbouring rights afforded to individuals through statute or common law are substantively similar is proportionately inconsequential to the practical effects of the law on the success of national music industries. In contrast, the direct effects of administrative tribunal decisions, the collective administration of neighbouring rights, and the numerous challenges flowing therefrom more strongly — but, at once, insidiously — shape the ways in which music makers are enabled to monetize the use of their music and the accordant triggering of their neighbouring rights.

For that reason, this Part will offer a broad overview of Canadian, U.S., and European neighbouring rights law as it is embodied in statute and put into practice by both administrative tribunals and collective societies or music licensing companies.

### *A. Canada*

Because this article takes a Canadian perspective to neighbouring rights law and copyright law reform, the Canadian legal and regulatory framework will comprise the baseline upon which an international analysis is built, although, as will be noted in Part III, there are notable instances in which Canadian law deviates substantively from the law of numerous other jurisdictions.

The Canadian situation with respect to performing rights for performers and sound recording owners has been described in the literature as "legislative, comprehensive, and collectives-driven."[38] In Canada, neighbouring rights were introduced as a part of the 1997 amendments to the Canadian Copyright Act.[39] Previously, only authors of the underlying musical work enjoyed public performance rights and the attendant concurrent remuneration from royalties.[40] Performers and producers of sound recordings, under the 1997 amendments, became entitled to royalty payments from any public performance of their sound recordings per section 19(1) of the Act, which establishes that citizens and permanent residents of Canada or of another Rome Convention country, corporations with headquarters in Canada or another Rome Convention country, and music

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37 *See* Bob Tarantino, *Neighbouring Rights in the US and Canada: Contracts and Copyrights*, ENTERTAINMENT & MEDIA LAW SIGNAL: INFORMATION AND OBSERVATION ON THE NEWEST DEVELOPMENTS IN ENTERTAINMENT AND MEDIA LAW (June 6, 2012), http://www.entertainmentmedialawsignal.com/neighbouring-rights-in-the-us-and-canada-contracts-and-copyrights.

38 *Id.*

39 *Id.*; Hancock, *supra* note 15, at 523.

40 *Id.*

makers whose recordings are first fixed in Canada or another Rome Convention country are entitled to be paid "equitable remuneration" for their sound recordings' performance in public or communication to the public by telecommunication.[41]

Both broadcasters and commercial establishments, including bars, nightclubs, hotels, and airlines, must, under the Canadian Copyright Act, make payments for music makers' rights to a collective society responsible for licensing sound recordings.[42] Royalties are set by the Copyright Board of Canada and are divided so that the performer or performers receive in aggregate 50% and the maker or makers receive in aggregate 50%.[43] The royalties are set through the Copyright Board's certification of tariffs, which differ in their conditions and rates for different uses: the Copyright Board of Canada has certified separate tariffs for the use of background music, for live events, for dance venues including nightclubs and bars, for fitness activities, for broadcasting, for satellite radio, for "pay audio," and for music streaming.[44] In the wake of the 1997 amendments to the Copyright Act, the Neighbouring Rights Collective of Canada, later re-named "Re:Sound Music Licensing Company," was established to collect royalties and distribute them to music makers.[45] Re:Sound also plays an advo-

41 Copyright Act s 19(1).

42 *Tariffs*, RE:SOUND MUSIC LICENSING COMPANY, http://www.resound.ca/tariffs (last visited May 17, 2017).

43 Copyright Act s at 19(3).

44 *Tariffs*, *supra* note 42; *see, e.g.*, Copyright Board, Statement of Royalties to Be Collected by NRCC for the Performance in Public or the Communication to the Public by Telecommunication, in Canada, of Published Sound Recordings of Musical Works for the Years 2003 to 2009: Tariff No. 3 (Use and Supply of Background Music) (2006), C. Gaz. Supp. (Oct. 26, 2006), http:www.cb-cda.gc.ca/tariffs-tarifs/certified-homologues/2006/20061021-m-b.pdf; Copyright Board, Statement of Royalties to Be Collected by Re:Sound Music Licensing Company (Re:Sound) for the Performance in Public or the Communication to the Public by Telecommunication, in Canada, of Published Sound Recordings Embodying Musical Works and Performers' Performances of Such Works for the Years 2008 to 2012: Tariff No. 5 (Use of Music to Accompany Live Events Parts A to G), C. Gaz. Supp. (May 26, 2012), http://www.cb-cda.gc.ca/tariffs-tarifs/certified-homologues/2012/supplement-May26.pdf (Tariff No. 5); Copyright Board, Statement of Royalties to Be Collected by Re:Sound in Respect of the Use of Recorded Music to Accompany Dance (2008-2012), C. Gaz. Supp. (July 16, 2011), http://www.cb-cda.gc.ca/tariffs-tarifs/certified-homologues/2011/Re-Sound-6.A-2008-2012.pdf; Copyright Board, Statement of Royalties to Be Collected by Re:Sound for the Performance in Public or the Communication to the Public by Telecommunication, in Canada, of Published Sound Recordings Embodying Musical Works and Performers' Performances of Such Works for the Years 2008 to 2012: Tariff No. 6.B (Use of Recorded Music to Accompany Fitness Activities), C. Gaz. Supp. (Mar. 28, 2015), http://www.cb-cda.gc.ca/tariffs-tarifs/certified-homologues/2015/TAR-2015-03-28-supplement.pdf.

