



# *A Gramscian Analysis of the Public Performance Right*

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**ABSTRACT (EN):** This chapter briefly traces the historical establishment and expansion of the public performance right in musical works within those countries united by the Anglo-American legal tradition, with a focus on the Canadian experience. Viewing the issue of the public performance right in musical works within a critical Marxist frame, the essential problem leading to the creation of the public performance right in musical works is seen as an outgrowth of the struggle between the author/composers and the dominant publishing interests which dictated their employment and terms of recompense. Within this frame, the analysis utilizes Antonio Gramsci's theoretical conceptions of hegemony to provide the structural basis on which the analysis rests. Ultimately the struggle is seen as an example of the dominant publishing interest's effective absorption of the desires and goals of the creator interests, but reiterated in such a way as to achieve the primary goals of the publishing interests within an evolving hegemonic order.

**RÉSUMÉ (FR):** Ce chapitre trace brièvement l'établissement historique et l'expansion du droit de représentation publique des œuvres musicales dans les pays de traditions anglo-américaine, avec une attention particulière portée à l'expérience canadienne. En étudiant, d'un œil marxiste critique, la question de la représentation publique des pièces musicales, le problème essentiel menant à la création de ce droit est vu comme la conséquence de la lutte entre les auteurs-compositeurs et les intérêts dominants des éditeurs qui ont dicté leur emploi et les termes de leur compensation. Les

concepts théoriques de l'hégémonie utilisés dans l'analyse d'Antonio Gramsci fournissent une base structurelle à cette analyse. Ultimement, cette lutte semble un exemple de l'absorption par les intérêts dominants des éditeurs, des désirs et des buts des intérêts des créateurs, réitérée de façon à ce que les objectifs premiers des intérêts des éditeurs soient atteints à l'intérieur de l'ordre hégémonique en évolution.

## A. INTRODUCTION

The success of performance rights organizations has been responsible for the massive growth of copyright collectives, particularly in Canada. Prior to the 1988 *Phase I* revisions to the *Copyright Act*,<sup>1</sup> there was only a single type of copyright collective authorized under Canadian law—those collecting on the public performance right in music. Since the *Phase I* revisions came into law, more than thirty-four copyright collectives<sup>2</sup> have been registered with the Copyright Board of Canada. With thirty-four registered collectives, Canada has more than double the copyright collectives of any of the key nations listed in Daniel Gervais's 2002 study.<sup>3</sup>

Despite the fact that a public performance right in music was first explicitly granted under the 1842 *Copyright Act*,<sup>4</sup> it was actively ignored by the industry of the day, and as a result, the first performance right collective in the United Kingdom, the Performing Right Society, would not be formed until 1914. This chapter views the subsequent adoption and successful expansion of the public performance right as an example of a hegemonic process as delineated by Antonio Gramsci.

## B. GRAMSCI

Antonio Gramsci (1891–1937) was a leading member of the Italian Communist party as well as a highly critical journalist. Gramsci was arrested by the Italian Fascist state in November of 1926 and would remain in prison until

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1 *Copyright Amendment Act*, SC 1988, c 15.

2 *Copyright Act*, RSC 1985, c C-42, s 2 [collective society]. A copyright collective is an agency created under the terms of the *Copyright Act*, which collects royalties or licensing fees on behalf of registered copyright owners.

3 Daniel J Gervais, "Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective" (2002) 1 *Can J L & Tech* 21 at 38 (table 3).

4 *Imperial Copyright Act of 1842* (UK), 5 & 6 Vict, c 45.

he was transferred to a clinic in 1935 and then a hospital where he would die in April of 1937. His theoretical work, and the contribution of his conception of hegemony in particular, have been adopted and championed by a wide range of social theorists with differing interpretations, but it is important to note that Gramsci's hegemonic theory is fundamentally a theory of class struggle. However, the theory as Gramsci develops it is so encompassing, it is not surprising that it has been widely adopted within other discrete frames of social analysis.

With the aforementioned in mind, it seems appropriate and necessary at this point to place this Gramscian analysis of the public performance right within the context of political class struggle. While the analysis focuses on a single aspect of copyright, it is essential to remember that copyright as a process controls the flow, distribution, use, and reuse of information throughout society. Within that context, copyright can and has been used as a tool of capital within business and publishing dimensions. Copyright has provided those interests with a means to deny or limit the use of information by society, and in particular those members of society who make up the working class/users of the information. The successful imposition of the public performance right created the precedent for the establishment of further owners' rights across a spectrum of information and not merely the public performance of musical works. The contemporary discourse surrounding the Canadian copyright collective known as Access Copyright is a direct result of the success of the hegemonic order.

