



WorkInCulture

Environmental Scan: Precarity for Artists and
Cultural Workers

Final Report

Prepared by:

The Consulting Matrix, Inc.
401 Richmond Street West, Suite 392
Toronto, ON M5V 3A8

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Introduction

Purpose and scope of the project

WorkInCulture has engaged Consulting Matrix to conduct an environmental scan on the subject of precarity among artists and cultural workers. The environmental scan has two components: first, a review of the policy and legislative environment surrounding the issue as it affects artists and cultural workers in Ontario; and second, an inter-jurisdictional scan covering counter-measures to precarity that have been implemented in other jurisdictions.

The purpose of the environmental scan is:

- To create an evidence base from which to propose counter-measures to income precarity as it impacts the lives of artists and cultural workers in Ontario;
- To narrow measures down to specific, practical initiatives that are scalable for the province; and
- To make a case for the measures that have the best chance of having a positive material impact on the lives of artists and cultural workers experiencing precarity.

The project focuses on:

- Measures that increase the income stability of artists and cultural workers experiencing precarity;
- Measures that mitigate precarity as it affects individuals, rather than organizations;
- Measures that take account of what makes artists' and cultural workers' experiences of precarity different from those of workers in other sectors, while also drawing from solutions designed for self-employed workers generally;
- Measures that are practical within the economic, policy, and legislative environment in Ontario; and
- Measures that are systemic and will create lasting change, rather than those that are limited, local, or one-off.
- Groups of cultural workers that most frequently experience precarity, namely artists and other cultural workers who work primarily on a freelance basis.

Progression of the work

In the first phase of work, Consulting Matrix conducted the policy and legislative review, as well as preliminary research for the inter-jurisdictional scan, which was delivered in the form of an outline of several measures from other jurisdictions, from which five were selected as subjects for case studies. This final report presents the policy and legislative review, the preliminary jurisdictional scan, and the five case studies.

Part 1: Policy and legislative environment

General remarks

Precarity within the cultural sector is not a new issue, in Ontario or elsewhere. Since around the turn of the 20th century, precarity has been almost an essential aspect of the economic position of artists, who are socially expected to be independent and autonomous, and who typically value independence and autonomy highly themselves. This usually places them outside the standard employment relationships that still apply to most workers, and thus in work that is intermittent (or at least intermittently compensated). And, unless an artist can command high fees for their work, they will likely find themselves a position of financial insecurity as a result. Coupled with this, artists in Canada, as self-employed workers, are partially excluded from national social insurance—a system designed to provide financial security to workers—and are not entitled to the same employment standards or collective bargaining rights as regular employees. Bracketing issues related to arts funding and the awarding of grants, these are the main policy factors that contribute to precarity among artists in Ontario.

The movement to find solutions to precarity in the cultural sector is part of a larger struggle for recognition of the status of the artist in society. Part of that is the recognition that, for art to thrive, artists need not only freedom of expression, but also the satisfaction of basic material needs. Socially, artists have a status that distinguishes them from other self-employed workers, and this status is recognized at least nominally in most countries. In 1980, the United Nations Educational, Scientific and Cultural Organization (UNESCO) published a recommendation to United Nations member states concerning “the Status of the Artist,” to which several governments have responded with laws referencing the recommendation. The recommendation itself is too detailed to adequately summarize here, but, for advocates of artists’ rights, has and should continue to serve as a reference against which to compare the status of the artist where we are.

Canada’s *Status of the Artist Act*, passed 12 years later in 1992, implicitly recognized that artists are unlike other self-employed workers, and that their position in the country’s economy needs to be accounted for by laws that apply specifically to artistic professions. Effectively, the Act created a structure for collective bargaining between artists’ unions and federal bodies that employ artists—a small step forward. In Ontario, things took longer, but finally in 2007 the *Status of Ontario’s Artists Act* was passed, largely to the disappointment of artists’ associations, who saw it as nominal and ineffective. Indeed, the bill avoids making any mention of artists’ socio-economic standing, an issue well within the power of the provincial government, which has jurisdiction over employment standards and most forms of collective bargaining, to address.

Copyright

Copyright in Canada is governed by the Copyright Act. The Copyright Act protects the rights of creators of “original literary, dramatic, musical and artistic” works, with respect to those works. Creators of works that fall under this definition automatically hold certain rights respecting the work, the specifics of which depend on the type of work.

Generally, copyright means the sole right to produce or reproduce a work or a substantial part of it in any form, including publication and performance as well as adaptation of the work to another medium. In the case of sound recordings and computer programs, copyright includes the right to rent out the work, or authorize the rental of a work.

Copyright also includes *moral* rights, which are inalienable (cannot be sold or otherwise transferred). These include the rights to attribution, integrity, and association of a work. The right to integrity entails that a work cannot be modified with an intent to negatively affect the honour or reputation of the author without the author’s consent, and the right to association entails that a work may not be used in association with a product, service, cause, or institution, without the author’s consent.

Copyright generally lasts for the life of the author, plus 50 years after the end of the calendar year following their death. Exceptions include copyright for performances and sound recordings, which last for 70 years after the first performance or the first recording, respectively.

For works created after June 7, 1988, an exhibition right also applies. This means that any public exhibition of an artist’s work must be authorized by the artist, unless the work is for sale or hire. This enables artists to negotiate payment for the public exhibition of their works.

Works, performances, recordings and communication signals protected by copyright may be registered or unregistered. Registration does not grant additional rights, but serves as evidence that the registrant is the copyright holder.

The Copyright Act also outlines circumstances under which copyright does not apply. In 2012, the Stephen Harper government passed the Copyright Modernization Act, an amendment to the Copyright Act which included an expansion of the criteria for the exception of copyright to include “fair dealing” for the purpose of study or education, as well as satire or parody. This includes situations such as when an essay is assigned for reading in a university course and is provided to students as a hand-out or digital file.

Policy proposals

Canadian organizations representing different groups of artists have recommended amendments to the Copyright Act. There are three main changes that these organizations have advocated for:

1. Extension of the length of copyright

The Society of Composers, Authors and Music Publishers of Canada (SOCAN) has advocated for extension of the length of copyright term for authors (including songwriters and composers) to 70 years after the death of the author. In a submission to the Standing Committee on Finance, SOCAN points out that this would harmonize Canadian copyright law with that of the United States, Australia, the United Kingdom, and the European Union.

The pending Canada–United States–Mexico Agreement (CUSMA), which, if ratified by all three nations, will replace the North American Free Trade Agreement (NAFTA), will obligate Canada to extend the copyright duration for authors to life plus 70 years. However, since this change would only affect the duration of copyright after the author’s death, it is not likely to benefit living authors.

2. Addition of an Artist’s Resale Right

The addition to the Copyright Act of an artist’s right to benefit from the resale of unique works has been advocated for by the two main Canadian organizations representing visual artists: Canadian Artists Representation/Le front des artistes du Canada (CARFAC) and Regroupement des artistes en arts visuels du Québec (RAAV).

An amendment providing for such a right would be of obvious financial benefit to Canadian artists. There are numerous examples of artists in Canada whose works have initially sold for modest prices, later to dramatically increase in value, who saw no financial benefit for the economic value they created, remaining in the same financial situation as before. Indigenous artists are perhaps disproportionately affected by this loss of potential financial gain from their work when it increases in value.

There is significant international precedent for such a right. It exists in all European Union member states, where it is known as the Artist’s Resale Right, and there is a strong movement toward establishing an international treaty on the right that would harmonize copyright law across most of the world and prevent the evasion of resale fees through the resale of art in jurisdictions where the right does not exist. The Artist’s Resale Right will be discussed in greater detail in the following chapter of this report.

3. Repeal of the fair use exception for purposes of study or education

The Copyright Modernization Act has had the perhaps unintended effect of significantly reducing the incomes of Canadian authors who were previously able to collect fees when their work was reproduced in educational contexts.

In a 2018 letter to the Standing Committee on Industry, Science and Technology, the International Authors Forum, a network of 63 organizations representing authors called upon the Committee to keep the fair dealing principle for education in check. The letter notes that, in

2016, Access Copyright projected for the following year a decrease in royalty distributions of approximately 80% compared to 2012, before the Copyright Modernization Act came into force (Access Copyright's 2018 annual report shows a 77.3% decline from 2012 royalty distribution levels).

Current government policy direction

In May 2019, the Standing Committee on Canadian Heritage presented a report to Parliament containing 22 recommendations concerning the current ecosystem of the creative industries in Canada. The report recommends all three of the measures discussed above. It also includes recommendations to regulate online music streaming services and ensure fair compensation is paid to artists when their work is distributed through such services. Other recommendations include:

- Developing mechanisms by which streaming services will develop and promote Canadian content
- Review of tariffs for online music services by the Copyright Board to ensure fair compensation
- Placing a limit on the term for which copyright can be assigned
- Review and improvement of enforcement of statutory damages for copyright infringement

As the response from the federal NDP points out, the report leaves out any recommendation concerning the regulation of video streaming services such as Netflix.

Social insurance

Within the social insurance system, self-employed artists are in the same position as other self-employed persons. Their access to the insurance policies which cover employed workers is either limited, non-existent, or comes at a higher cost.

Employment Insurance

Employment Insurance (EI) is a federal insurance plan which provides temporary benefits, in the form of income support, to fully enrolled workers who become unemployed (except through quitting of their own volition or being justifiably dismissed). It also provides what are known as "special benefits," which are provided in cases of illness, pregnancy, nursing or caring for a new child, and caring for a person who is seriously ill or injured.

Enrolment in Employment Insurance is automatic for employed workers, but voluntary for self-employed workers. Once enrolled, a self-employed worker can withdraw only if they have not yet filed a claim. After the first claim, enrolment is permanent. In addition, self-employed workers who do choose to enrol are *not* eligible for the regular unemployment benefits that

cover employed workers in case of loss of work. Self-employed workers who enrol in EI are only eligible for special benefits.

The premiums paid into EI by employed and self-employed workers are the same (1.62% in 2019, up to a maximum of \$860.22). In the case of employed workers, the employer also pays a contribution equal to 1.4 times the amount of the employee's premiums. Self-employed persons are not required to make this contribution, nor do they have the option to pay it in exchange for regular benefits.

Canada Pension Plan

The Canada Pension Plan (CPP) is a federal pension plan that generally provides benefits to enrolled persons after they retire. Individuals generally become eligible to receive CPP benefits at age 65. CPP also provides disability benefits to persons under the age of 65 who have made sufficient contributions and are unable to work regularly because of a disability.

Contribution to CPP is generally required for every person over the age of 18 who earns more than \$3,500 per year. This includes self-employed workers. However, whereas for employed persons the CPP contribution is split between the employee and employer with each paying 50%, self-employed persons must pay the whole contribution (10.2% of income) themselves. The maximum annual contribution for self-employed workers is \$5,497.80 (for employed workers, accordingly, the maximum is half that amount).

Workplace Safety and Insurance

Workplace safety in Ontario is principally governed by the provincial Workplace Safety and Insurance Act. Under the Act, employed workers and some self-employed workers are entitled to make claims to the Workplace Safety and Insurance Board (WSIB) when they are injured or become ill as a result of their work. Benefits include wage replacement and medical expenses. Benefits can also be applied for and received by a surviving spouse if a worker dies as a result of their work.

Depending on the sector, and setting, in which an artist works, they may or may not be covered under provincial workplace safety insurance.

Issues

In addition to the obstacles faced by self-employed artists as a result of working outside of the regular employment framework, other patterns in the economic activities of artists contribute to their being under-covered by social insurance.