45 Tarantino, *supra* note 37.

cacy role on behalf of music makers: it helps to drive the certification of new tariffs by submitting tariff proposals to the Copyright Board of Canada, participating in public hearings, engaging in direct discussions with music users, and, where necessary, bringing action for judicial review of the Copyright Board's decisions.[46]

### *B. United States*

While the Canadian situation with respect to neighbouring rights has been described as "legislative, comprehensive, and collectives-driven," the United States' approach has been reciprocally described as "contractual, incremental, ad hoc, and rights-holder driven."[47] Driving the contrast between the two countries' neighbouring rights schemes is the fact that Canada is a signatory to the Rome Convention while the United States is not. With a 28% share of worldwide royalties, the United States is the single largest market for public performance rights, even though the collection of such rights is limited to the public performance of sound recordings in such digital media as online radio, satellite broadcasting, online broadcasting of terrestrial radio transmissions, and music streaming.[48]

Section 106 of the United States Copyright Act of 1976 establishes the exclusive rights in a work afforded to copyright owners.[49] In contrast to other forms of copyright subject matter, music makers' sound recordings are not, within the Copyright Act of 1976, granted a general public performance right which would allow owners to collect royalties when their works are performed publicly; that is to say, the Copyright Act of 1976 does not establish a generalist bundle of neighbouring rights in sound recordings.[50] Rather, the public performance right in sound recordings is recognized solely with respect to digital transmissions as established within the 1995 Digital Performance Right in Sound Recordings Act[51] ("DPRA") and modified within the 1998 Digital Millennium Copyright Act ("DMCA").[52] The DPRA grants owners of copyright in sound recordings the exclusive right to the digital public performance of their works, and the DMCA responds to a number of copyright issues raised by

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[46] *About*, RE:SOUND MUSIC LICENSING COMPANY, http://www.resound.ca/what-we-do (last visited May 17, 2017).

[47] Tarantino, *supra* note 37.

[48] *See supra* note 30 and the sources cited therein.

[49] 17 U.S.C. § 106 (2012).

[50] Technically speaking, the concept of a "neighbouring right" in sound recordings — a right adjacent to copyright — cannot exist in U.S. copyright law because sound recordings are, per § 102 of the *Act*, copyright subject matter. Therefore, in those instances in which the broadcasting of sound recordings is protected, it is protected by a copyright to public performance and not a neighbouring right.

[51] Pub. L. No. 104-39, 109 Stat 336.

[52] Pub. L. No. 105-304, 112 Stat 2860, 2887.

the then-newly overwhelming impact of the Internet on all types of copyright subject matter.[53] Ostensibly in recognition of the impossibility of policing endless content, the DMCA removed liability for Internet service providers whose servers transfer potentially infringing data.[54] Therefore, with any Internet transmission, the only parties to which the owners of sound recordings may look are those who broadcast or otherwise make material available on the Internet, and, to a lesser extent, those who access it.[55]

All of this is to say that the United States does not recognize the public performance right when sound recordings are broadcasted over AM and FM radio, and accordingly, American recording artists do not receive royalties when their songs are played over terrestrial radio. To emphasize the importance of this point, I will turn to the example provided in a study by Laura Johannes:[56] Simon and Garfunkel's highly popular song *The Sound of Silence*, written by Paul Simon and released in 1964, has been broadcast more than 5,000,000 times.[57] If a single U.S. radio station were to play nothing but *The Sound of Silence* on a constant loop, twenty-four hours per day, every day, it would take nearly thirty years to broadcast the three minute and five second song five million times.[58] Under current U.S. copyright law, if this hypothetical radio station operated using a traditional AM or FM broadcast, it could play *The Sound of Silence* indefinitely without incurring any financial obligation to Art Garfunkel, who played no official role in the composition of the song or the writing of its lyrics. The radio station's obligations to Simon would extend only to his copyright in the recording's underlying musical work. He would earn royalties as a songwriter, but not as a recording artist.[59]

While, to the extent of anyone's knowledge, no American radio station has played *The Sound of Silence* on loop for thirty straight years, the

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53 Tarantino, *supra* note 37.

54 DMCA, tit. II; UNITED STATES COPYRIGHT OFF., THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY 8 (1998), http://<www.copyright.gov/legislation/dmca.pdf.

55 *See, e.g.*, Laura Bielinski, *Post-Grokster Contributory Copyright Liability and Potential P2P Entitlement to the DMCA ISP Safe Harbors*, 6 VA. SPORTS & ENT L.J. 209 (2006); Andrew Bernstein & Rita Ramchandani, *Don't Shoot the Messenger! A Discussion of ISP Liability*, 1 CAN. J.L. & TECH. 77 (2002); Diane M Barker, *Defining the Contours of the Digital Millennium Copyright Act: The Growing Body of Case Law Surrounding the DMCA*, 20 BERKELEY TECH. L.J. 47 (2005).

56 Laura Johannes, *Hitting the Right Notes: The Need for a General Public Performance Right in Sound Recordings to Create Harmony in American Copyright Law*, 25 WASH. U. J.L. & POL'Y 445, 445 (2001).

57 *Id.*

58 *Id.* at 445 n.5.

59 *Id.* at 446; 17 U.S.C. §§ 101, 106(4), 114(a) (2012).

principle underlying the hypothetical stands up to scrutiny. The conglomerate of performing artists whose recordings are played over terrestrial radio in the United States go uncompensated for such exploitation of their work, and are only compensated for terrestrial radio plays where they have a stake in the underlying musical work.[60] To summarize, then, only songwriters are entitled to royalties when their songs are played on U.S. terrestrial radio stations, but when it comes to digital broadcast services, both songwriters and music makers enjoy similar remuneration (and to the extent that a songwriter, like Paul Simon, appears on a recording as a performer, the songwriter-performer is entitled to payment both with respect to the recording and the underlying musical work).