### **C. GRAMSCI'S THEORETICAL CONCEPTIONS OF HEGEMONY**

Gramsci's concept of hegemony is situated within a political economic view of society, and is formulated in relation to some fundamental Marxist positions. Key amongst these is the Marxian concept of economic determinism. Within orthodox Marxist formulations, economic relations form the bedrock upon which other hierarchical spheres of culture depend. Economic relations are the base in a base-superstructure hierarchy and, within the historical processes delineated by Marx, determine derivative structures that form the superstructure (the realms of the political, the social, and the intellectual). The base level is composed from the elements of material production: money, things, the relations of production, as well as the stage of development of productive forces which can be thought of more simply as

the physical world as well as the forces of economic relations that capital creates. Located within the superstructure are political and ideological institutions, social relations, and cultures. An orthodox interpretation holds that the movements and goals of the independent units of society are a result of these established and inherited property structures, and within these units of organization, cultural activity is an expression of controlling economic interests.

For Gramsci, society is the sum of all its cultural and ideological parts and is not simply driven by economic divisions. Therefore the dialectic nature of the social order, with its varying influences and exchanges, can and does have political outcomes regardless of class status. In his analysis of the French revolution, Gramsci makes it clear that the upheaval was not simply determined by economic inequalities:

In any case, the rupture of the equilibrium of forces did not occur as the result of direct mechanical causes — i.e. the impoverishment of the social group which had an interest in breaking the equilibrium, and which did in fact break it. It occurred in the context of conflicts on a higher plane than the immediate world of the economy; conflicts related to class “prestige” (future economic interests), and to an inflammation of sentiments of independence, autonomy and power.<sup>5</sup>

Thus, in his analysis of the French revolution, Gramsci rejects a rigid base-superstructure model because it relies too heavily upon class status, and does not sufficiently appreciate the intellectual and philosophical impact of the culture and individuals within it.

Within a Gramscian hegemonic framework, the dominant class relies not only upon coercion and naked power to subvert the subordinate class to their goals, but also manufactures consent through the creation of cross-class alliances. This theory assumes a consent given by the majority in a particular direction as suggested by those in power. Consent is not always peaceful and may also be induced by means of coercion through physical, legal, or cultural processes. The consent is taken to be “common sense,” but is in reality an ideology of dominance that has become so widespread, powerful, and increasingly unnoticeable that over time society’s members no longer question it: “The ‘spontaneous’ consent given by the great masses

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5 Antonio Gramsci, *Selections from the Prison Notebooks of Antonio Gramsci* (New York: International Publishers, 1971) at 184.

of population to the general direction imposed on social life by the dominant fundamental group; this consent is 'historically' caused by the prestige (and consequent confidence) which the dominant group enjoys because of its position and function in the world of production."<sup>6</sup>

For Gramsci there were no absolutes, but only possibilities for which each person could strive. Though he recognized the fundamentally political economic nature of class struggle, Gramsci also realized that a society was the sum of all its cultural and ideological parts, not simply its class status. Therefore, the dialectic nature of the social order, and its interrelationships with their varying influences and exchanges, could and would have political outcomes regardless of class status: "A third moment is that in which one becomes aware that one's own corporate interests, in their present and future development, transcend the corporate limits of the purely economic class, and can and must become the interests of other subordinate groups too."<sup>7</sup> Gramsci does not simply say that their interests must be imposed on the subordinate group, but rather that the dominant group's interests *become the interests of the subordinate*. Herein lies the notion of consent that is at the heart of hegemony.

Within Gramsci's view of society as a hegemonic order, the subordinate class participates in and consents to the historical processes of change. The subordinate members of society are empowered through a participatory process, and because of this they experience a sense of agency and involvement when changes take place. While the system is participatory, it is not equal, and the very nature of the hegemonic order ensures that the values of the dominant order will perpetually be inculcated into the culture as a whole.<sup>8</sup>

Gramsci recognized that at various times within society, crises develop, and while some are insignificant, others are indicative of deep pockets of discontent within society. Such crises create the opportunity for new classes to overthrow the established order. "If the ruling class has lost its consensus, i.e. is no longer 'leading' but only 'dominant,' exercising coercive force alone, this means precisely that the great masses have become detached from their traditional ideologies, and no longer believe what they used to believe previously, etc."<sup>9</sup> If unsuccessful, the class attempting to wrest

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6 *Ibid* at 12.