Many Ontario artists (67% according to a 2005 survey) have to work outside of their artistic activity to survive economically. In assessing eligibility for regular EI benefits, self-employment income is taken into account along with regular employment income (for example, from a

second job) and may reduce the amount of benefit that an artist is eligible to receive, or even disqualify them from receiving any benefit.

Many artists also earn income at a delay from the time the work is completed (for example, from sale of works, licensing and royalties, public lending or exhibition fees). They may continue to earn passive self-employment income even while they are not working at all, which can also pose a problem for receiving regular EI benefits from loss of a job. The EI system does not have any provision for dealing with a loss-of-work situation like this, where loss of work and loss of income don't temporally coincide.

This situation can also prevent artists enrolled in EI from accessing special benefits, or receiving the full amount they would otherwise be entitled to, when they cannot work due to illness, or when they need to care for a newborn child or a family member.

The disadvantage that self-employed artists face with respect to CPP contributions—being required to pay an additional 5% of their income to make up for the employer contribution—is self-explanatory, as is the lack of access to provincial workplace insurance. While some artists who work under union contracts may be protected while working, for example, on a film set, artists who work mainly in a personal studio are not likely to have any insurance in case of an injury at work.

In addition to these issues with access to social insurance, self-employed artists face obstacles accessing secondary health insurance, which is often provided by employers. While nearly all will be covered by the Ontario Health Insurance Plan (OHIP), dental and other health care not covered under OHIP may be financially inaccessible. Lack of extended health coverage particularly affects senior artists, who are at much greater health risk.

Artists' professional organizations have worked to fill in gaps in social insurance coverage, as well as provide additional benefits to their members, such as emergency funds, group insurance policies, and RRSPs. Some of these are funded through contributions from members, and some through contributions from engagers.

Taxation

Taxation of self-employed artists comes in the form of both income tax and sales tax. Artists face somewhat unique issues within both of these systems as a result of their patterns of earning, often characterized by fluctuating income.

Income tax

Fluctuating incomes can result in higher average tax burdens, and this situation frequently affects artists. A visual artist's income may fall in a high tax bracket one year due to, for example, a large institutional commission, and may drop to a low tax bracket the next while they focus on developing their practice, or fall out of the spotlight. A screenwriter's income may peak one year from the sale of a script to a large production company, and may trough

the next year due to simple bad luck. As a result, they will pay a high rate of income tax in their “good” year, and a low one in their “bad” year, but the average rate for the two years will be higher than if the income were spread evenly over the two years.

In Canada, artists’ project grants are subject to a tax exemption which can reduce the amount of the grant that is counted as taxable income. Generally, the first \$500 of an artist’s project grant is tax-exempt.

Sales tax

Self-employed workers in Ontario are required to register for a Harmonized Sales Tax (HST) number once their self-employment income exceeds \$30,000 in a given year. Starting in the quarter when that threshold is breached, the worker (who is taxed as a business), has to collect HST on all of their fees and remit it to the Canada Revenue Agency (CRA). They are then able to claim a deduction on the sales tax they remit to the government based on the sales tax they pay on inputs to their business, such as art supplies.

Policy proposals

Income tax averaging measures are available to artists in many other jurisdictions outside of Canada, as well as in Quebec. Numerous organizations representing artists in Canada, including ACTRA and SOCAN, have advocated for income tax averaging measures (which were available more generally prior to 1988) to be made available to Canadian artists in order to reduce their overall tax burden.

In 2012, a bill was introduced in Parliament (Bill C-427) by NDP member Tyrone Benskin which proposed to allow Canadian artists to average their income for federal tax purposes, and to create a tax exemption for the first \$10,000 of royalty income derived from artistic activities. The bill cited Australia and United Kingdom, as well as Quebec, as examples of jurisdictions where income averaging for artists already exists. The bill failed 142 votes to 121, with all votes against from Conservative MPs.

Collective bargaining and employment standards

In Canada, collective bargaining is mostly within the jurisdiction of the provinces, with only select groups of workers subject to federal collective bargaining laws. Self-employed artists, like other self-employed persons, do not have the same collective bargaining rights as employees, and are generally excluded from laws governing collective bargaining.

In the federal jurisdiction, a separate act called the Status of the Artist Act governs collective bargaining rights for self-employed artists in cases where the federal government is the engager. The Act grants self-employed artists the right to form associations that have the exclusive right to collectively bargain, on behalf of the sector of artists they represent, with federal institutions such as the National Gallery of Canada (NGC) and broadcasters such as the

Canadian Broadcasting Corporation (CBC). For example, CARFAC is certified as the exclusive representative body for visual and media artists, excluding photographers and illustrators, craftspeople, and those represented by Quebec associations. In this capacity, CARFAC has negotiated a collective agreement with the NGC that includes minimum fees for artists' labour. Currently, there are 26 artists' unions certified under the Act. The federal Status of the Artist Act also sets out conditions for the recognition of producers' associations for purposes of collective bargaining; however, there is little incentive for producers to do so.

Outside of those guaranteed under the Status of the Artist Act, self-employed artists in Ontario do not enjoy collective bargaining rights as employees do under the Ontario Labour Relations Act.¹ Collective agreements between unions representing self-employed artists and their engagers are voluntary—for example, a film production company is not obligated under law to bargain in good faith with ACTRA, which represents film actors. However, collective bargaining still takes place outside of the framework provided for employees under the Labour Relations Act. Ontario artists in some sectors, particularly the performing arts, have a history of collective bargaining by means of strong professional associations with sufficient power to force engagers to bargain with them. Ontario artists in different sectors have had varying success in collective bargaining with engagers.

Similarly, self-employed artists are not included under Ontario's Employment Standards Act, which guarantees minimum standards for employees with regard to wages, public holidays, leaves of absence, paid vacation, and overtime pay, among other standards.

Policy proposals

ACTRA has advocated for amendments to Ontario's Labour Relations Act that would grant unions representing self-employed artists rights comparable to those guaranteed to employees' unions. ACTRA has also advocated for the inclusion of self-employed artists under the Employment Standards Act.

¹ An exception applies for self-employed persons who are deemed to be dependent upon a single engager over a reasonable period of time. In this case, a self-employed person enjoys the same collective bargaining rights under the Ontario Labour Relations Act as an employee.

Part 2: Jurisdictional scan

Social insurance schemes

Germany: The Artists' Social Fund (Künstlersozialkasse)

In Germany, the Künstlersozialkasse (KSK) manages social insurance contributions for self-employed artists (in the areas of music, performing art or visual art including design) and journalists. Unlike other self-employed persons, members of the KSK are required to pay only the employee share (50%) of the mandatory social insurance contributions. The other half is paid partly by federal government subsidy (20%) and partly by fees (Künstlersozialabgabe) levied from organizations that regularly employ artists and/or journalists (30%). These contributions cover health insurance, retirement insurance, and long-term care insurance.

The Künstlersozialabgabe is levied from such organizations as a percentage (revised yearly by the Ministry of Labour) of the total remuneration paid in the calendar year for the services or goods (e.g. artworks) of artists or journalists. It is somewhat analogous to the regular social insurance contribution that would be made by an employer, although the employer contribution may be lower than it would be for an employee.

According to the KSK, one reason why the state chooses to support independent artists and journalists through this system is "because this occupational group is socially much less well protected than other self-employed persons." The other rationale for the system is cultural: "This is not only a socio-political, but also a cultural-political achievement. For with this institution of the KSK, the creative task of artists and publicists is recognized as important to society."

Although the social insurance system in Canada differs significantly from that of Germany, where health insurance is paid for not out of the general tax pool, but by employees and employers, a levy on organizations that employ artists on a freelance basis (and thus don't make any social insurance contributions to the artists they employ) could be implemented in Canada to cover the employer's part of mandatory CPP contributions (as the German system does for retirement insurance), or used to fund other forms of support for artists.

Austria: The Artists' Social Insurance Fund (Künstlersozialversicherungsfonds)

In Austria, self-employed artists are able to apply for grants that go directly toward their social insurance contributions (for health, accident, and retirement insurance) through the Künstlersozialversicherungsfonds (KSVF). The amount granted is based on income, and grants are awarded to all artists whose annual earnings from self-employed artistic work are within a certain range (€5,361.72—€29,042.65 in 2019) and who are determined by a panel to be artists

working on a freelance basis. Income averaging can be applied over three years in order to allow applicants to reach the minimum threshold of artistic income.

Through the KSVF, artists may also access an emergency support fund. The total volume of the fund is €500,000 per year, and individuals may access €5,000 of support funding per request by making an application, which is reviewed by an advisory board. This may take the form of a one-off payment or a recurring payment for a maximum of 12 months.

The KSVF is funded primarily by levies on commercial broadcasters, as well as on the import and sale of satellite receiving devices. The KSVF's emergency support fund resembles emergency funds managed by some Canadian artists' professional organizations, such as the AFC and CANVAS's Artist Relief Fund, except that it is administered by the state and funded through specific commercial levies.

France: Intermittent du spectacle

In France, a special social insurance scheme enables professional artists and technicians working within the performing arts, film, and audiovisual media sectors to access support intended to compensate for the intermittency of work inherent to these sectors. The scheme has its roots in a policy devised in the 1930s to attract technicians to the film industry who would otherwise work in other fields where work was more stable. It is similar in principle to unemployment insurance, but has different requirements.

The requirements differ slightly for artists and technicians, but in both cases the requirements for number of hours worked within a given period are lower than they are for regular unemployment insurance. The amount paid out is calculated according to the same principles as Employment Insurance in Canada, based on the amount earned and the hours worked within a given period.

Both employers and employees (workers in these sectors are typically contract employees, rather than freelancers) contribute to the fund. They are required to pay additional contributions on top of the regular unemployment insurance contributions.

Netherlands: Work and Income for Artists Act (Wet Werk en Inkomen Kunstenaars)

Between 2005 and 2012, under the Artists' Work and Income Scheme Act (Wet werk en inkomen kunstenaars or WWIK), professional artists in the Netherlands whose income was below the social assistance level were entitled to an income supplement. Essentially, this was a special form of social assistance designed specifically for artists that amounted to a limited form of basic income, as applicants were not required to look for work outside of their artistic practice while receiving the benefit. The benefit was designed to provide for an artist's costs of living while they developed their practice to a point where it could be self-sustaining.

An applicant was required to have been working as a professional artist for at least 12 months before applying. A special agency (Kunstenaaars & Co.) was set up to examine applicants in order to determine whether or not they could be considered professional artists. Applicants also had to prove that they had earned a minimum of €1,200 from their artistic work within the past 12 months. Applicants who had graduated from a recognized art school within the past 12 months were exempt from this requirement. Artists receiving income through the program were required to show an increase in their artistic income after every 12 months (for example, after the first 12 months, the minimum artistic income to qualify increased to €2,800).

The benefit could be received for a cumulative total of four years, which did not need to be consecutive but could be spaced out over 10 years. The amount paid was 70% of the standard social assistance rate. Recipients were allowed to earn 125% of the social assistance level, without a reduction in benefit. The program was cancelled in 2012, after which point artists could instead access social assistance available to other self-employed persons.

South Korea: Korean Artists Welfare Foundation

In 2012, South Korea passed the Artists Welfare Act, which led to the establishment of the Korean Artists Welfare Foundation. Similar to the Dutch social assistance system under WWIK, the foundation supports artists who earn an income below the minimum cost of living, thus establishing a place for artists among other vulnerable groups who receive special social benefits.

Short-term monthly benefits (3 to 8 months) in the form of an income supplement are provided to artists who qualify for assistance. Part of the aim of the foundation is to facilitate artists' access to social insurance programs that they are normally excluded from, including workplace accident, unemployment insurance and the national pension plan. To this end, the government pays a contribution of 50% of artists' social insurance costs (as would be paid by an employer) in certain cases.