The Copyright Royalty Board sets American digital performance royalties, which differ in their conditions and rates for different uses, including satellite radio, music streaming, and Internet broadcasts of terrestrial radio, but not "interactive" streaming services wherein the user selects his or her choice of music on demand.[61] Forty five per cent of performance royalties are paid directly to the featured performer or performers on the recording, 50% of royalties are allocated to the copyright holder, which is usually the performers' record label, and the remaining 5% of royalties are allocated to funds for non-featured musicians and vocalists (i.e., backup musicians, background vocalists, and session players).[62] The body established to collect royalties and distribute them to music makers in the

[60] Note that there is a multitude of ongoing litigation and recently resolved or settled cases in the United States regarding whether there is a general performance right in pre-1972 sound recordings. *See, e.g.*, David Oxenford, *Flo and Eddie NY Suit on Pre-1972 Sound Recordings Ordered Dismissed By Court of Appeals – No Issues with Copies Made in the Transmission Process*, BROADCAST LAW BLOG (Feb. 17, 2017), http://www.broadcastlawblog.com/2017/02/articles/flo-and-eddie-ny-suit-on-pre-1972-sound-recordings-ordered-dismissed-by-court-of-appeals-no-issues-with-copies-made-in-the-transmission-process. There have also been congressional legislative efforts to provide for performance royalties for broadcast radio in the United States. *See, e.g.*, To provide parity in radio performance rights under title 17, United States Code, and for other purposes, H.R. 848, 111th Cong. (2010).

[61] *Rate Proceedings*, COPYRIGHT ROYALTY BOARD, https://www.loc.gov/crb/rate (last visited May 17, 2017). Interactive music streaming services' royalties are privately negotiated, but because the medium is new and each service's success is entirely reliant on the quality of its catalogue, music makers have been able to negotiate favourable royalty rates from those services. Spotify, for example, pays 70% of its earnings to record labels and publishers. *See* Micah Singleton, *This Was Sony Music's Contract with Spotify*, THE VERGE (May 19, 2015), http://www.theverge.com/2015/5/19/8621581/sony-music-spotify-contract; Victor Luckerson, *Here's How Much Money Top Musicians Are Making on Spotify*, TIME (Dec. 3, 2013), http://business.time.com/2013/12/03/heres-how-much-money-top-musicians-are-making-on-spotify.

[62] 17 U.S.C. § 114(g)(2) (2012).

United States is named SoundExchange.[63] Like Canada's Re:Sound, SoundExchange also plays an advocacy role on behalf of music makers by submitting rate proposals to the Copyright Royalty Board, participating in hearings, engaging in direct discussions with music users, and, where necessary, bringing action for judicial review.[64]

Notably, in 2012, U.S. radio station collective Clear Channel Media and Entertainment (known today as iHeartMedia, Inc.) and large independent recording corporation Big Machine Label Group reached a private agreement whereby Clear Channel would pay Big Machine and its artists a revenue-based royalty for terrestrial radio broadcasts.[65] The agreement between Clear Channel and Big Machine was the first of its kind in the United States, and comprised the first time in which royalties were payable to music makers in the United States for the triggering of the copyright in their sound recordings broadcasted over terrestrial radio.[66] But the agreement comprised a royalty-payment instrument as consideration for a copyright license granted by the owner (Big Machine) to the broadcaster (Clear Channel). Because the right established through the agreement between the parties was not enabled by statute, the administration of Big Machine's rights is therefore not the purview of a collective like SoundExchange, nor is the royalty payable to Big Machine set by an administrative body such as the Copyright Royalty Board. Instead, the agreement between the parties was privately negotiated and the royalties privately administered; other music makers seeking similar arrangements are left to construct them on their own. Broadcasters who refuse to enter such agreements with record labels, it must be emphasized, are not by law copyright infringers, and record labels that go uncompensated for the use of their music by such broadcasters accordingly have no cause of action against them.[67]

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63 SOUNDEXCHANGE, *supra* note 14.

64 *See, e.g.*, *Advocacy*, SOUNDEXCHANGE, http://www.soundexchange.com/advocacy (last visited May 17, 2017). For an example case in which SoundExchange brought action for judicial review, see SoundExchange, Inc. v. Librarian of Congress, 571 F.3d 1220 (D.C. Cir. 2009).

65 Tarantino, *supra* note 37; Ed Christman, *Exclusive: Clear Channel, Big Machine Strike Deal to Pay Sound-Recording Performance Royalties to Label, Artists*, BILLBOARDBIZ (June 5, 2012), http://www.billboard.com/biz/articles/news/1094776/exclusive-clear-channel-big-machine-strike-deal-to-pay-sound-recording.

66 Ed Christman, *Could the Big Machine, Glassnote Deals with Clear Channel Set Market Rate for Radio Royalties?*, BILLBOARDBIZ (Mar. 6, 2013, 2:50 PM), http://www.billboard.com/biz/articles/news/1551224/could-the-big-machine-glassnote-deals-with-clear-channel-set-market-rate.

67 It must be noted that because many large radio stations also engage in Internet simulcasting (or other internet transmission) of their programs, they would be required to secure licenses for those use cases.

### *C. Europe*

If one views the Canadian and United States frameworks as two extremes along a linear continuum of neighbouring rights legislation, then the European neighbouring rights framework would align more closely with the Canadian model. Nonetheless, the European standard is distinct enough, and foreign enough to the North American legal system, such that it must form a third prong to the discussion of neighbouring rights administration worldwide. I posit, therefore, that the neighbouring rights legislative framework in Europe could be described as "convention-based, directives-driven, and internationally standardized," but the administration of such rights could be described as "fragmented and nationally individualistic."