7 *Ibid* at 181.

8 *Ibid*.

9 *Ibid* at 275-76.

control would simply fade back into the social frame until such time as another opportunity arose. The fundamental disconnect of the masses from the ruling ideologies is characterized as an organic crisis that could lead to an overthrow of the dominant order. These moments represented what Gramsci referred to as moments of *organic crisis*, a crisis so fundamental and so widespread that it creates the possibility of overthrowing the ruling hegemony.

Viewing the public performance right issue from a historical perspective we see that the fundamental problem lay in the disparity between publishers and composers. The publishers and the new emerging middle class controlled the means of production and distribution and they would choose to invest in those works they believed would sell. For the composers it was a closed system. If you could convince a publisher of the potential value of your work they might choose to publish it, but if so they would in all likelihood offer you a lump sum in exchange for the copyright. An article from the *Evening Standard* of September 1902 points out the significant disparity between the profits of composers and the publishers.<sup>10</sup> They note that the composer Johann Strauss was paid forty pounds for his *Blue Danube* waltz, which sold 400,000 copies in a single year in America and England and generated over 100,000 pounds for the publisher. Put another way, for every pound the composer received, the publisher received 2,500 pounds. Nonetheless these two oppositional classes had to forge an alliance to create the successful hegemonic order.

#### D. THE PUBLIC PERFORMANCE RIGHT

It is the *owner* of the work that enjoys all the economic rights delineated in subsection 3(1) of the *Copyright Act*, including the “sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof.”<sup>11</sup> These economic rights provide the means of compensation for the owner of the work. With respect to the economic rights delineated in the *Copyright Act*, it is the right to “perform the work or any substantial part

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10 James Coover, *Music Publishing, Copyright and Piracy in Victorian England: A Twenty-Five Year Chronicle, 1881–1906*, from the *Pages of the Musical Opinion & Music Trade Review and Other English Music Journals of the Period* (London: Mansell Publishing, 1985) at 89.

11 *Copyright Act*, above note 2, s 3(1).

thereof in public” that provides the basis of discussion for this chapter. This owner’s right of public performance should not be confused with the more recently added neighbouring right of a “performer’s performance.” They are two separate economic rights, though they are related.

Historically, in the case of music, the copyright owner has always been the publisher, as the assignment of copyright to the publishing house has generally been a condition of publication.<sup>12</sup> It is also important to note that the public performance right is a particular form of recompense unique to cultural goods, and is fundamentally dominant in the area of musical goods. Though the costs of the public performance right are not transparently borne by the individual users, it nonetheless impacts significantly in the operating costs of the larger community. In 2009, the three major North American performing rights organizations, the Society of Composers, Authors and Music Publishers of Canada (SOCAN), the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music International (BMI), collected a little over \$2.1 billion. In Canada, given the current population of just under thirty-four million,<sup>13</sup> the SOCAN collection amounted to \$7.55 per capita.<sup>14</sup>

What seems to be lacking in the discussion of the owner’s public performance right is why the owners should receive an additional economic right beyond those for reproduction and distribution. This concept of paying to use something, after it has been purchased or rented, was unique in its application to musical works. While the first instance of copyright in the Anglo-American tradition appears in 1710 in the *Statute of Anne*,<sup>15</sup> an owner’s public performance right does not appear until the *Dramatic Literary Property Act* of 1833,<sup>16</sup> and then only with respect to musical-dramatic

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12 Joanna Demers, *Steal This Music: How Intellectual Property Law Affects Musical Creativity* (Athens, Georgia: University of Georgia Press, 2006) at 12.

13 Central Intelligence Agency, *The World Factbook* (January 2011), online: Central Intelligence Agency [www.cia.gov/library/publications/the-world-factbook/geos/ca.html](http://www.cia.gov/library/publications/the-world-factbook/geos/ca.html).