New Zealand: Universal accident insurance

New Zealand is one example of a jurisdiction in which self-employed artists enjoy, by default, the same level of workplace injury insurance as employed workers. The Accident Compensation Corporation provides no-fault accident insurance to all people legally in New Zealand. The corporation is funded through levies on employees, employers, fuel, vehicle registration, and the general tax pool.

Tax exemptions

Ireland: Artists' Exemption

In Ireland, subject to certain conditions, individual income earned from the sale of artistic works is exempt from income tax up to a maximum of €50,000 per year. These earnings are still subject to a 5% social insurance contribution. In some cases, income from grants, awards, or prizes may be included in the exemption. In order to qualify, a determination has to be made (usually in collaboration with the Arts Council) that the artist's work is original, creative, and has cultural or artistic merit. In order to get a determination, an artist must submit a claim with samples of their work and testimonials.

The Irish revenue agency offers advance opinions on the determination to residents outside the EU or European Economic Area (EEA). The purpose of offering advance opinions is presumably to attract foreign artists to live and work in Ireland, consistent with the country's corporate tax policies, which serve to lure foreign corporations to the country in order to create jobs

Quebec: Tax deduction for copyright income

In Quebec, professional artists who earn less than \$60,000 from copyright income (including public lending rights) in a single fiscal year are entitled to deduct up to \$30,000 of that income from their total taxable income. The deduction was introduced in 1995.

Income averaging

Australia: Income averaging for special professionals

In Australia, individuals classified as "special professionals" (authors or inventors—including authors of various types of artworks—performing artists, production associates—those who make artistic contributions to a production—and sportspersons) are eligible for four-year income averaging.

United Kingdom: Income averaging for creators of literary or artistic works

In the United Kingdom, creators of literary or artistic works who earn income from the sale or collection of royalties from those works are eligible for two-year income averaging.

Quebec: Income averaging for artists

Quebec's tax law allows for a form of income averaging for professional artists, introduced in 2004. Artists (who fall under the definition of a professional artist according to one of the two

acts governing the professional status of artists) who purchase an annuity may deduct the amount of their annuity contribution from their income for that year. They are only taxed on the income when it is paid out from the annuity. Income can be spread out in this manner over up to seven years.

Copyright and royalties

Artist's Resale Right

In European Union member states, the Artist's Resale Right entitles creators of original works of art to a royalty payment each time one of their works is resold through an auction house or art market professional. The royalty rate is between 0.25% and 4%. The rate decreases with the increase in the sale price of the work. Royalties earned through the Artist's Resale Right are exempt from VAT. For the Artist's Resale Right to apply, the sale price of the work must be equal to or greater than €3,000; however, in some countries, the minimum is lower (for example, in the UK, the minimum is €1,000).

The Artist's Resale Right was legislated in the EU in 2001, but, in some European nations, artist's resale rights had already existed for a long time. France established a resale right for artists in 1920 (*droit de suite*), and in 1948 Norway legislated a fee of 5% on all sales of artworks over 2000 NOK, the proceeds of which went into grants and scholarships for artists through the Relief Fund for Visual Artists; this law is still in effect today. The 1948 Brussels Act of the Berne Convention for the Protection of Artistic and Literary Works, of which Canada is a party, contains an "optional obligation" of an artist's resale right, which only 80 of the 177 parties had implemented as of 2015.

Australia implemented the right in 2010, explicitly recognizing the positive effect that the right would have on the country's Indigenous artists. When a work of art is resold in Australia for over \$1,000 AUD, the artist is entitled to a 5% royalty payment. A study by the National Association for the Visual Arts (NAVA) found that, between 2010 and 2015, 65% of the artists who received royalties were Aboriginal or Torres Strait Islanders, and that they received 38% of the royalties generated. Moreover, of the 50 artists who received the most money from the royalty right, 22 were Aboriginal or Torres Strait Islanders.

Some of the world's largest art markets, including China, the United States, and Switzerland, however, have not codified the right in law. This creates issues with compliance, as regardless of where a work of art is produced, the artist is only entitled to a royalty when their work is resold in a country that legally recognizes the artist's resale right. A study by the World Intellectual Property Organization (WIPO) released in 2017 found that the introduction of the Artist's Resale Right in the UK art market (the third largest art market in the world) had no discernible effect on market activity (i.e. did not decrease sales).

Alternative granting models

Nordic countries: Working grants

Since the 1960s, the Nordic countries (Finland, Sweden, Norway, Denmark, and Iceland) have provided support to their professional artists through a common model of no-strings-attached working grants, paid monthly in the form of a stipend, which may be taxed or untaxed, and may include social insurance contributions. The length for which working grants are awarded generally ranges from 6 months to 10 years, depending on how established the artist's practice is, and also on judgments of quality. The amount of the grant ranges from about €9,500 (in Sweden) to about €31,380 (in Iceland) per year, although in Denmark there is not a set amount. Grant recipients are generally required to take leave of any regular employment while they are receiving the grant, with exceptions in the case of 6-month grants. The number of grants awarded also ranges. Although information on the number of grants was not accessible for all countries, as two examples, Iceland allocates funding for the payment of 1,600 "artist's salaries" per month, and, in 2017, Norway awarded 894 working grants for artists.

Working grants are generally form part of a larger set of grants for artists, including project and travel grants. Budgets for all countries were not accessible, but, in the case of Finland, working grants made up the largest part of the budget (more than a third) for national support for artists. In some Nordic countries, there are working grants specifically for senior artists. The region of Flanders in Belgium also has a similar granting model

Germany: Grant applications and social assistance

In Germany, for purposes of determining a person's eligibility for social assistance, artist grant applications are considered equivalent to job applications, if the applicant is a professional artist. The definition includes any artist who graduated from an accredited art school.

Collective bargaining

Quebec: Sectoral bargaining

Quebec passed two acts in 1988 regulating artistic professions (*An Act Respecting the Professional Status and Conditions of Engagement of Performing, Recording and Film Artists* and *An Act Respecting the Professional Status of Artists in the Visual Arts and Crafts and Literature and their Contracts with Promoters*). These set out procedures for the recognition of sectoral artists' associations, which represent all self-employed artists working in a given sector and can bargain collectively with engagers on their behalf. The acts also set out regulations for contracts between artists and engagers.

Co-operatives

Société mutuelle pour artistes (SMart)

SMart is member-owned co-operative that takes on the role of employer for self-employed workers, acting as an intermediary between workers and clients, as well as providing other services and benefits. The organization was founded in Belgium in 1998, and now operates also in Germany, Austria, Spain, France, Hungary, Italy, the Netherlands, and Sweden. SMart was initially designed for artists, but membership expanded to include self-employed persons generally.

SMart works differently depending on the labour laws and social insurance systems in the country it is operating. The services offered may also differ due to the decentralized, democratic governance model of the organization.

Generally, when a user works through SMart, the organization provides administrative services, including invoicing, debt collection, and bookkeeping, as well as legal advice and access to group insurance plans. As the employer, it remits mandatory social insurance contributions.

When users work through SMart, the organization guarantees payment for work within a week of its completion, regardless of whether the client has paid or not. In some places, SMart also provides co-working spaces and information and training sessions (for example, on contract negotiation, client communications, and networking).

The cost of using SMart varies by country, but is usually about 7% of the contract sum, and may include a small annual fee. This pays for SMart's operations and contributes to a contingency fund to cover late payments and defaults.

SMart may also offer purely administrative services without setting up an employment relationship with a user. In this case, the user pays an hourly rate for support on project management, bookkeeping, and documentation, as well as legal advice.

Wales: Oren Actors Management Co-Operative

Oren Actors Management was founded in 1985 as a co-operative actors' agency. The agency allows actors who are members to work as agents for other members when they are between contracts. They perform all the regular duties of an agent, and collect a commission on contracts that they facilitate.

Mutual assurance

The Artist Pension Trust

The Artist Pension Trust (APT) is a for-profit company that invests in contemporary art, and which also acts as a mutual assurance scheme for artists. The stated objective of the trust is to

“bring financial security and international exposure to a select group of emerging and established artists around the world.” APT owns the world’s largest collection of contemporary art and regularly loans out work to major institutions.

Artists are invited to join the fund based on selection by the company’s curatorial team. If an artist chooses to participate, they deposit artworks into the trust, which stores them for later sale. When a work is sold, 32% of the proceeds are distributed among artists who are members of the trust, 40% goes to the artist, and the remaining 28% goes toward operational costs and provides a return to the trust’s financial investors.

Artists are selected to join the fund on the basis of a prediction that the value of their work will increase. In some cases, the value of some artists’ work consigned to the trust increases drastically, while the value of other artists’ work increases more modestly in value, or decreases. The latter artists still benefit from the fund due to payouts from the trust from the sale of more commercially successful artists’ work.

Although APT is a for-profit company, and ultimately primarily an investment vehicle (that it functions as a mutual assurance scheme could be considered incidental to the profit motive), adapting the mutual assurance scheme to a co-operative ownership model could provide comparable benefit to members. There have been numerous controversies surrounding the management of the fund due to perceived conflicts between the interests of the artists and the interests of the company and its investors.

Netherlands: Broodfonds (Bread funds)

Bread funds are a type of mutual assurance organization designed to enable self-employed people to receive sick pay when they are unable to work due to illness. The first bread fund was established in 2006. Members have individual accounts which they pay into based on the amount that they want to receive when they are sick and unable to work (as an example, a member who contributes €33,75 per month would receive €750 if they were sick for one month). There is also a group account, used to fund overhead costs, into which members pay a small amount (€10) each month, as well as a fee upon joining. When a member is sick, payments are made out of the individual accounts of all of the other members. An individual bread fund has a maximum of 50 members, and new members can join only by invitation.

Savings incentives

Canada Saver’s Credit

The Canada Saver’s Credit is a policy proposal made by the Common Good Retirement Initiative and based on the Saver’s Credit introduced in the United States in 2001. The proposal presents evidence that the current savings incentives embedded in Canada’s tax system mainly benefit middle- and upper-income Canadians, and that lower- and middle-income Canadians are not being sufficiently enabled to save. The Canada Saver’s Credit would

encourage saving by matching contributions to Tax Free Savings Accounts in the form of refundable tax credits, deposited directly to the account, up to \$1,000 annually. 100% matching would be available to those with family net income of around \$36,000, with the proportion decreasing gradually with higher incomes.

Conclusion

The majority of artists in Ontario are counted among the ranks of the self-employed. The rapid increase in self-employed workers generally is an urgent problem for government to address, given that the existing social insurance, employment standards, and collective bargaining laws are largely based on the assumption of a standard employer-employee relationship. For artists, a group of workers whose average incomes are low, this exclusion from the standards, protections, assurances and rights afforded to those in standard employment has a significant impact, greater than for self-employed workers in other sectors who are better compensated. Nonetheless, one of the interesting points that our inter-jurisdictional research brought up was that there is a strong potential for cross-sectoral co-operation in securing a better position for self-employed workers within a new economy that increasingly counts on them. Notable here is the grouping together of artists with journalists in the German social insurance system, as well as SMart, which was first designed for artists and later adapted to work for all self-employed workers.