In Europe, a key feature of the current copyright framework is the European Union, which has introduced several directives covering most aspects of the substantive law of copyright and related rights.[68] A directive, in the European Union context, is a legal act of the European Union requiring Member States to achieve a particular legal result without dictating the specific means of achieving that result.[69] European Union lawmaking in the copyright and neighbouring rights field, through the legal and socio-political regime enabling directives of the European Union, takes place within an established international legal framework that individual institutions of European Union Member States are collectively mandated to recognize and strive to implement. Key aspects of that legal situation with respect to copyright law are the TRIPs Agreement and WIPO Treaties, each of which the European Union has ratified.[70] Two further international legal instruments to which the European Union has committed, and which underpin its law and policymaking in the neighbouring rights field, are the Rome and Berne Conventions.[71] These conventions have been acceded to by all Member States, and are the explicit bases of the WIPO Treaties and several of the European Union's copyright and related rights directives.[72]

Three directives have been instrumental in developing a harmonized legal framework throughout the European Union with regard to neighbouring rights: first is Council Directive 93/83EEC of 27 September

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[68] JUSTINE PILA & PAUL TORREMANS, EUROPEAN INTELLECTUAL PROPERTY LAW 243 (2016).

[69] *European Union Directives*, EUR-LEX, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Al14527.

[70] PILA & TORREMANS, *supra* note 68, at 247ff.

[71] *See generally* Berne Convention; WIPO Rome Convention.

[72] *WIPO Administered Treaties*, *supra* note 8; *WIPO-Administered Treaties: Contracting Parties > Rome Convention*, WIPO, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=EN&treaty_id=17 (last visited May 17, 2017).

1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission,[73] and second is Council Directive 93/98/EEC of 29 October 1993 — later replaced by Directive no. 2006/116/EC of 12 December 2006 — on the term of protection of copyright and certain related rights.[74] Third is Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society ("Information Society Directive 2001"),[75] which contains a basic legislative code governing the recognition and protection of copyright and related rights throughout the European territory. Its provisions, and the referring obligation of Member States' courts under Article 267 of the Treaty on the Functioning of the European Union, have led the Court of Justice of the European Union ("CJEU") to assume a central role in European copyright law.[76] Information Society Directive 2001 is especially important as it represents the closest proximity to a complete European copyright and related rights code, mandating that Member States provide music makers with the exclusive right to prohibit direct or indirect, or temporary or permanent reproduction of their sound recordings by any means and in any form.[77] Member States, under Information Society Directive 2001, are required, therefore, to grant wholesale rights to music makers over their sound recordings.

Each of the legal instruments referenced above are binding on European Union Member States, not citizens, meaning they cannot be invoked directly by individuals as a source of legal rights or obligations in legal proceedings. And furthermore, they are only binding on states as to their effects, not to the form and method of their implementation.[78] But the practical realities of European Union lawmaking are such that Member States' discretion when implementing directives is substantially limited. The limitations imposed on European Union Member States are particularly evident within the domestic trial and appellate courts, which are obligated to give substantial deference to European Union directives and CJEU interpretation of legal issues present therein.[79] Practically speak-

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73 PILA & TORREMANS, *supra* note 68, at 247.

74 EUROPEAN COMM'N, REMUNERATION OF AUTHORS AND PERFORMERS FOR THE USE OF THEIR WORKS AND THE FIXATIONS OF THEIR PERFORMANCES 19 (2015) (SMART 2015/0093).

75 *Id.*

76 PILA & TORREMANS, *supra* note 68, at 243.

77 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Official Journal L 167, 22/06/2001 P 0010-0019 at Article 2 [hereinafter Information Society Directive 2001].

78 EUR-LEX, *supra* note 69.

79 PILA & TORREMANS, *supra* note 68, at 252.

ing, while individual Member States are, in theory, granted autonomy in developing their own distinctive bodies of copyright law, the European Union framework is such that the legislative situation with respect to neighbouring rights is remarkably consistent across the territory.

To wit, the following are a few examples of Member States' copyright legislation across the European Union. In the United Kingdom, the Copyright, Designs and Patents Act 1988 states:

> (1) Where a commercially published sound recording of the whole or any substantial part of a qualifying performance—
>
> (a) is played in public, or
>
> (b) is communicated to the public. . .
>
> the performer [or person otherwise having recording rights in relation to a performance] is entitled to equitable remuneration from the owner of the copyright in the sound recording.[80]

The British Act also mandates that a right to equitable remuneration "may not be assigned by the performer except to a collecting society," and establishes a right to application to the Copyright Tribunal for matters relating to the varying of amounts payable or other such decisions made by the Tribunal.[81] By way of comparison, the following is the neighbouring rights provision found in Chapter 5, section 45b, of the Norwegian Act Relating to Copyright in Literary, Scientific and Artistic Works, etc.:

> When sound fixations of the performances of performing artists are communicated to the public by means of a broadcast or retransmission of a broadcast within the period of time specified in Section 45, both the producer of the fixation and the performing artist whose performances are reproduced are entitled to remuneration. . . .
>
> A claim for remuneration shall be presented to those who are liable to pay it through a collection and distribution organization approved by the Ministry concerned. The King may issue further rules for the collection and distribution of remuneration.[82]

The Dutch Related Rights Act reads similarly:

> Article 2:
>
> 1. A performer shall have the exclusive right to authorize one or more of the following acts: . . .
>
> d. the broadcast, repeat broadcast, making available to the public or other form of publication of a performance or a recording of a performance or a reproduction thereof. . . .

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[80] Copyright, Designs and Patents Act 1988, 1988 c 48, s 182D.