14 SOCAN, “2009 Financial Report,” online: [www.socan.ca/pdf/pub/FinancialReport2009.pdf](http://www.socan.ca/pdf/pub/FinancialReport2009.pdf). Note that in 2004 when this research was begun the total collection was one billion five hundred and fifty four million, and the SOCAN figure was \$6.40 per capita. For all three groups as a whole that amounts to a 38 percent increase in collections during the period. For SOCAN alone it amounts to a little more than a 14 percent increase. The collection figures for the various agencies were obtained from their published financial reports. The SOCAN report also cites both BMI, and ASCAP’s 2009 collections.

15 *An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times Therein Mentioned*, 1710, 8 Anne, c 19.

16 *Dramatic Literary Property Act*, 1833, 3 & 4 Will IV, c 15.

works such as theatre or opera. In 1842 the *Copyright Act* would establish an owner's right of public performance, but it would never be widely enforced. Only in 1914 would an owner's public performance right begin to be collected, 200 years after the *Statute of Anne*.<sup>17</sup> It is only within the last few decades that similar rights have been extended to books or other works.

Perhaps most intriguing is the question of why music has been treated differently. We do not pay additional fees to the engineer who designed our cars every time we take a drive. Surely the conception, realization, and designs that have been borne out in our vehicles are unique, creative, and original contributions. Arguably, our lives are enriched in significant ways by the end results of these efforts, and yet there is no payment made to these creators, nor to the industrial interests that support them, every time we start the engine and drive down our roads. If we wish to dismiss the automobile as simply a mechanical contrivance, then let us consider the other professions that might be deemed more creative or artistic. The architect who designed our homes does not receive a royalty for each night we spend in them, or for each party we hold. Even if the building were commercial and not a private home, royalties are not paid. When the portrait artist paints his work and sells it to a buyer, his economic interest in it ends there. The portrait artist receives no royalty when it is put on display, nor are the visitors to the home where it hangs counted so that a royalty might be returned to recompense for their viewing. We have struck our economic bargain between artist (be it automotive designer, architect, or portrait artist) and end user when we purchased or rented their creation. No further rents are paid. Nonetheless, it has somehow become accepted that it is perfectly reasonable for an author/composer, or more specifically the copyright owner (who is often not even the original creator), to be paid for each use beyond the point of sale or rental.

There is no obvious logic or model for an additional economic right to be collected following the initial economic transaction. The standard economic arguments proffered such as incentive for creation would not apply to this additional right,<sup>18</sup> as the creator would have been paid when they

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17 A public performance right in music was successfully imposed in France beginning in 1851 with the establishment of the *Société des Auteurs, Compositeurs et Éditeurs de Musique* [SACEM].

18 Such arguments are questionable in any case when applied to artistic creation since artists create for many reasons beyond simple economic recompense. The annals of artistic creation are filled with artists who left huge bodies of work despite little if any financial success in their own time e.g., Charles Ives, Lead Belly, Van Gogh.



sold the container in which the work was held. Though large scale uses such as broadcasting<sup>19</sup> may not appear on the surface to adequately recompense the creator given their broad dissemination of the work, broadcast of some kind has always been absolutely necessary for the creation and expansion of markets, as evidenced by the long historic practice of payola in the industry.<sup>20</sup> Not only is the owner's public performance right an additional economic right added to the existing reproduction right, it is an economic right collected on something that has no physical existence: a performance.

## E. THE NATURE OF PERFORMANCE

Like a thought or conversation, a performance exists only in the moment and later as a memory. If it is fixed in a medium, then it is no longer a performance, but a recording and, as such, can be sold or traded. Within this context, the thought of a unique owner's right of public performance seems even more problematic when applied specifically to music. If we consider music as an abstract object, or even simply as a commodity form, its only purpose is performance. Textual or manuscript manifestations serve only as guideposts in the creation or re-creation of a performance. Indeed, if performance were not the intent, the composer would not have released the work to the world.

More importantly, unlike a recording or a broadcast, a performance is not a one-way transmission. Performers respond, react, and interact with their audiences. A performer can play the same song on every night of a tour and each performance will be different and unique. Much of the difference in those performances will come from the audience and their reac-

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19 Note that the advent of the public performance right predated broadcasting technology by a significant margin. SACEM was formed in France in 1851. Radio broadcasting does not become commonplace until the mid 1920s.