Most of the legislative measures from other jurisdictions contain some form of professional regulation—some way of determining who can be counted as an artist (or at least as a professional artist), and who, therefore, is entitled to claim the rights of an artist. Status of the artist legislation from other Canadian jurisdictions (Quebec, Newfoundland, Nova Scotia) sets out criteria for determining whether or not a person is a professional artist, such as peer recognition, income derived from their work, representation by a gallery or agent, and so on. During the drafting of the federal Status of the Artist Act, a Canadian Artist Code was also drafted, which set out criteria for the recognition of professional artists; however, the code was not incorporated into the law and has no legal force. Criteria like these, which Ontario left out of its status of the artist legislation, are prerequisite to any policy to support professional artists, particularly in an environment of limited financial resources and a growing artist population.

Given the 27-year gap between the release of the UNESCO recommendation and Ontario's legislative response, we can expect legislative progress to be slow (Quebec, by comparison, passed legislation regulating artistic professions and contract relationships between artists and producers in 1988). Therefore, some combination of advocacy and direct, co-operative efforts, expanding on those already in place, will likely be required. These could include new initiatives and strategies on the part of existing trade unions, or the establishment of new co-operative organizations with the objective of providing financial security to artists. Our research turned up some compelling examples of strategies across the board.

Part 3: Case studies

Künstlersozialversicherungsgesetz (“Artists Social Insurance Act”)

Overview

The Künstlersozialversicherungsgesetz (“Artists Social Insurance Act” or KSVG) was passed by the German federal parliament in July 1981. The Act changed the rights and obligations of self-employed, professional artists and journalists with respect to their contributions to the social insurance system, effectively reducing the amount that they are required to pay by 50%. In order to fund the other 50%, the Act introduced a levy (Künstlersozialabgabe or KSA) on organizations that employ artists and journalists, as well as a subsidy from the federal budget. In effect, the Act makes the mandatory social insurance contributions of artists and journalists equivalent to those of an employee (whose employer would pay the other 50%).

The Künstlersozialkasse (“Artists Social Welfare Fund” or KSK) was created as the statutory body charged with administering the Act. Artists and journalists who meet the criteria outlined in the Act are required to register with the KSK. The KSK collects insurance contributions from the three sources (the insured person, the KSA, and the federal subsidy) and forwards them to insurance providers.

Background on the German social insurance system

In Germany, the social insurance system is generally funded through direct, mandatory contributions, split evenly between employer and employee. The premiums paid are relative to the individual’s earnings. Through this, employees are covered under health, unemployment, retirement, and long-term care insurance plans. They are also covered under accident insurance, which is paid for solely by the employer, as in Ontario.

Coverage under the German public health insurance system is not automatic as it is in Ontario, and different rules apply to people of different employment status. Most employees are registered through their employer with a public health insurance provider. High-earning employees may opt out of the public health and long-term care insurance system and purchase private insurance instead. Private health insurance rates are based on individual risk assessment (which means rates can be substantially higher or lower depending on risk factors like age or pre-existing conditions), whereas public health insurance rates are uniform.

Self-employed persons (except for self-employed artists and journalists under the KSVG) have the choice of enrolling in a public or private health insurance plan. In either case, they must pay the full premium for health insurance, rather than the 50% that an employee pays out of their wage. Retirement insurance functions in the same way.

Although it is mandatory for self-employed people in Germany to make social security contributions, it is not possible for the government to enforce payment and ensure that all workers are insured. This means that many go uninsured, particularly self-employed people who do not have sufficient incomes to afford to pay for insurance.

Because all of the social insurance programs in Germany are funded directly by worker and employer contributions rather than from the general tax pool (as is largely the case for Ontario's health insurance system), the amount of money that most individuals pay to the government each year is much more heavily weighted toward explicit social insurance contributions than general income tax. For example, an employee making €30,000 in gross income annually would pay about €3,700 in income tax and about €6,000 in social insurance contributions. Calculating the tax burden of a self-employed person is more complex; however, the above should illustrate the economic impact of any policy that affects the amount of social insurance contributions that a person is required to make.

How was it established?

The impetus for the KSVG was the finding, through research studies carried out during the 1970s, that self-employed artists and journalists were more commonly uninsured against illness and old age than the general population in Germany. This was believed to be due to their peculiar, unfavourable economic position, and resulting inability to afford to pay into the social insurance system. The common situation among this group of workers of low income and lack of insurance created both a precarious situation for them and a burden on the social assistance system, which was faced with filling in the gaps. The solution that was proposed was to create an incentive for these workers to become insured by setting up a system that would reduce their mandatory contributions to health and pension insurance to an affordable rate, roughly equal to those of a regular employee.

Two studies which dealt with the economic and social situation of artistic professionals provided data to back up the need for a special solution for self-employed artists: the federal government-commissioned "Künstlerbericht," and a report by the independent research group Institut für Projektstudien titled the "Künstler-Report," both published in 1975. These were preceded by other research studies by the Institut für Projektstudien, including the 1972 "Autoren-Report" and the 1974 "Künstler-Enquete," which helped to identify the issue and build an evidence base as well as political momentum toward finding a solution. The first draft of the Act was part of a catalog of proposed measures written in 1976 on the improvement of the professional and social position of artists and journalists². It went through several versions before finally being passed in 1981.

At the time that the issue was being discussed within the government, the social and economic situation of cultural workers was receiving significant attention, both in Europe and

² *Maßnahmenkatalogs der Bundesregierung zur Verbesserung der beruflichen und sozialen Lage der Künstler und Publizisten*. 1976.

internationally: UNESCO published a report in 1977 on problems of employment and the working and living conditions of the world's artists, which would inform its 1980 recommendation on the status of the artist³; the European Council released a recommendation in 1979 concerning social protections for intellectual and artistic workers⁴; and in 1977 the European Commission published a document outlining its initiative for the cultural sector, which had the aim of safeguarding the socio-economic fabric of persons and organizations that produce cultural goods and cultural achievements⁵. Hence, at the time, developing such a policy was seen as relevant and urgent.

The period during which the Act was developed, up to its coming into force in 1983, corresponds with a period during which the centre-left Social Democratic Party (SPD) was the dominant party in the German federal parliament (Bundestag). At the time the bill was introduced, the SPD had a coalition government with the centrist, classical liberal Free Democratic Party (FDP), which also backed the bill. From 1983 to the present, the centre-right, neoliberal-tending Christian Democratic Union (CDU) has been the most powerful party in the Bundestag, except for a brief resurgence of the SPD in the late 90s and early 2000s. Despite its differing political leaning, the CDU has not strongly opposed the policy, and indeed around the time the law was drafted, the CDU was also developing its own policies for the improvement of social and economic conditions for artists. More recently, the SPD and CDU have worked together as coalition partners to update the policy and ensure its efficiency.

What were the arguments for and against?

A key argument during the developmental phase of the KSVG was that the economic relationship between artists and journalists, on the one hand, and “marketers” (such as galleries, promoters, producers, and publishers), on the other, is a *dependent* one, similar to the dependent relation between employee and employer. Though they may be self-employed, artists and journalists are not economically independent (as other self-employed persons, like shop owners or architects, are), but rely on these marketers, as a go-between to facilitate their access to the market in order to make a living. Therefore, it was argued, the obligation falls on the marketer to contribute to the social insurance system on behalf of the artists and journalists they employ, as they would be obliged to in a standard employer–employee relationship.

In line with this reasoning, the original version of the Act, submitted in 1976, stipulated that “marketers” were to pay for the entire employer's share (50%) of artists' and journalists' social insurance contributions. This was met with considerable resistance from the marketers, and a compromise was found, which resulted in the current arrangement: 30% from marketers and 20% from federal funds. When the bill was revised, the reason given for the new arrangement

³ *The Status of the Artist: General Review of Problems of Employment and Conditions of Work and Life*, OIT-UNESCO-RECA/11. 1977.

⁴ *Recommandation 857: Protection sociale des travailleurs intellectuels et des profession libérales et artistiques (indépendants et salariés)*. 1979.

⁵ *Aktion der Gemeinschaft in kulturellen Bereich*, KOM(77) 560 endg. 1978.

was that artists and journalists do not always work through a middleman but sometimes provide services or sell their work directly. Funds from a levy on fees paid by marketers could not be expected to cover social insurance contributions on this direct income, so those funds would have to come from a different source.

Who is it intended to serve?

The Act applies to anyone who *regularly* and *gainfully* works as a self-employed artist or journalist (“Publizist”)⁶. It defines an artist as someone who creates or teaches music, performance, or visual art. It defines a journalist as someone who practices journalism as a writer, journalist or otherwise, or who teaches journalism.

In practice, the policy benefits a larger group of professionals than these definitions may seem to imply. Since the definitions of artist and journalist are not elaborated upon in the Act (much less art or journalism themselves), it has been necessary for the KSK to make decisions about who is included on a case-by-case basis. The result has been a fairly liberal interpretation. For example, a web designer (along with most other professionals in the field of design) is considered to be a visual artist in the sense of the Act. Some professions that combine technical and artistic functions, or are situated in a grey area in between, have also been included, such as editors (both of texts and of audiovisual media) and translators.

The Act excludes from the KSK those who employ more than one person in the course of their artistic or journalistic activity, with an exception for apprenticeships. Thus, it is meant to benefit independent artistic and journalistic workers, rather than owners of small businesses.

Who does it benefit?

Those classified under the “visual arts” subsector (which includes designers as well as visual artists) have consistently made up the largest share of those insured through the KSK (about 35% as of 2019). Music is the second most represented sub-sector (about 28%), followed by the written word (22%) and performing arts (15%). Men (52%) are slightly better represented than women (48%). The majority of those insured through the KSK are over 50, and nearly all are over 30. The largest age group is 50–60 (33%), followed by 40–50 (26%), over 60 (22%) and 30–40 (20%). Only 3% of members are under 30.

How is it funded?

⁶ The word used in the Act is “Publizist,” which does not have a direct English translation but refers to those who comment on current affairs to the public. It includes journalists, but isn’t limited to journalism, as it may include lecturers or public speakers, writers of belles-lettres, and others. In practice, this category has been stretched to include most professional writers (who wouldn’t be included under the definition of “artist” in the Act). However, for the sake of brevity, “journalist” will be used as a translation, as it is the closest corresponding English word to “Publizist.”

There are three sources of funding the social insurance of KSK members: a 50% contribution from the insured members themselves; a levy (Künstlersozialabgabe or KSA) on organizations that make regular use of the work of self-employed artists and journalists covering 30%; and a subsidy from the federal government covering the other 20%. The federal government pays for the operational costs of the KSK.

As of 2019, the rate of the KSA is 4.2%. This amount is levied on all fees paid for artistic or journalistic works or services by companies that fall under the criteria outlined in the Act. The rate is set by the KSK and revised yearly based on the ratio of (a) KSA contributions collected to (b) the total reported income of KSK members for the previous year.

From 1989 until the year 2000, the rate was calculated separately for each sub-sector (e.g. fine arts, performing arts, written word), on the basis that different sub-sectors have different rates of “self-marketing” (direct income without the use of an intermediary who would pay the levy), but since 2000 the rate has been equal for all sub-sectors.

The KSA is not levied on royalties derived from copyright.

The Act lists some of the types of organizations that are required to pay the KSA, including:

- Publishers and press agencies
- Theatres, orchestras, choirs
- Promoters of artistic or journalistic performances (e.g. concert promoters, performance venues)
- Broadcasting and television companies
- Recorded audiovisual media production companies
- Galleries and art dealers
- Advertising and public relations agencies
- Variety and circus companies
- Museums
- Education and training institutions

It also sets criteria for determining whether organizations *not* listed above are liable to pay the levy. An organization is generally liable when it uses artistic or journalistic works or services with the intention of generating income (but not necessarily profit) from them. There is no exception in this respect for non-profit organizations. There are also minimum thresholds for liability: if an organization doesn't pay more than €450 in fees for artistic or journalistic works or services, they are not liable to pay the levy.