[81] *Id.* ss 182D(2), 182D(5)(a), 182D(5)(b).

[82] Copyright Act (Act No. 2 of May 12, 1961, relating to Copyright in Literary, Scientific, and Artistic Works) (consolidated version of 1999) ch. 5, s. 45b (Nor.).

> Article 6:
>
> 1. A phonogram producer shall have the exclusive right to authorize:
> . . .
> c. the broadcast, repeat broadcast, making available to the public or other form of publication of a performance or a recording of a performance or a reproduction thereof. . . .
>
> Article 7:
>
> 1. A phonogram or reproduction thereof published for commercial purposes may be broadcast or otherwise communicated to the public . . . provided an equitable remuneration is paid. . . .
> 2. In the event of disagreement as to the amount of the equitable remuneration, the District Court of The Hague shall have sole competence at first instance to determine, on application to either of the parties, the amount of the remuneration.
> 3. The remuneration shall be payable to both the performer and the producer . . . .
>
> Article 15:
>
> 1. The equitable remuneration referred to in article 7 shall be paid to a representative legal person designated by Our Minister of Justice, who shall be exclusively entrusted with the collection and distribution of such remunerations. The legal person . . . shall represent the right-holders at law and otherwise in matters relating to the level and collection of the remuneration and the exercise of the exclusive right.[83]

The above legislative provisions are indicative of the neighbouring rights frameworks throughout the European Union. In content, if not necessarily in style or execution, neighbouring rights legislation in place within European Union Member States is highly symmetrical. Neighbouring rights legislation throughout the European Union, being convention-based and directives-driven, is standardized throughout the region.

Nonetheless, there is differentiation within the European territory both as to the processes by which tariffs are set and the methods through which neighbouring rights are administered. Of the European Union Member States in the top ten neighbouring rights revenue generating countries — the United Kingdom, France, Germany, the Netherlands, and Norway — the United Kingdom's configuration is most similar to that in Canada and the United States; rights are administered in the United Kingdom by Phonographic Performance, Ltd. ("PPL"), rates are set by the Copyright Tribunal, and the right to equitable remuneration for the exploitation of sound recordings is established at Section 182D(1) of the Copyright, Designs, and Patents Act, 1988.[84] Nonetheless, in the United Kingdom, remuneration is payable directly to the owner of the copyright,

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[83] Related Rights Act (1993) arts. 2, 6, 7, 15 (Neth.).

[84] Copyright, Designs and Patents Act s 182D.

who is compelled to distribute royalties to performers accordingly.[85] German neighbouring rights remuneration is managed by GVL per the German Act on the Management of Copyright and Related Rights by Collecting Societies, which mandates at section 38 that rate-setting be negotiated and set by GVL itself, not an administrative tribunal.[86] France and the Netherlands stipulate that both performers and producers are entitled to equal royalty shares, but Germany and the United Kingdom do not.[87]

## *III. DIFFERENTIATION BETWEEN INTERNATIONAL NEIGHBOURING RIGHTS FRAMEWORKS AND THEIR ECONOMIC EFFECTS*

An examination of the neighbouring rights frameworks in Canada, the United States, and Europe reveals significant regional differentiation. Some examples of differentiation are clear from a basic statutory analysis. Both the Canadian and European frameworks, by virtue of their mutual ratification of the Rome Convention, are similar to one another, but highly distinct from the United States, whose recognition of neighbouring rights is comparatively limited. While neighbouring rights in Canada and Europe are modulated through the mechanism of a collective organization appearing before an administrative body to propose the certification of tariffs or the alteration of remunerative rates, remuneration for the exploitation of sound recordings on terrestrial radio within the United States can only be determined through ad hoc negotiations with individual exploiters.[88] Such differentiation is rooted in the regions' unique statutory schemes — while the statutes in Canada and in Europe mandate the creation of collective organizations to advocate for the establishment of new compensatory schemes and administer the resulting remuneration to music makers, the American situation is far more libertarian in its approach. That is to say, if American rights holders wish to receive compensation for the broadcasting of their sound recordings in non-statutorily protected use cases, then the only option available to them is to seek privately arranged deals with individual music users.

The major statutory distinction between Canada and other Rome Convention countries is its legislative exception for sound recordings incorporated within "cinematographic works" per section 2 of the Copyright

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85 *Id.* s 182D(1).

86 Verwertungsgesellshaftengesetz vom 24. Mai 2016 [Collecting Societies Act of 24 May 2016], BGBl. I [Federal Law Gazette] 1190, http://www.gesetze-im-internet.de/englisch_vgg/englisch_vgg.html#p0195.

87 ELS VANHEUSDEN, PERFORMERS' RIGHTS IN EUROPEAN LEGISLATION: SITUATION AND ELEMENTS FOR IMPROVEMENT 23-24 (2007).

88 *See* Part II(B), *supra*.