20 New York State Office of the Attorney General, Press Release, "Sony Settles Payola Investigation" (25 July 2005) online: [www.ag.ny.gov/press-release/sony-settles-payola-investigation](http://www.ag.ny.gov/press-release/sony-settles-payola-investigation). In 2005 the attorney general's office of New York State investigated a number of the music industry's largest corporations. In the *Assurance of Discontinuance*, it was noted that "Sony BMG had illegally provided radio stations with financial benefits to obtain airplay and boost the chart position of its songs . . . through such deceptive and illegal practices as: (a) on occasion, bribing radio station employees . . . (b) providing a stream of financial benefits to radio stations . . . (c) providing vacation packages . . . and other valuable items . . . (d) using independent promoters as conduits for illegal payments . . ." at para 4.

tions to the performance. It is an ephemeral and transitory state that is to a large degree mutually constituted by performer and audience.

It is also of the utmost importance to recognize that despite our contemporary conception (both legal and social) of what may constitute a performance now, and perhaps more significantly what the performing rights organizations might believe constitutes a performance, historically, during the period of its inception and for a significant time period to follow, the *only* type of performance that existed with respect to music was a live in the moment transmission between audience and performer(s). Thus, to reiterate, the public performance right is not only an additional economic right unique to musical works beyond the traditional rights of reproduction and distribution, but in its historic inception it was attached to something that had no physical manifestation, a performance.

## F. A CHRONOLOGICAL REVIEW OF THE GRAMSCIAN HEGEMONIC ORDER

Within the context of the struggle between composers and publishers, the publishers held the balance of power. Although there existed an explicit performance right in the United Kingdom as early as 1842, the publishers made it clear that they had no intention of observing it. In fact they were able to overcome their own internal competitive class interests to form an association in 1881 primarily to oppose the right at the national level in their opposition to the *Berne Convention for the Protection of Literary and Artistic Works*.<sup>21</sup> Their lack of success in opposing the *Berne Convention* was likely due to the larger capital interests beyond their own which held more influence with the various governments involved and whom would benefit from an increased level of trade brought about by an international agreement. “[W]hile Berne may have been a response to the claims and work of the International Literary Association (or, looked at from a purely British perspective, the Copyright Association), it was equally a strategic instrument for the extension and maintenance of trade interests.”<sup>22</sup> However, despite the advancement of the *Berne Convention*, the British publishers still ignored the public performance right. “William Boosey was generally accepted as

21 *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, 1161 UNTS 30 [*Berne Convention*]; Coover, above note 10 at 9–11.

22 Lionel Bently & Brad Sherman, “Great Britain and the Signing of the *Berne Convention* in 1886” (2001) 48:3 *Copyright Soc’y USA* 311 at 339–40.

the industry's leader, but neither he nor most of his colleagues in the Music Publisher's Association were yet committed to performing right or the importance of the gramophone."<sup>23</sup>

The necessity of expansion led to the first cross-class alliance with the composers. Without the public face of the composer, the publishers would not have been able to collect the performance right. Presumably this would have been a simple decision for the composers, since it would provide a new revenue stream. However the creation of a right of public performance did not address the core issue of disparity between publisher and composer in terms of both recompense and power. Instead of the imbalance being addressed, the issue was deflected with the advocacy of a public performance right, the costs of which would be borne by the users.

The British music industry's opposition to a public performance right was extreme. Consider the following: despite the fact that the United Kingdom's *Copyright Act* of 1842 had established a public performance right for musical works, a collective would not be formed until 1914. The French performance right society, *Société des Auteurs, Compositeurs et Éditeurs de Musique* (SACEM), had pursued their rights on British soil since 1881 but, without the support of the Music Publishers Association, they achieved only minimal success. The Music Publishers Association (MPA) was formed in part to oppose the imposition of a public performance right, or as the Chairman of the MPA referred to it the "vexatious rights of performance."<sup>24</sup> Great Britain signed the *Berne Convention* in 1886, and though there was an attempt to form a British performing rights society in 1890, it failed without the support of the MPA.<sup>25</sup>

The *Berne Convention* was the first international treaty to establish a public performance right in music. Article 9<sup>26</sup> of the *Berne Convention* of 1886 stated "[t]he stipulations of Article 2 apply equally to the public performance of unpublished musical works, and of published works as to which the author has expressly declared upon the title-page or at the commencement of the work that he forbids their public performance."<sup>27</sup> The 1908 Berlin revision to

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23 Cyril Ehrlich, *Harmonious Alliance: A History of the Performing Right Society* (New York: Oxford University Press, 1989) at 14.