For artists and journalists, the minimum annual income threshold for registration with the KSK is €3,900. There is an exception to the minimum income requirement for those beginning their careers (during the first three years, the minimum does not apply). There is also some flexibility in order to take account of fluctuating incomes (a person registered with the KSK is allowed to

stay registered as long as their annual income does not go below the minimum more than twice within a six-year period.

Registering with the KSK is not a matter of opting in—it is obligatory for any artist or journalist who expects to earn, in a given year, above the minimum threshold from their artistic or journalistic work. Opting out is only possible if an individual shows proof of coverage under a private insurance plan. However, as mentioned, it is difficult for the government to enforce mandatory social insurance contribution in the case of self-employed workers, so it is still possible (although against the law) to be a professional artist or journalist and not be insured.

Challenges

The KSVG has undergone several revisions, which have included measures to:

- Reduce the administrative burden faced by the KSK, as well as by KSA-liable organizations
- Set fair rates for the KSA
- Better demarcate which organizations are liable to pay the levy and which are not
- Ensure compliance on the part of insured persons and liable organizations
- Ensure that insured persons do not lose their coverage when their income fluctuates below the minimum

Compliance has been the main focus of the most recent reforms, as it is recognized as the main factor underpinning the success or failure of the policy. The more organizations comply with the law and pay the levy, the lower the levy rate can be set. This results in a more equitable situation for the organizations that do pay. However, enforcing compliance implies a greater administrative burden. A partial solution to this has been to unload some of the burden onto other government agencies that are already doing compliance checks for social insurance contributions (in particular, the federal retirement insurance agency).

Other challenges have resulted from the major changes in the cultural labour market that have taken place since 1983. Between 1992 and 2017, the total number of persons insured through the KSK increased from 47,713 to 186,949 (about 2.2 times).

Politically, the KSVG has received consistent support from the major parties in the federal government. The CDU and SPD have co-operated on several reforms, while keeping the spirit of the original policy intact. Despite the solid support within the federal parliament, there have been political challenges to the policy in its recent history: In 2008, 7 of Germany's 16 federal states recommended either an abolition or "business-friendly" reform of the KSVG. But the recommendation was strongly opposed by even the neoliberal-leaning CDU, as well as the Greens and SPD. The artists' social insurance system is at this point deeply entrenched and largely accepted by artists and "marketers" alike.

Resale Royalty Scheme in Australia

Overview

The Resale Royalty Scheme is a policy that was implemented in Australia in June 2010, following the coming into force of the Resale Royalty Right for Visual Artists Act, passed in 2009. It entitles authors of works of visual art to a royalty when their work is resold if:

- The change of ownership is in the form of a commercial resale involving an art market professional (i.e. not a private transaction but through an intermediary)
- The resale price is equal or greater than \$1,000 AUD, including sales tax
- The work's first change of ownership took place after the law came into force (June 8, 2010)
- The author is an Australian citizen, permanent resident, or citizen of a country with a mutual resale rights agreement with Australia
- The author is living or became deceased within 70 years of the sale

The royalty rate is a flat 5% of the resale price, including sales tax. From this amount, 15% is subtracted to cover administrative costs. The rate is consistent (does not vary based on the total resale price, as in other resale royalty schemes)⁷ and the royalty amount has no limit. The responsibility to pay the royalty is shared between the seller, buyer, and art market professional (dealer). An appointed agency (Copyright Agency Limited) is charged with collecting and distributing the royalties.

Background

The concept of an artist's right to an economic interest in their work, extending beyond its initial sale to include successive resales, has a history dating back at least as early as 1893. It was first legislated in France, where it is known as the *droit de suite*, in 1920. Other jurisdictions were slow to recognize the right, although it was discussed internationally by the members of the Berne Convention as early as 1928 and acknowledge in principle in 1948. Despite this, many signatories to the Berne Convention have not legislated the right, although a significant number have. The European Union passed a directive to all member states to create legislation guaranteeing an artist's resale right, which has since been harmonized across all EU member states. Other states outside of the EU have also recognized the right and created legislation to guarantee it. The right is legislated differently in different jurisdictions, but generally takes the form of a royalty paid to the artist (or, in some cases, to a collective fund

⁷ Such as the Artists' Resale Right which exists in the United Kingdom and other European Union member states. The Australian Resale Royalty Scheme has been selected for study here due to points of jurisdictional comparability between Canada and Australia, particularly geographical and population size and the presence of significant populations of Indigenous artists. For sources of information on artists' resale rights from an international perspective, see Appendix I.

benefitting artists in general or the art sector) on the resale of works of visual art that they create.

Art plays a central role in Australian Indigenous societies, and Indigenous art makes up a significant share of the Australian art market. Australia's most recent census in 2016 indicated that 3.3% of the population is Indigenous. Auction sales figures from the same year show that, of sales of artworks by Australian artists, 8.7% of the total value was from sales of works by Indigenous artists⁸. The share of the Australian art market accounted for by Indigenous art has grown significantly over the last few decades, as has the overall size of the art market.

How was it established?

The introduction of an artist's resale royalty had been discussed in Australia for over a decade before formal legislative discussions began. In 1989, the Australian Copyright Council published a report on the concept and its implications⁹. The report recommended that informed public debate be stimulated to confirm public support for the right in principle, and that consideration be given as to the best way to introduce a resale royalty scheme. Following this, a report prepared for the Aboriginal and Torres Strait Islander Commission and Australian Institute of Aboriginal and Torres Strait Islander Studies in 1998 endorsed the principle of a resale royalty scheme, based on consultations with Indigenous stakeholders and the national visual arts copyright collection society, Viscopy¹⁰.

In 2002, the federal government, ruled by a coalition between the centre-right Liberal Party and the agrarian National Party, commissioned a report on the contemporary visual arts and craft sector in Australia (known as the Myer Report after its author, Rupert Myer). The report recommended the introduction of a resale royalty arrangement, noting that, of the submissions to the inquiry that addressed the possibility of introducing an artist's resale right, most were in favour of it. It also cited a survey of the Indigenous arts sector, conducted on behalf of the Australia Council for the Arts, that showed majority support for the introduction of a resale royalty scheme, despite some respondents expressing concerns about possible negative impacts. Most supporters believed that national legislation was the best way to implement a resale royalty scheme, an opinion which was shared by Myer. The report did not predict an appreciable impact on the art market, although it noted various risks and the difficulty of predicting what the impact would be. The report discussed various considerations to be taken into account in drafting legislation, and recommended that a working group be established to analyse the options further.

⁸ <https://www.aasd.com.au/index.cfm/artist-nationality-totals/>. Accessed August 16, 2019.

⁹ *Droit de Suite: The Art Resale Royalty and Its Implications for Australia*. Australian Copyright Council, 1989.

¹⁰ *Our Culture : Our Future—Report on Australian Indigenous Cultural and Intellectual Property*. Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission, 1998.

Following the recommendations of the Myer Report, in 2003, the Department of Communications, Information Technology and the Arts released a discussion paper outlining options for a resale royalty scheme and requesting submissions from stakeholders on the subject. Submissions from the visual arts sector generally supported the introduction of a legislated resale royalty, and those from auction houses and galleries generally opposed it. Some galleries supported a model of voluntary industry self-regulation (i.e. a code of practice) that would include an artist's resale royalty, but this concept was not generally supported.

However, by 2006, the Attorney General and the Minister for the Arts and Sport announced that the government had decided against introducing an artist's resale right, arguing that resale royalty schemes “bring most benefit to successful late career artists and the estates of deceased artists” and “would bring little advantage to the majority of Australian artists whose works rarely reaches the secondary art market and would also adversely affect commercial galleries, art dealers, auction houses and investors.”¹¹ They also claimed that research did not suggest that the right would benefit Indigenous artists in particular.

The 2007 federal election shifted power to the centre-left Labour Party, which, fulfilling its election campaign commitment, reversed the decision and introduced the Resale Royalty Right for Visual Artists Bill in 2008. A House of Representatives Standing Committee published a report in February 2009 with several recommendations for revisions, particularly to accommodate Indigenous principles of communal ownership and succession and the business models of Indigenous Art Centres, but no measures were included to specifically address the specific sociocultural and business characteristics of Indigenous communities. The bill was passed without substantial changes, with a commitment to review the scheme within five years.

Who is it intended to serve?

The policy is intended to benefit visual artists by recognizing their inalienable right to a perpetual economic interest in the value of their work, and setting up a system to collect and distribute what the policymakers deem to be a fair share of that value when the work changes hands on the market. Although the potential impacts of the right on Indigenous artists and the Indigenous art market were a primary point of consideration throughout the history of the policy up to the passing of the Act, the Act does not include any special provisions for Indigenous artists and is not explicitly intended to benefit Indigenous artists in particular, nor is it intended to benefit artists of any particular income level.

How is it funded?

The collection and distribution of royalties is funded by a combination of government funding and a 15% deduction from each royalty payment by the collecting agency as an administration

¹¹ http://minister.dcita.gov.au/kemp/media/media_releases/new_support_for_australias_visual_artists. Archived June 14, 2006. Accessed via archive.org.

fee. The fee was initially set at 10% and was increased to 15% in 2015. In 2013, the average administrative cost of collecting and distributing a single royalty payment was estimated at \$30, not including non-recurrent set-up costs.

What were the arguments for and against?

The main arguments in favour of the policy were based either on (1) the assertion of an inherent intellectual property right or (2) the assumption of a financial benefit to artists struggling to make a living, particularly Indigenous artists. Arguments against the policy were typically based on either (1) belief that the policy may benefit some established artists or their estates, but was not likely to bring benefit to lower-income artists or (2) belief that negative market impacts would outweigh the financial benefit of the royalty to artists altogether.

The existence of the intellectual property right itself was not a major point of contention. Arguments for the existence of the right were most often based on comparison between the rights of artists and those of other intellectual property rights holders, such as authors of books and composers of music, whose works are not “limited” and who are therefore able to maintain an economic interest in their work through the collection of royalties when the work is re-used or re-produced. Proponents make the analogy between resale and reproduction, and assert the right in order to redress the imbalance of rights between different types of cultural producers. The lower incomes of visual artists compared to other types of artists are seen as evidence of an imbalance in economic position that can be at least partially rectified by recognizing visual artists’ resale rights.

Has the policy been effective?

In 2013, the Office of the Arts announced a post-implementation review of the Act and its implementation. The government released a discussion paper and requested submissions from stakeholders with a closing date in July of the same year. The review was never published; however, the submissions to the review, from 74 organizations and individuals, are publicly available. Given that the review was initiated only five years after implementation, while the average resale occurs 20 years after a work’s creation, the data that were available at the time provide a limited perspective on the effectiveness of the policy. Thus, submissions to the review are largely based on anecdotal information representing the experiences of a particular individual or stakeholder group. This is acknowledged by the National Association for the Visual Arts in its submission to the review.

Overall, the positions of the various groups of stakeholders had not significantly changed since before implementation, with the perceptions of its consequences generally matching each group’s expectations. Increased administrative burdens placed financial pressure on resellers, while artists were generally appreciative of the recognition of the right and the royalties they had received. A plethora of reforms were suggested to make the scheme fairer and more

efficient, to a regrettable lack of response from the government. Some of these will be discussed in the next section of this study.

Currently, Copyright Agency, which collects and distributes the royalties, reports that, from the scheme's initial implementation in June 2010 until March 31, 2019, more than \$7 million in royalties have been generated¹² and distributed to more than 1,800 artists from more than 19,000 resales. Most of the royalties collected were between \$50 and \$500 (i.e. for works that sold for between \$1,000 and \$10,000). More than 63% of the artists who received royalties are Indigenous, and these artists have received 38% of the total royalties. Moreover, of the 50 artists who have received the most royalties, 22 are Indigenous. Accordingly, the majority of the royalties are going to a minority of non-Indigenous artists.