Act.[89] The Canadian definition of "sound recording" excludes "any soundtrack of a cinematographic work where it accompanies the cinematographic work."[90] A "cinematographic work" is defined within the Act as including "any work expressed by any process analogous to cinematography, whether or not accompanied by a soundtrack."[91] Per the statute, therefore, the Canadian neighbouring rights collective, Re:Sound, is not permitted to collect remuneration for sound recordings broadcast over television, for example, if the broadcast accompanies any TV drama. This point was litigated in *Re:Sound v. Motion Picture Theatre Associations of Canada* after Re:Sound filed two tariff proposals claiming royalties for the use of sound recordings embodied in movies shown by motion picture theatres and other establishments exhibiting movies, and in television programs broadcast by commercial television services.[92] The case was brought to the Supreme Court of Canada, which unanimously held that the Copyright Board of Canada was correct in determining that "soundtrack" includes pre-existing sound recordings and that such recordings are excluded from the definition of "sound recording" when they accompany a cinematographic work.[93] While the Court also held that such a legislative provision was not in contravention to Canada's international obligations as signatory to the Rome Convention,[94] European Union directives implementing the Rome Convention standard do not include any similar "cinematographic work" exclusion, and Information Society Directive 2001 specifically mandates at section 26 that broadcasters transmitting on-

[89] Copyright Act s 2.
[90] *Id.*
[91] *Id.*
[92] Re:Sound v. Motion Picture Theatre Ass'ns of Canada ¶ 5, [2012] 2 SCR 376.
[93] *Id.* ¶ 26ff.
[94] *Id.* ¶ 47ff ("The appellant also argues that the Act is incompatible with the *Rome Convention*. As I mentioned above, the *Rome Convention* provides that '[p]roducers of phonograms shall enjoy the right to authorise or prohibit the direct or indirect reproduction of their phonograms' (Article 10). The appellant submits that producers of soundtracks would be denied this right if a pre-existing sound recording is deemed to be a soundtrack and that the effect of the Court of Appeal's interpretation is therefore that the Act is in breach of the *Rome Convention*. The appellant is overlooking Article 3 of the *Rome Convention*, which defines a 'phonogram' as 'any exclusively aural fixation of sounds of a performance or of other sounds'. Thus, excluding a soundtrack from the definition of 'sound recording' where the soundtrack accompanies the cinematographic work is consistent with the *Rome Convention*, since this exclusion is not for "exclusively aural fixation[s]'. Contrary to the appellant's assertion, a 'ripped' (reproduced) recording of a pre-existing sound recording that accompanies a motion picture would be subject to copyright. As the Court of Appeal pointed out, once a pre-existing sound recording is extracted from a soundtrack accompanying a cinematographic work, it once again attracts the protection offered for sound recordings. There is therefore no violation of the *Rome Convention*.").

demand television programs that incorporate music from commercial recordings ought to be collectively licensed.[95]

While there are certain legislative gaps creating major differentiation between the U.S., Canadian, and European frameworks, an examination of instances of baseline legislative similarity across the board — for example, in commercial webcasting in the United States, or in terrestrial broadcasting throughout Canada and Europe — helps to reveal further regional diversity in the ways in which each region administers, as opposed to mandates, neighbouring rights law. The processes attendant to the establishment of tariffs, the setting of royalty rates, and the simple day-to-day realities of operating collective neighbouring rights organizations play a major role in affecting the distribution of remuneration to music makers and the costs imposed on music users. A major point of contrast between the territories, therefore, is the differentiation between categories of use recognized within different territories, with different attendant remunerative rates, and with different ways in which each collective organization puts the law into action by taking measures to increase collection, reduce costs, and maximize revenues flowing to music makers.[96] While a comprehensive, empirical analysis of each territory's entire neighbouring rights framework is outside the scope of this article, a number of examples are indicative of international fragmentation underlying what is at first glance

[95] Information Society Directive 2001, *supra* note 77; *see, e.g.*, Gesellschaft zur Verwertung von Leistungsschutzrechten [GVL], Tariff for the exploitation of commercially published sound recordings and videoclips in private TV programmes, German Federal Gazette 14916 (2005) [hereinafter GVL]; for further reading on the German neighbouring rights framework and its treatment of cinematographic works, see Melissa Eddy, *YouTube Agrees to Pay Royalties, Ending German Music Dispute*, NEW YORK TIMES (Nov. 1, 2016), http://http://www.nytimes.com/2016/11/02/business/international/germany-music-royalties-youtube.html?_r=0.

[96] That is to say, another source of international neighbouring rights inconsistency is differentiation in neighbouring rights organizations' operational statistics. Collective rights administrators are non-profit organizations that collect payment from licensees, deduct costs, and distribute the remaining monies to music makers. The dollar amount flowing to the proprietors of a sound recording's neighbouring right is therefore partially dependent on the extent to which organizations increase collection, enforce the law, and reduce operating costs. The simplest indicator of organizations' operational efficiency is their expense-to-revenue ratio, usually expressed in annual "year in review" documents as a percentage. Regardless, such an analysis is outside of the scope of this article. For an example of how increased efficiencies and minimized costs directly correlate to increased revenues for music makers, see Karen Bliss, *Canadian Labels See Bump in Royalties Following New Collection Society Efficiencies*, BILLBOARD (July 8, 2016), http://www.billboard.com/articles/business/7431158/canadian-labels-bump-royalties-collection-societies-efficiency. The formulation of a single-repertoire database by Canadian collection societies CONNECT Music Licensing and Re:Sound immediately resulted in an additional $2 million payable to rights holders.

a reasonably homogenous statutory environment with but a few glaring instances of incongruity. I will explore a number of those examples herein.

Re:Sound manages tariffs applicable to terrestrial radio, satellite radio, music streaming, pay audio, fitness activities, dance, live events, and background music use.[97] Within those categories are a number of "sub-tariffs" which more specifically delineate remunerative rates for particular uses. The "Live Events" tariff, for example, has sub-tariffs for receptions, conventions, assemblies, and fashion shows; karaoke; festivals, exhibitions, and fairs; circuses, ice shows, fireworks displays, and similar events; parades; and parks, streets and other public areas.[98] PPL, the United Kingdom's collective society, administers a similar yet more fragmented series of tariffs much more highly specified for particular uses. Whereas Canada's "Background Music" tariff cluster covers "eating & drinking; retail; and fitness" establishments, the United Kingdom's Background Music cluster covers over thirty unique use cases ranging from background music in museums and art galleries, to swimming pools, to railway stations.[99] Nonetheless, what appears to be a highly specified set of tariffs in the United Kingdom is, in practicality, a more rigid and less malleable system than that which is in place in Canada; where licensing fees in the United Kingdom for use in non-broadcasting business practices tend to be structured around a series of bracketed flat rates, the cost of Canadian background music licenses are calculated precisely to the fraction of a cent for each licensee dependant on factors such as the establishment's square footage or admissions revenue.[100] The Netherlands's Sena has adopted a

97 *See supra* note 44 and the sources cited therein.