24 Coover, above note 10 at 38.

25 *Ibid* at 43.

26 Following the 1908 revisions to the *Berne Convention* this stipulation would move to article 11 where it remains in the most recently amended version.

27 "Berne Convention, Berne (1886)," in Lionel Bently & Martin Kretschmer, eds, *Primary Sources on Copyright (1450–1900)*, online: Arts & Humanities Research Council [www.copyrighthistory.org](http://www.copyrighthistory.org).

the *Berne Convention* recognized a mechanical right for the copyright owner due to the success of the mechanical music business (piano rolls, gramophones, melodeons).<sup>28</sup> The new mechanical rights would also provide new areas for the expansion of the performance right hegemony.

## G. THE ESTABLISHMENT OF THE ANGLO-AMERICAN PERFORMANCE RIGHT COLLECTIVES

The Performing Right Society (PRS) incorporated in 1914 and began its attempts to enforce the public performance right in the United Kingdom. The failures of previous attempts to start a British collective were not due to any lack of desire from composers, who were always looking for new sources of income, but rather the lack of support from the Music Publishers Association. Once the publishers saw the economic value in the union with creators, the partnership was established, thereby forming the *historic bloc*<sup>29</sup> as delineated by Gramsci and the first infant steps of the ruling hegemony. The American Society of Composers, Authors and Publishers (ASCAP) would also form in 1914 but in New York City. The PRS and ASCAP would eventually establish the first successful performing rights organization in Canada in 1925.

The PRS was the first cross-class alliance between composers and their traditional opponents, publishers, within the Anglo-American tradition. As Gramsci noted with respect to the establishment of any hegemonic order, the basis was purely economic. For the publishers to successfully establish the PRS they needed the public face of the composers. It was this public face that allowed the public inculcation of the *justness* of the performance right. Had the attempts been made to collect purely on the basis of the publishers' right it would likely not have succeeded. The pattern of establishment was similar in the United States and Canada. Considering the tone of the debates in Canada's Parliament, it was only marginally accepted in Canada even with the composers as the focus.<sup>30</sup>

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28 *Berne Convention*, above note 21, revised in Berlin, 13 November 1908.

29 Gramsci, above note 5 at 181.

30 *House of Commons Debates*, 18th Parl, 1st Sess, No 1 (28 February 1936) (Hon CH Cahan). The Parliamentary debates of 1936 in Canada are quite vivid in their descriptions of the Canadian Performing Right Society as "evil," and that some form of control was needed to "put an end to price-fixing and extortion" at 644.

Gramsci noted that throughout the course of the hegemonic order the dominant group leading the order would face various moments of crisis. Despite winning a significant victory establishing their right to collect from cabarets in *Herbert v Shanley Co.*,<sup>31</sup> ASCAP continued to face an uphill battle. The American Federation of Musicians (AFM) advised its members not to perform any works by ASCAP members out of fear that the increased costs might adversely effect their employment in hotels and lounges.<sup>32</sup> In addition to the AFM, the Hoteliers Association,<sup>33</sup> and the Motion Picture Exhibitors Association<sup>34</sup> actively opposed ASCAP's right to license their use of music. Similarly, many music publishers intuitively felt that a successful application of the performing right would in effect mean that users would have to pay for music twice: once when purchased from the publisher and again when used. Shortly after the *Herbert* ruling of 1917, the music publishers would form their own association, the Music Publishers Protective Association (MPPA), in response to concerns about the impact that ASCAP might have on their industry.<sup>35</sup> However, similar to the British experience, the economic depression of the 1920s, coupled with technological changes, saw the sales of sheet music plummet and the publishers' need to find alternate ways to profit from their copyrights.<sup>36</sup> Ultimately, a deal was struck and the majority of publishers joined ASCAP and brought their catalogues along with them.

The emergence of radio broadcasting also created opportunities for the growth of the hegemonic order. It was not immediately apparent in either Canada or the US if the performance right extended to broadcasting. In the US, ASCAP decided that broadcasting might be a very lucrative source of funding and in an obvious attempt to establish its territory offered temporary licences. The licences waived any fee, but admitted ASCAP's jurisdic-

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31 *Herbert v Shanley Co.*, 242 US 591 (1917) established that cabaret — bars, nightclubs, hotels — performances were a performance for profit regardless of whether or not there was a door charge.