The exclusion of the first sale after the law's coming into force in 2010, regardless of whether or not it is a primary or secondary sale, has meant that many secondary sales have not had royalties collected on them. Based on figures from Copyright Agency's 2018 annual report, only 25% of secondary sales over \$1,000 between 2010 and 2018 were subject to a royalty. The rate at which royalties are collected can be expected to increase significantly once those works initially excluded are resold again.

While it is difficult to assess the specific impact of the resale right on the art market due to its general volatility and the number of factors involved, auction sales figures do not show an overall decline since 2009. Total sales at auction have consistently surpassed the 2009 level in each subsequent year to date. In 2017, total sales were at their highest since 2007, when they reached an all-time peak before the 2008 financial crisis.¹³ In the same year Australia broke into the top 10 national contemporary art markets for the first time, based on auction sales figures.¹⁴ While auction sales do not provide a full picture of the national art market, nor provide a reliable indication of the effect of the resale right scheme, they do show that complaints from art market professionals of the policy's disastrous economic impact may be exaggerated. The brief interval between the 2008 financial crisis and the introduction of the policy has also made it difficult to distinguish the respective effects of each event on the market.

How could it be improved?

As mentioned above, the government solicited feedback on the policy from stakeholders in 2013, and received a large number of recommendations.

One issue that the policy reportedly posed for the Indigenous art market was its incompatibility with the way in which Indigenous artworks are commonly bought and sold on the primary market. The initial transfer of the work from the creator to the dealer (which is in some cases a

¹² It is unclear whether or not this amount includes the 10% administrative fee retained by Copyright Agency.

¹³ <https://www.aasd.com.au/index.cfm/artist-nationality-totals/>. Accessed August 16, 2019.

¹⁴ <https://www.artprice.com/artprice-reports/the-contemporary-art-market-report-2017/renewed-growth>. Accessed August 16, 2019.

private, non-Indigenous owned company or individual, and in some cases an Indigenous-owned art centre) usually takes the form of an upfront sale, which would be considered the primary sale under the law. Then, when the dealer sells the work to a client (which could be seen as analogous to a gallerist selling a work consigned to them by an artist), the sale is considered a resale under the law, and thus may be subject to a royalty payment to the artist, where in the case of a typical primary sale by a gallerist it would not. This arguably puts Indigenous artists at a disadvantage on the market. While the scheme may be designed so that the dealer is prevented from making an unfair profit on the work (such as selling a work purchased for \$50 from the artist for \$5000 on the market), such dishonest dealers would be unlikely to report the sale anyway. The Australia Council and others recommended adapting the law to account for business models particular to the Indigenous art market.

Sotheby's, the largest art auction house in Australia, recommended that the royalty be changed from a rate charged on the sale price of artworks to a rate charged on their marginal increase in value, which would thus not be charged when a work is sold at a lower value than the previous sale. This model does not seem to have been seriously discussed before the passing of the Act, but may result in a royalty that relates more directly to the value "created" by the artist. Sotheby's cites an example of a work that sold in 2007 for \$1.25 million, again in 2011 for \$1.2 million, and again in 2013 for \$960 thousand. Were the resale royalty applicable on all three sales, the artist would receive a royalty of 5% minus administrative fees on each sale (totalling \$153,450), despite each seller taking a loss on the sale. Not only would the artist be receiving large royalties despite the work decreasing in value, but the fact that the work changed hands three times within six years arguably does not correspond to any measure of value created by the artist. Sotheby's also recommended a royalty cap, and the limitation of the copyright to the life of the artist.

The threshold of \$1,000 was addressed by numerous respondents, some suggesting a lower threshold so that more artists would benefit, and some suggesting a higher threshold to reduce administrative burdens.

Société mutuelle pour artistes (SMart)

Overview

Société mutuelle pour artistes (SMart) is a co-operative organization, originally founded in Belgium in 1998, which provides a variety of services to freelance workers. As is still reflected in its full name, SMart was originally formed to provide services to artists, although it is now open to freelance workers of all professions. The organization was founded in order to provide a solution to two problems faced by self-employed artists. The first issue was that artists working on a freelance basis often worked “under the table,” because there was not significant economic incentive to declare their income to the social insurance authority. This left them in a situation of reduced social security, as well as illegality. The second issue was that freelance artists, as individual owner-operators, were often faced with the double burden of performing their professional services and handling all of the (unpaid) administrative work that goes along with it, including contract management and enforcement.

Primarily, SMart functions an intermediary between freelance workers and their clients, allowing freelancers to work within the legal framework of standard employment, with SMart taking on the role of employer. To achieve this, each time a freelancer negotiates the provision of services to a client, SMart creates two contracts: an employment contract with the freelancer, and a services contract with the client. SMart manages the service contracts, including collection of payments, thus shifting the administrative burden from the individual freelancer to the organization. Thus, all work that takes place through SMart is “above board,” and freelancers working through the organization are integrated into the social insurance system, with SMart making the appropriate payroll deductions and forwarding them to the social insurance authority. Its operations are funded by a percentage charged on revenue from all contracts that it administers.

While contract management is its core service, SMart also provides an array of other services, such as providing workspace, training and project funding, as well as conducting research and advocating on behalf of its users. SMart has since established offices in other European countries, beginning with France in 2009, with services adapted to local legal structures and user needs.¹⁵

Evolution

SMart’s organizational structure has evolved significantly since its inception. The organization has gone through three major phases: initially a non-profit association, after expanding its services and scaling up significantly, a chartered private foundation (SmartBE) was created in 2008 to oversee the organization’s operations, different aspects of which were delegated to

¹⁵ Jurisdictionally specific information in this study, such as services provided and fees, refer to SMart Belgium, as it is the jurisdiction where SMart is most established.

several distinct legal entities. The structural change was made to ensure transparency and to safeguard the social mission of the organization. The foundation was to provide financial oversight and develop the service delivery model, while ensuring all activities were within the its mandate. At this time, the organization opened up its services to self-employed workers from outside the artistic professions (services were restricted again in 2012, before opening up again in 2016).

While the growth of the organization allowed for a significant expansion of services, the organizational model, which came to resemble a private corporation with subsidiaries (albeit with a social mandate rather than fiscal responsibility to shareholders) caused some to question whether the organization had strayed too far from its roots as a mutualist association of artists. The governance model in particular (based on a board of directors, with seats divided equally between the foundation and the various branches, plus the two founders as statutory directors) placed significant distance between members and the management of the organization, with members coming to resemble customers rather than stakeholders.

At the 2014 general assembly, members voted to restructure the organization into a cooperative. Following the decision, a participatory planning process (“SMart in Progress”) set out to determine, through consultation with members, what the economic model of the organization should be, what services it should provide, what its audiences should be (“for whom and with whom?”), and how it should be governed. Working groups were formed around each of these questions, and the working groups made recommendations, which fed into the strategic plan “SMart 2020.” The formation of the cooperative took place in June 2016.

Organizational and governance model

SMart is now registered in Belgium as a limited liability co-operative company with social aim (*société cooperative à responsabilité limitée à finalité sociale*). Membership is open to users (i.e. freelancers) and clients of the organization, as well as those with indefinite employment contracts with the company (in principle, anyone with an economic interest in the organization). In order to become a member, one must purchase at least one share in the company (at a price of €30). Members are entitled to one vote in the general assembly and can elect or serve on the Board of Directors. The Board of Directors is composed of 60% “Category A” members (users) and 40% “Category B” (clients, suppliers and professional partners) members, elected by secret ballot for a four-year term.

SMart’s statutes state that shareholders voluntarily give up expectation of a private return on their capital investment in the company in favour of a principle of “social profit.” Thus, no dividends are paid out to members. The social goals of the company for its members are stated in the statutes as follows:

- The greatest social, economic, fiscal and legal protection possible
- The recognition of their social and economic utility
- Their personal fulfillment and the choice of an optimal working environment

- The creation of rights specific to a collective, socially useful and profitable model that integrates new modes of work, exchange, entrepreneurship and remuneration
- The mutualisation of means and risks inherent to business and work

Who is it intended to benefit?

The multi-membership model, with members admitted from both ends of the contractual relationships that SMart mediates, is an important aspect of the company's organizational model, which seeks to instill cooperative values not just among workers, but across the sectors in which they work. However, power within the organization is firmly in the hand of the "Category A" worker-members. The "social goals" of the company do not explicitly privilege either group, but apply almost exclusively to freelance workers.

SMart is open to most types of self-employed workers, but excludes certain sectors and professions from membership for legal, liability, or ethical reasons. These include regulated professions, the construction industry, work involving the promotion of weapons, and certain commercial practices deemed unethical.

SMart is funded primarily through the service fee that it charges on revenue earned through the contractual relationships that it mediates. The fee varies depending on the jurisdiction—in Belgium, the rate is 6.5%, while in France it is 8.5%. Members also pay a €30 annual fee (in Belgium—this fee also varies)¹⁶. The variation in fees has to do with the costs of operating in different jurisdictions, including economies of scale.

All profits earned by the organization are re-injected into services for members, or other activities that benefit members (such as research and advocacy). The Board of Directors is responsible for ensuring that the management of funds is in line with the social goals of the organization. Economies of scale allow for a wide range of benefits to be provided for a relatively low cost.

Services

Administration

As previously mentioned, SMart's primary service is mediating the contractual relationship between freelancer and client, acting as the freelancer's "employer" and selling the freelancer's services to the client. This allows a freelancer who works exclusively through SMart to eschew completely the setting up of a "business" for tax purposes, because, as the employer, SMart is responsible for all tax declarations arising from the revenue they earn. This includes sales tax and social insurance.

¹⁶ This is the same as the €30 that members pay for a "share" in the company—the share expires after one year, at which point the member must purchase a share again (unless multiple shares are purchased, in which case membership is guaranteed for the same number of years).

SMart also ensures payment for completed contracts within 7 days of the completion of work, regardless of when the client pays. This is made possible through a “guarantee fund” that a portion of the service charge is allocated to. As the employer, it is SMart’s responsibility to ensure payment for completed work.

Under certain conditions, SMart makes indefinite employment contracts with members, paying a fixed monthly salary. This entitles the worker to rights reserved for permanent employees, such as parental leave and paid vacation. Eligibility is based on demonstration of a level of regularity in the revenue that the member generates through SMart.

Insurance

SMart provides accident insurance for its members, regardless of whether or not they occur when the member is working. SMart also provides liability insurance and business travel insurance to workers while on contract.

Advice

Members have access to advisors who are able to answer questions about social and fiscal status, contract and activity management, administrative obligations, unemployment, and project financing.

Training

SMart provides professional skills training to its members in areas such as negotiation, communication, and networking.

Legal assistance

Members have access to legal advice regarding social and tax law, copyright, international mobility, commercial law, and other topics related to freelance work. Members can also obtain legal representation in matters related to their work at reduced rates through SMart.

Workspace

Members have access to coworking spaces provided by SMart. There are currently eight different locations in Belgium.

Other activities

Advocacy

SMart has been active since its early years in lobbying for cultural workers’ and self-employed workers’ rights.

Research

SMart established a research office in 2012, which produces studies of issues of concern to its members, such as cultural policy, employment policy, the cultural economy, copyright, the rights of self-employed workers, and the cooperative movement.