98 *See* Tariff No. 5, *supra* note 44.

99 *See* Tariff No. 3, *supra* note 44; *see, e.g.*, *I'm Not Sure What Type of Licence I Need*, PPL, http://www.ppluk.com/I-Play-Music/Businesses/How-much-does-a-licence-cost/Business-type-116 (last visited May 17, 2017); *Tariff for the Public Use of Sound Recordings PPLPP040 – Background Music Tariff – Museums and Art Galleries*, PPL (2017), http://http://www.ppluk.com/Documents/Tariff%20PDFs/PPLPP040.pdf; *Tariff for the Public Use of Sound Recordings PPLPP050 – Background Music Tariff – Swimming Pools*, PPL (2017), http://www.ppluk.com/Documents/Tariff%20PDFs/PPLPP050.pdf; *Tariff for the Public Use of Sound Recordings PPLPP043 – Background Music Tariff – Railway, Underground and Bus/Coach Stations*, PPL (2017), http://http://www.ppluk.com/Documents/Tariff%20PDFs/PPLPP043.pdf.

100 *Compare* Tariff No. 3, *supra* note 44, in which, at section 5(1), the playing of background music is subject to a license fee calculated by multiplying the number of admissions, attendees, or tickets sold multiplied by 0.0831 cents CAD; *with* this to PPL's Museums and Art Galleries Tariff, *supra* note 98, in which a flat fee of £124.55 is charged per Permanent Exhibition or Display per Annum and £10.50 is charged per week per Non-Permanent Exhibitions and Displays for periods not exceeding eleven weeks per year.

licensing scheme that has similarities to both the Canadian and British approaches; like the Canadian system, Sena offers broad categories of license to music users (the "general license" and the "media license"),[101] but, like the British system, employs a bracketed flat-fee system for specific use cases.[102] Norway's Gramo, on the other hand, differentiates solely between industry categories — retail and customer facilities, cinemas, ski resorts — and not between categories of use.[103]

Correlated to differences in tariff structuring are differences in tariff rating. Canada's Tariff No. 8 – Non-Interactive and Semi-Interactive Webcasts establishes a rate of $0.00007673 (U.S.) per sound recording played in a commercial, non-CBC webcast, subject to a minimum of $75.23 (U.S.) paid per year.[104] The United States' rate for commercial webcasting, on the other hand, is $0.0017 (U.S.) per performance for non-subscription services and $0.0022 (U.S.). for subscription services, with a $500 (U.S.) minimum fee per year.[105] The United Kingdom's rate is $0.00097288 (U.S.) per performance, subject to an $878.65 (U.S.) advance paid to PPL recoupable against royalties at the standard rate per performance.[106] Looking to Continental Europe, podcasts in the Netherlands with a volume of music comprising greater than 80% of the show's content are subject to a fixed fee of $4,176.96 (U.S.) per year, and an additional fee between $2,784.36 and $5,569.20 per year depending on the service's listenership.[107] Smaller webcasts are charged per listener, per year; webcasting up to and including 500 listener slots is charged at a rate of $0.001065

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101 *See Do I Need a Music Licence?*, SENA, https://www.sena.nl/en/music-customers (last visited May 17, 2017) [hereinafter SENA, *Music Licence?*].

102 *See* Sena, 2016 Fee Schedule at 5 (2016), in which, similarly to PPL's British tariffs in *supra* note 99, music users are charged rates depending on whichever applicable fee bracket; for example, restaurants with surface area between 101 and 200 $m^2$, 201 and 400 $m^2$, 401 and 800$m^2$, and 801 to 1600 $m^2$ are allotted particular fees per category no matter where they lie on the applicable scale.

103 *See Priser for Musikkbruk*, GRAMO, http://www.gramo.no/jeg-bruker-musikk/priser-for-musikkbruk (last visited May 17, 2017).

104 Copyright Board, Statement of Royalties to Be Collected by Re:Sound for the Communication to the Public by Telecommunication, in Canada, of Published Sound Recordings Embodying Musical Works and Performers' Performances of Such Works – Tariff No. 8 (Non-Interactive and Semi-Interactive Webcasts) (2009–2012), C. Gaz. Supp. (May 17, 2014), http://www.cb-cda.gc.ca/decisions/2014/ReSound8-60-tarif.pdf. Note that monetary figures have been converted from the applicable national currency to U.S. dollars as of December 5, 2016.

105 *Commercial Webcaster 2016 Rates*, SOUNDEXCHANGE, http://www.soundexchange.com/service-provider/rates/commercial-webcaster (last visited July 18, 2017).

106 *Online Radio and Services*, PPL, http://www.ppluk.com/I-Play-Music/Radio-Broadcasting/Radio-types/Online-radio-and-services (last visited May 17, 2017).