32 Bennie L DeWhitt, *The American Society of Composers, Authors, and Publishers, 1914–1938* (Atlanta: Emory University, 1977) at 25.

33 *Ibid* at 23–24 and 34.

34 *Ibid* at 37–38.

35 *Ibid* at 35.

36 That was in fact cited as one of the justifications for the expansion of the performance right in the report of the Canadian Royal Commission chaired by Justice Parker. Similar rationales can be found in pleas made for the blank media levy relative to cassette copying, and the current request for increased intellectual property rights in the wake of perceived losses due to downloading.

tion.<sup>37</sup> In 1923 the National Association of Broadcasters (NAB) was formed from the ranks of private broadcasters in the United States. It was the position of the NAB that broadcasting music on the radio did not constitute a performance for profit.<sup>38</sup> In 1925 the performance right was extended to broadcasting in the United States following the ruling in *Jerome H Remick & Co v American Automobile Accessories Co.*<sup>39</sup> This move to expand into new related territories would become habitual within the hegemony.<sup>40</sup>

Possibly, as a result of their experience with the broadcasting tariff, ASCAP realized the value of lobbying and by 1927 had become an effective presence in Washington, illustrating clearly that it intended to influence policy decisions.<sup>41</sup> This period marks the first efforts of the hegemonic order to inculcate their ideology beyond their membership and target markets. By virtue of influencing directly at the policy level, ASCAP helped to enable the expansion of its regimes with less recourse to individual legal actions. It was also at this time that ASCAP began to expand into Canada in association with the PRS in their joint establishment of the Canadian Performing Right Society (CPRS) in 1927.

In an echo of its forming partners, the CPRS also faced hostility at its inception, ultimately resulting in Royal Commissions to investigate its actions in 1932 and 1935. Enough concerns were raised during the 1935 Commission that a permanent tribunal, the Copyright Appeal Board, was formed in 1936, specifically to deal with issues related to the performance right. Meanwhile, by 1939 the United States broadcast licensing revenues rose to 4.5 million dollars and were set to reach 9 million dollars in the proposed new contract.<sup>42</sup> As a result, the broadcast industry, in conjunction with its trade

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37 William Randle, *History of Radio Broadcasting and its Social and Economic Effect on the Entertainment Industry, 1920–1930* (Western Reserve University, 1966) at 369.

38 *Ibid* at 370.

39 5 F(2d) 411 at 411–12 (1925).

40 Given the success of ASCAP in this instance, one cannot help but wonder if their contemporary descendants, Access Copyright (AC), might have fared better in the current tariff process had they merely extended their control (their proposed tariff included areas not previously under licence, such as web links and image displays, and also lacked exclusions for fair dealing) via their contracting, without simultaneously increasing their licence fees. While they likely would have still faced opposition, it probably would not have been as widespread or heated. In fact, given university administrators' overall concern with the bottom line, it might just simply have gone through. Once AC had established their territory, they could have gradually raised the rates.

41 DeWhitt, above note 32 at 120.

42 Marc Hugunin, "ASCAP, BMI and the Democratization of American Popular Music" (1979) 7:1 *Popular Music and Society* 8 at 9.

association, the NAB, formed their own licensing agency, Broadcast Music International (BMI). Following the Second World War, and following the pattern of the other performing rights organizations, BMI expanded into Canada and set up a Canadian office to collect on the performance right. While the NAB had initially been established in opposition to ASCAP, after its failure in the courts the NAB adopted the ideology of the dominant order and while still in competition with elements within the hegemony (ASCAP). They nonetheless had become proponents of the dominant ideology of the hegemonic order (the public performance right).

Surviving the attacks and crises of the Royal Commissions, opposition from broadcasters and the public, the hegemony continued to move forward and simultaneously began the political process of lobbying to influence policy outcomes. The Ilsley Commission of 1959 devoted an entire chapter of its report solely to the issue of performance rights, though the tone had changed markedly from the earlier Royal Commissions. Not only were the performance rights regimes being generally treated with less suspicion (which is interesting given that two previous commissions had been specifically called to investigate them), but they had reached a level of confidence that allowed them to suggest that the government regulation via the Copyright Appeal Board was inconsistent with obligations under international agreements.<sup>43</sup> By this time the hegemony was firmly established and confident. It had continued to expand, moving into radio, and now began its encroachment into the emerging medium of television.