Negotiation

SMart has also, to a limited extent, demonstrated its ability to bargain with clients and negotiate agreements on behalf of its workers. In 2016, SMart negotiated a joint agreement with two food delivery platforms, Deliveroo and Take Eat Easy. The agreement guaranteed that SMart employees providing delivery services to either company would receive the statutory minimum wage, plus a performance bonus and tips. It also stipulated that SMart employees were to be reimbursed for the use of their own mobile phones, and guaranteed them minimum three-hour shifts.¹⁷

In 2016, Take Eat Easy went bankrupt. SMart employees who were owed wages by the company were paid out of the guaranteed salary fund, while those who worked directly through the company did not receive their outstanding wages.¹⁸

In October 2017, following the introduction of a special tax relief for income gained from platform work, Deliveroo terminated its contract with SMart. At that time, SMart reported that 3,828 of its members had worked through the company, and Deliveroo reported that 90% of its riders worked as employees of SMart.¹⁹ The platform returned to a per-delivery remuneration system within a self-employment framework.

Who does it serve?

Despite opening up to professions outside of the cultural sector, the activities of SMart's members are still concentrated there. Although, given the relatively recent opening of services to non-cultural workers, their share of overall active membership is significant. In its annual report for 2018, SMart Belgium reported that:

- 38% of members who completed a contract in that year worked outside the cultural sector, earning 32% of gross wages.
- Within the cultural sector, the largest group was “non-artistic or artisanal” cultural workers, who accounted for 24% of members completing a contract that year, earning 21% of gross wages.
- The largest subgroup of artistic or artisanal cultural workers was plastic and graphic artists (19% of members working that year earning 17% of wages).²⁰

The average age of SMart members, as of 2018, was 39 years.²¹

¹⁷ *Work in the platform economy: Deliveroo riders in Belgium and the SMart arrangement*. Jan Drahokoupil and Agnieszka Piasna. European Trade Union Institute, 2019.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Rapport d'activité 2018, Perspectives 2019: Belgique, France*. SMart, 2019.

²¹ <http://consocollaborative.com/article/smart-comment-une-cooperative-dartistes-a-seducit-35-000-travailleurs-europeens/>. Accessed August 21, 2019.

Is it effective?

Measuring the effect of SMart on the broader cultural economy—even if the scope is limited to Belgium—poses a challenge due to the difficulty of isolating SMart as an individual factor influencing artists' economic welfare. However, its attractiveness to the types of professionals it targets—as measured by its membership—can be seen as an indicator of its perceived benefit to them. The economic efficiency of the organization—at least internally—can be measured simply by looking at the balance sheet that is included in its annual reports.

In 2018, SMart Belgium reported that about 90,000 people had signed up with the organization as freelancers since 2008. This does not represent the number of current active users, or the number of users who have actually been paid through SMart, but the number of people who have signed up, whether they used the services or not. The number of users who have used SMart's services and been paid for work through them over the same period was around 61,000. The total number of persons signed up with SMart increased fairly steadily over the 10-year period.

The number of people who used the service in 2018 in order to get paid for work was around 20,000. This number decreased by about 3,000 between 2017 and 2018, which the organization attributes to the cancellation of its agreement with Deliveroo. Accordingly (given that Deliveroo workers were likely among the lowest-earning SMart users), the amount of revenue brought in through contracts administered by SMart on behalf of its members continued to increase over the same period, despite the decrease in membership.

The balance sheet, at least for SMart's home jurisdiction, also shows growth, as well as an increased profit margin. In 2018, gross revenue for SMart in Belgium was about €6.1 million. According to the report, this represented a 57% increase from 2017. In France, however, SMart reported a loss of about €1.1 million (which was nonetheless an improvement from the previous year).

Collective bargaining rights for artists in Quebec

Overview

Quebec has two pieces of legislation that enable artists (creative and interpretive) to join associations that will bargain with associations on behalf of the group:

- *Act Respecting the Professional Status and Conditions of Engagement of Performing, Recording and Film Artists, and*
- *Act Respecting the Professional Status of Artists in the Visual Arts, Arts and Crafts and Literature, and their Contracts with Promoters*

The two acts govern collective bargaining in their respective sectors. They are the responsibility of the Minister of Culture and Communications.

Associations of artists and employers/promoters form and seek recognition. Once recognized, the parties negotiate a first agreement (and subsequent agreements).

Background²²

In 1985, the Liberal Party had returned to power with a large majority of the popular vote, under the leadership of Robert Bourassa. While a federalist, Bourassa was a strong Quebec nationalist who had introduced Bill 22, which made French the official language of Quebec. He also advocated for Quebec to be recognized by Canada as a distinct society.

The Assemblée Nationale in Quebec held hearings in the spring of 1986²³ on the status of the artist. In her opening remarks, the Minister of Culture, Lise Bacon, spoke of a goal that was common to everyone: “c’est une identité culturelle québécoise propre, affirmée et en santé”. As a result, the government wished to create “un contexte de travail et de production équitable pour nos créateurs comparativement aux conditions de travail des autres citoyens québécois.” The government was open to hearing from artists and their organizations about any solutions, but the Minister was clear that they would not adopt a protectionist nor paternalist approach. The government recognized that cultural policy was a tool for economic and social development that would help elevate Quebec to an international level. Success would not be at the expense of the well-being and the future of the artists who are the origin of cultural development.

While proposed changes to copyright (“le droit d’auteur”) were a preoccupation then, as now, the Government’s consultation focused on taxation (“objective is to make the fiscal regime in Quebec treat artists as equitably as other categories of tax payers while taking the inherent particularities of cultural disciplines into account”), labour relations, access to programs such

²² All translations by Judy Wolfe, with apologies for inaccuracies.

²³ *Journal des débats Commissions parlementaires Commission permanente de la culture Consultation générale sur le statut économique de l’artiste et du créateur*. Le mardi 20 mai 1986.

as employment insurance and the Canada Pension Plan, and working conditions. A final point was to ensure that artists had access to the courts to recover monies owed to them under copyright law. “Il faudra s’assurer que les artistes et créateurs aient le même accès aux tribunaux que l’ensemble des citoyens.”

The Parti Québécois was represented on the Commission by André Boulerice. He supported the idea of the Commission, and of the centrality of culture to the quality of life. “(L)a culture reflète, interprète, exprime nos valeurs, nos préoccupations, nos façons d’être, notre sensibilité particulière.” He shared the view that culture had important economic benefits, and saw that the Commission would provide an opportunity to raise awareness among the population of the necessity of legislation to support the status of the artist.

Boulerice elaborated on the problems some artists were having with contracts. Contracts took many different forms; there were many employers and producers; often the contract was not respected, so the artist had to look to various intermediaries to obtain what was owed. He suggested that a standardized contract was a goal of the proposed legislation. He also raised the issue of associations and ‘regroupements’ and how they would be defined and resourced to do what would be needed. Boulerice identified the need for minimum social protection for artists whose work was intermittent or temporary – a form of employment insurance for artists within the overall employment insurance regime. He also raised the issue of training artists to manage their careers and market themselves in the context of increasing global competition.

The Chair of the Commission, Claude Trudel, offered a history of support to the arts in Quebec and across Canada, noting that despite that support and the very large economic contribution of the arts, the incomes of artists were very low. He posed a series of questions: Are there too many artists? Why are artists the biggest subsidizers of cultural activity? How is it that we train artists who don’t find work, having graduated from ‘les grandes ecoles’, and spend their whole life depending on a system of state subsidies? He also noted some of the highlights of briefs the Commission had already received: composers and writers complained that they did the first work, but got paid last. People working in cinema noted that the artist can’t make anything without an audience, and looked to the process to place quotas on films and improve the status of artists.

The Commission went on to hear many presentations and read many briefs before the Government submitted its legislation in early 1989. During the line by line review of the Act, there was considerable debate about the definitions of sectors and of associations/ regroupements while there remained essential accord about the intention of the legislation. Boulerice remained unconvinced that authors were going to benefit from the provisions of the Act.

Who is it intended to serve?

Each Act is specific about who it covers. In the case of Performing, Recording and Film artists:

For the purposes of this Act, an artist is a natural person who practises an art on his own account and offers his services, for remuneration, as a creator or performer in a field of artistic endeavour covered by the Act.

The Act also covers occupations relating to the design, planning, setting up, making or applying of costumes, hairstyles, prostheses, make-up, puppets, scenery, sets, lighting, images, sound, photography, visual or sound effects, special effects, or any occupation relating to recording; occupations relating to sound or picture editing and continuity; the occupations of script supervisor or location scout manager and occupations relating to the management or logistics of an efficient and safe shoot, whether indoors or outdoors, including transport and handling of equipment and accessories. Trainees, team leaders and assistants are also covered.

Several organizations have been recognized under the Act:

Alliance québécoise des techniciens de l'image et du son
<https://aqtis.qc.ca/en/>

Association des réalisateurs et réalisatrices du Québec
<https://reals.quebec/>

IATSE, the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada.
<https://www.iatse514.net/en/>
<https://www.iatse.net/directory/667>

Québec District Council of the Directors Guild of Canada
<https://www.dgc.ca/en/quebec/>

The act that covers Visual Arts, Arts and Crafts and Literature describes its target very differently:

This Act applies to self-employed artists who create works in the fields of visual arts, arts and crafts and literature and to the promoters of such works.

Associations that have been recognized as representing writers, artists and artisans under the Act include:

Union des écrivaines et écrivains québécois (UNEQ)
<http://www.uneq.qc.ca/>

Quebec Writers' Federation
<http://www.qwf.org/>

RAAV Regroupement des artistes en arts visuels du Quebec
(Parallel to CARFAC elsewhere in Canada)

<https://www.raav.org/>

Metiers d'art du Quebec

It is interesting to note that at least one organization formed in response to the legislation:

“From time immemorial people have created functional pieces, works of art and one-of-a-kind products from any kind of material. To ensure that these artists are properly represented under the Act Respecting the Professional Status of Artists in the Visual Arts, Arts and Crafts and Literature, and Their Contracts with Promoters (Act S-32.01), the Conseil des métiers d'art du Québec (CMAQ) was officially formed in 1989. Today, nearly 1,000 professional artists and artisans from across Quebec benefit from the association's services.”

In both cases, as this is broad legislation, the Acts do not specify the demographics of who is eligible for coverage: they describe the work done and the relationship to the promoter or employer. Anyone who qualifies under the definitions is covered by the legislation. It is likely that artists would need to have established themselves to some extent before they would benefit from either piece of legislation: enough to be employed in the performing or media arts sectors, or to have produced enough of high enough quality to merit a contract with a promoter in the other sectors.

Members of the associations agree to be bound by the agreements. In the case of the Performing, Recording and Film Artists Act:

Every artist is free to negotiate and agree to the conditions of his engagement by a producer. An artist and a producer bound by the same group agreement cannot, however, stipulate a condition that is less advantageous for the artist than the condition stipulated in the group agreement.

In the Visual Arts, Arts and Crafts and Literature sectors, associations must defend and promote the economic, social, moral and professional interests of the artists and represent the artists whenever it makes sense to do so. They may negotiate a group agreement, or in any event establish model contracts for the performance of services and make agreement with the producers as to the use of such contracts.

What resources are needed?

The Administrative Labour Tribunal serves all sectors in Quebec, and is funded by the province:

[It] interprets and sees to the application of Québec laws on the status of artists. The main functions of the Tribunal consist in defining the negotiating sectors or fields of activities for which recognition may be granted, and in recognizing artists' associations and associations of producers qualified to negotiate collective agreements

As in any other collective bargaining regime, the costs of the Associations are covered by members through dues. The Associations may also receive revenue because of investments they make, or the benefits they provide to members. There is no cost to government or taxpayers.

How is, or can, its success be measured?