107 *Fees for Music Use on the Internet*, SENA, https://www.sena.nl/Portals/0/Documents/Gebruikers/Tarieven/47a_FeesForMusicUseOnTheInternet.pdf (last visited

(U.S.) multiplied by the average listenership per hour, multiplied by the number of tracks played per hour, and subject to a minimum fee of $662.49 (U.S.) per year.[108] Webcasting is but one example of the high degree of fragmentation with respect to neighbouring rights worldwide.

In sum, while an overview of laws reveals a number of similarities in neighbouring rights schemes throughout the world, the law's practicable effects are more highly differentiated throughout the world as a result of the large number of variables introduced in the processes attendant to the administration of neighbouring rights, including tariff establishment and rate setting. The economic effect of that fragmentation is such that it costs users different amounts, calculated differently, for the same kind of use in different countries. By that same token, music makers are afforded significantly different compensatory schemes for the use of their music depending on the location of that use; it is not a stretch to suggest, therefore, that music is simply "valued" differently in different countries. At the very least, such fragmentation creates, in a connected world and global music landscape, a regrettable level of inconsistency and unpredictability across borders. A more unified system of neighbouring rights could compensate for, or at least isolate, variables inherent to a non-integrated international system of collective rights administration. Canada is presently in a position to make reforms to bring its neighbouring rights policy into greater congruity with international legal regimes. In what follows, I will briefly propose some measures to alter the Canadian *Copyright Act* to better serve both music makers and music users.

## *IV. THE CANADIAN COPYRIGHT ACT IN 2017: SOME REFORMATIVE PROPOSALS*

2017 is mandated per section 92 of the Canadian *Copyright Act* as the year in which "a committee of the Senate, of the House of Commons, or of both Houses of Parliament is to be designated or established for the purpose of reviewing this Act."[109] What lessons could Canadian policymakers learn from a study of neighbouring rights domestically and abroad? In so far as neighbouring rights trigger the interests of both music makers and music users, it is important for Cabinet to continue to balance the tension between those interests through legislative reform that brings Canada's music industry into greater regulatory symmetry with countries throughout the world. My research has led me to three specific suggestions. First and foremost, the gap presently created by the "cinematographic work"

May 17, 2017). The figures reproduced here were extrapolated to the period of a year based on a fee per month outlined in Sena's documentation.

[108] *Id.*

[109] Copyright Act s 92.

exception at section 2 of the Copyright Act ought to be closed in order to bring Canada into parity with such countries as Germany, the United Kingdom, and Norway, all of whom have a framework in place to license television broadcasters for their transmission of pre-existing sound recordings synchronized with television shows or motion pictures.[110]

Second, Canada should consider modifying its current licensing framework to a more clearly delineated one like that which is in place in the Netherlands, which divides its licensing system into broader "general" (i.e., background music, live events, fitness activities, and others) and "media" (i.e., radio broadcasting, satellite radio, online streaming, and dance) categories.[111] To do so would enable an increase in accessibility and transparency for music users, and the certification of more specified tariffs for particular use cases. That having been said, Canadian policymakers and rights administrators should take note not to alter the malleability and customizability of Canada's current tariff system, which, like the rating system in place in the United States, more precisely, accurately, and fairly calculates remuneration owed to rights holders by music users than the system in place in jurisdictions throughout Europe.

Third, Parliament and the Copyright Board of Canada should take steps to standardize remunerative rates required of music users in accordance with the rates in place internationally. Such a move would require Canada to take an innovator role in policymaking through comprehensive consultation with rights administrators worldwide and empirical analysis of rate-setting throughout the major markets. After all, as this article has found, an "international standard" of neighbouring rights administration is, practically speaking, a myth.

## *V. CONCLUSION*

The need for a globally unified and optimized system of neighbouring rights is evident. First, a healthy body of neighbouring rights law is crucial in the present technological environment, which has seen increasing consumption of music through Internet-based streaming services. Second, a unified and optimized system of neighbouring rights is crucial to prevent fragmentation between various jurisdictions with diverse legal norms and mandates. Third, disjointed international neighbouring rights frameworks impact the fairness afforded both to performers, whose music may be compensated differently dependent on the territory of the use, and music

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110 *See, e.g.*, GVL, *supra* note 95; *Television Broadcasting*, PPL, http://www.ppluk.com/I-Play-Music/Television-Broadcasting (last visited May 17, 2017); *Avtale om vederlag for offentlig fremføring av innspilt musikk for kinematograf*, GRANMO, http://static.gramo.no/files/docs/schemas/2015-5/47081%20-%20Kino.pdf?_ga=1.99089374.1930694226.1484839650 (last visited May 17, 2017).

111 SENA, *Music Licence?*, *supra* note 101.

users, who may be required to pay neighbouring rights collectives different rates of compensation than their business colleagues in other countries.

The challenge facing Canadian copyright reformers is to identify areas of legal disparity, to suggest suitable approaches to institutional change, and to therefore attempt to balance international differences to create a more coherent cross-border neighbouring rights framework. A neighbouring rights framework that meets the standards of other large music markets is crucial for the success of the Canadian music industry. To that regard, this article has provided an original overview of neighbouring rights in Canada, the United States, and the major European markets, contrasted the applicable neighbouring rights frameworks to display just how fragmented the legal scheme is throughout the world, and proposed modest reforms ahead of the 2017 review of the Canadian *Copyright Act*. This article has provided a review, in macro, of the major issues surrounding this area of law and the reasons behind them. Moving forward, the contents of this article could be used to ground an empirical study of neighbouring rights law that more deeply engages with the wealth of data surrounding international differentiation between the administration of neighbouring rights and the setting of tariff rates. Such research would further the scholarship on neighbouring rights law by elucidating the ways in which disparate legal frameworks impact both performers' and users' rights, and provide the basis for Canadian policymaking innovation.