*The Cultural Professions Workforce in Quebec*²⁴ is published by the Quebec Ministry of Culture and Communications, which gathers and analyses industry data on an ongoing basis. These data suggest that cultural workers in Quebec are doing relatively well, both in numbers of active workers and in their income. This is due not only to the Status of the Artist legislation but to the economic development strategies of the province along with those of the City of Montreal.

In Québec, the number of people in the cultural professions grew by 23% between 2006 and 2016, reaching 146,540 workers. At the same time, the number of library workers, archivists and people working museums and art galleries declined by 25%. Growth areas included professionals working in visual arts and performing arts, which increased by 19% over the decade.

The cultural professions represent 3.5% of the active labour force in Quebec (compared to 3.4% in Ontario and 2.7% in Canada).

Two-thirds of Quebec's cultural workers live in the Montreal Census Area. Women make up 54% of cultural professionals (48% of the general labour force). This proportion has grown from 49% in 1996. Several occupations remain male-dominated, including camera operators (91% male).

Cultural professionals are younger on average than the labour force. Over 60% of cultural professionals are under 45, compared to 56% of the general labour force. The portion under 35 varies with the occupation: most dancers and other performing artists under 35, while only 13% of textile artists, leather and fur artists and 19% of librarians are in that category.

Nearly one-third (30%) of those in cultural occupations are self-employed compared to 12% in the general labour force. This status is particularly prevalent among men and among workers who work in a cultural industry.

In 2015, the median income of cultural occupations was \$35,475, which is similar to the median income of the overall labor force (\$35,823). The difference between the median salary of men and women is less pronounced among cultural workers (\$5440 more for

²⁴ Danvoye, Marik (2018). «Les professions de la culture et des communications au Québec en 2016», *Optique culture*, n°63, [En ligne], Québec, Institut de la statistique du Québec, Observatoire de la culture et des communications du Québec, décembre, 28p.
[www.stat.gouv.qc.ca/statistiques/culture/bulletins/optique-culture-63.pdf]

men) than in the general population (\$9299 more for men). Between 2005 and 2015, the median income of men in cultural occupations increased by 35% from \$28,594 to \$38,660 while that of women saw a smaller increase (+ 26%), from \$26,471 to \$33,220.

Attendance at live shows appears to be growing in Quebec. In 2017, attendance at live shows increased in Québec, attracting 7.7 million spectators, 9% more than in 2016, for ticket revenue of \$303 million (+ 9%). The 50 most-watched shows recorded 2.35 million admissions, 50,000 more than in 2016. In contrast to some years, the increase in admissions to the 50 most-watched shows is not the main factor behind the overall growth in theater attendance in 2017²⁵.

Variety shows stand out with a 28% increase in the number of spectators between 2016 and 2017. The three genres that make up this discipline, namely humor, circus and magic, and musical acts, each had an exceptional year, with respective increases of 17%, 42% and 50% of the number of spectators. Between 2016 and 2017, the audience for singers (la chanson) remained stable at 2.3 million admissions. Attendance at English-language shows increased by 19% to 1.4 million, while attendance at French-language shows dropped 19% to 0.9 million, above the average of the last five years. The market share of Quebec shows decreased slightly in 2017 and represents 70% of attendance, compared to 73% in 2016. This is due to a sharp increase in attendance for shows from outside Canada (+ 17%)²⁶.

These data suggest that the sectoral bargaining regime has not had a negative impact on promoters' ability to produce and sell shows in Quebec, although the sector is facing increasing pressure from imports.

Another study²⁷ looked at retail book sales over a five-year period. The author concluded that retail sales (book stores, large discount stores) had declined by some 5%, and households were spending less money on books. But this finding was countered by the possibility that people were reading more on free digital platforms, and purchasing books (in French as well as English and other languages) from online retailers located outside of Quebec, such as Amazon.ca. This finding suggests that the ability to negotiate fairly with authors has not limited publishers' ability to publish and sell books.

²⁵ Fortier, Claude (2018). « La fréquentation des arts de la scène au Québec en 2017 », *Optique culture*, [En ligne], no 61, octobre, Institut de la statistique du Québec, Observatoire de la culture et des communications du Québec, p. 1- 16. [www.stat.gouv.qc.ca/statistiques/culture/bulletins/optique-culture-61.pdf]

²⁶ Ibid.

²⁷ Routhier, Christine (2019). « Les ventes de livres en 2017 et en 2018 », *Optique culture*, [En ligne], no 65, juin, Institut de la statistique du Québec, Observatoire de la culture et des communications du Québec, p. 1-12. [www.stat.gouv.qc.ca/statistiques/culture/bulletins/optique-culture-65.pdf].

What could be changed?

Perhaps because it is 30 years old, the legislation is well-entrenched in the cultural sector to the point of not being noticed any more. From time to time, especially in the media and performing arts sector, there have been requests for amendments to the legislation but the fundamentals are not challenged by either artists or employers.

Copyright income tax deduction for professional artists in Quebec

Overview

Professional artists who are recognized as such under either of the two Quebec acts regulating artistic professions are eligible, on their provincial tax declarations, to deduct income derived from copyright from their total taxable income up to a maximum of \$15,000. The amount that is deductible decreases once the individual's income from copyright reaches \$30,000, and is reduced to zero when an artist's total copyright income is \$60,000 or greater. No such deduction is available to artists on their federal tax returns; therefore, an artist resident in Quebec still pays federal tax on copyright income.

Background

The tax deduction was introduced in 1995 as an amendment to Quebec's Taxation Act. It drew on Quebec's existing laws on the artistic professions, which came into effect in 1988, to determine eligibility.

Who is it intended to benefit?

The tapering of the amount of copyright income eligible to be deducted as higher income levels are reached suggests that the policy is targeted toward low- and middle-income artists. Otherwise, it is intended to benefit any artist who derives income from copyright.

When the policy was revised in 2001 (increasing the ceiling from \$30 to \$60 thousand), the government stated that the goal of the revision was "to further encourage the creation of original works and the emergence of new talents."²⁸

There is no evidence that any analysis of impacts or benefits of the tax credit has been undertaken.

How is it funded?

The credit is funded through the general tax pool. Information on the total benefit to artists, and corresponding reduction in provincial tax income, is not publicly available. Reports from the Ministry of Finance suggest that there are very few claimants for the benefit, as the relevant numbers are redacted.

²⁸ *Budget 2001–2002: Renseignements supplémentaires sur les mesures du budget*. Ministère des Finances du Québec, 2001.

Conclusion

Precarity, though a complex issue, can be defined rather concisely as a lack of financial security. Precarity is not a new issue: Most welfare-state policies, particularly social security systems, were built to alleviate precarity as it affected people who were mostly in (or temporarily outside) the conventional workforce. Unemployment insurance protects employees in case of loss of work due to factors outside their control. Without it, loss of work would be a severe crisis for most Canadians. Health insurance in Ontario protects all legal residents in case of sickness. Without it, many individuals and families would be plunged into poverty by the costs of medical care. Retirement insurance and other benefits for seniors provide (some) assurance that workers will have enough money to live on when they are no longer able to work due to old age. Without it, those who were unable to put aside money for retirement while they were younger would be left with nothing. And compulsory employer accident insurance ensures that when a worker is injured at their job, they don't pay the bill for it. Without it, workers and their families would regularly become destitute due to chance mishaps or employer negligence.

Policies that were designed to alleviate precarity among employees have not always extended to artists, who typically work outside the conventional workforce. Thankfully, in Ontario, some of them do. Without the systems that we do have in place (including Ontario Works and the Ontario Disability Support Program), it would be significantly more difficult for most artists to get by, and likely the province would have far fewer of them. Still, many artists do not have any assurance that an injury at work will not result in a total loss of income (or at least a need to apply for social assistance); much less are they protected in case of loss of work for reasons beyond their control or responsibility. With the increasing size of the self-employed workforce generally, of which most artists are a part, governments will be (and are being) forced to pay more attention to the risks that these workers are taking on, and the implications of those risks.

Some governments have long recognized the unique economic situation of artists, as well as their unique value to society, and created special insurance systems to account for those facts. The case of the Künstlersozialkasse in Germany shows that a policy that provides social benefits to artists, in recognition of their particular place within both the economy and society, can gain broad approval and support. The policy is an exemplary way of addressing the status of the artist in society. However, in a time when the welfare state is generally under threat, and the economic roles of cultural workers are being redefined, we can reasonably expect policymakers to be less receptive to such ideas.

Within a policy environment hostile to anything resembling “special treatment” or “hand-outs,” mutual support may instead be the answer. The case of Société mutuelle pour artistes (SMart) in Belgium shows that a cooperative society can, through an economic model not too different in principle from social security, fill in the gaps left by governments when it comes to the economic security of artists and cultural workers. Moreover, recognition of the shared struggles of artists and other self-employed workers can result in increased momentum for

such movements, as well as better economies of scale. As self-employment becomes more and more the norm in other sectors, self-employed cultural workers gain more and more potential allies. Within a democratic, cooperative framework of mutual support, artists are also less vulnerable to the whims of politicians looking to cut corners. They also have the power to choose the types of support that work best for them.

Another way of attacking the problem politically is from a rights perspective. Copyright is an issue that affects most artists, as creators of original works (whether a piece of music or a performance in a film or television show). There is a growing international consensus around the rights of visual artists to an economic interest in their work that persists after the work's initial sale. What form that right should take legally is still a matter for debate. While policies that recognize artists' resale rights may benefit some artists, and even some lower-income artists if the policy is well designed for that purpose, recognizing the rights of authors does not address the problem of precarity directly. Indeed, it may further subject artists incomes to the whims of the marketplace, while the potential for such policies to negatively impact the market still can't be discounted. Still, the initial benefit that the resale right in Australia appears to be providing to Indigenous artists shows promise.

We have also looked at two policies developed in Quebec, which is considered a world leader in its legislative recognition of the status of the artist. The first of these also comes from a rights perspective, guaranteeing different rights to two distinct groups of artists—roughly, creative and interpretive. The two Quebec acts passed in 1988 recognize the distinct economic positions of these two groups of artists, and seek to grant members of each group the rights most applicable to them. The general aim of both acts is to ensure fairness in dealings between artists and promoters, through contract regulation and the granting of collective bargaining rights. Like the German policy on artists' social security, these two acts acknowledge the particular disadvantages that artists face as a result of their position within the economy, and seek to remedy them by regulating the relationship between artist and promoter. In addition to this, we looked at a tax credit for artists who receive copyright income, but found that no data was available on its use as the numbers were redacted in reports from the Ministry of Finance, suggesting that there are very few artists taking advantage of the credit.

It is our opinion that the most effective measures in combatting precarity are those that confront the problem directly. Our existing social security systems were designed to do just that, and have done so effectively. However, self-employed artists and cultural workers need a better support system that is more appropriate to their work status and position within the economy. It is not certain that this can realistically be achieved through legislation, though we don't discount the possibility. Mutual support systems for artists already exist in Ontario, but our findings suggest to us that expanding upon these systems and creating alliances both within and outside the sector, with other self-employed workers, is the most promising way forward.

Appendix I: Further reading on artists' resale rights

Schten, Allison (2017). "No more starving artists: Why the art market needs a universal artist resale royalty right," Notre Dame Journal of International & Comparative Law: Vol. 7 : Iss. 1 , Article 6.

Ricketson, Sam (2015). "Proposed international treaty on droit de suite / resale royalty right for visual artists."

Farcky, Joëlle & Kathryn Graddy (2017). "The economic implications of the artist's resale right," World Intellectual Property Organization Standing Committee on Copyright and Related Rights, SCCR/35/7.