By the time the performance right hegemony entered the 1960s it was so thoroughly entrenched that it was no longer questioned, in fact just the opposite began to occur. The publications of the Economic Council of Canada (ECC), which had been charged with investigating a new copyright policy for Canada, began to reflect the effectiveness of the hegemonic order surrounding the public performance rights regimes upon the policy process. In a series of reports, *Copyright in Context: the Challenge of Change*,<sup>44</sup> Re-

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43 Royal Commission on Patents, Copyright, Trade Marks and Industrial Designs, *Report on Copyright* (Ottawa: E Cloutier Queen's Printer, 1957) at 100-1 (Chair: James Lorimer Ilsley), online: Library and Archives Canada <http://epe.lac-bac.gc.ca/100/200/301/pco-bcp/commissions-ef/ilsley1957a-eng/ilsley1957a-eng.htm>. The Commission noted that "Canada is therefore perfectly free, so far as the conventions are concerned, to enact such provisions as it thinks fit to prevent or deal with any abuse of the rights centralized in performing rights societies" at 100-1.

44 Bruce C McDonald, *Copyright in Context: The Challenge of Change* (Ottawa: Economic Council of Canada, 1971).

port on *Intellectual and Industrial Property*,<sup>45</sup> the ECC strongly recommended the adoption of copyright collectives modelled on the performance rights regimes for the purposes of collection in other areas. Perhaps the ultimate indicator of the extent to which the hegemony surrounding the performance right was successful is the fact that the Minister of Culture supported the idea that the two separate performing rights agencies in Canada, the Composers, Authors, and Publishers Association of Canada (CAPAC) and the Performing Rights Organization of Canada (PROCAN),<sup>46</sup> should amalgamate into a single monopoly.<sup>47</sup> Following the changes to the *Copyright Act* in 1988, they did so, forming the Society of Composers, Authors and Music Publishers of Canada (SOCAN). At the same time the hegemonic order reached its full maturation with the extension of copyright collectives across a broad spectrum beyond the public performance right with the Phase I revisions to copyright in 1988.

In observing the extension of copyright collective management regimes across a broad base of interests, it is imperative to stress the “natural outcome” and the “common sense” with which this direction was perceived. The policy changes appeared to be the natural evolution of the policy process. However the concept of a separate economic right (the public performance right itself) within the larger copyright frame was anything but a natural outcome. In fact, the very people who subsequently championed the right for their own economic interests, the publishers, were at the outset vehemently opposed to the right.

## H. HEGEMONIC RESISTANCE

Gramsci recognized that at various times within the hegemonic process, crises would develop, and while some would be insignificant others would be organic, representative of deep pockets of discontent within society. Such organic crises create the opportunity for new classes to overthrow the established order: “If the ruling class has lost its consensus, i.e. is no longer ‘leading’ but only ‘dominant,’ exercising coercive force alone, this means

45 Economic Council of Canada, *Report on Intellectual and Industrial Property* (Ottawa: Information Canada, 1971).

46 SOCAN, “Our History,” online: [www.socan.ca/jsp/en/pub/about\\_socan/history.jsp](http://www.socan.ca/jsp/en/pub/about_socan/history.jsp). BMI Canada had divested itself from its American parent corporation in 1969 and established itself as a solely Canadian entity operating under the name PROCAN.

47 Jan V Matejcek, *History of BMI Canada Ltd and PROCAN: Their Role in Canadian Music and in the Formation of SOCAN (1940–1990)* (Toronto: Matejcek, 1996) at 96.



precisely that the great masses have become detached from their traditional ideologies, and no longer believe what they used to believe previously.”<sup>48</sup>

Within the performance rights framework there were numerous instances of such resistance ranging from the publishing class themselves at the outset, through various trade and social unions as well as larger media interests. British and American publishing interests challenged the idea of a public performance right from the outset. Even after they had been formed, the performance right collectives continued to face opposition from the musicians union, hoteliers associations, cabarets, and motion picture exhibitors. Even after most of these issues had been settled in favour of the collectives, the onset of broadcasting would result in another adversarial standoff. The establishment of the Canadian Performing Right Society faced similar opposition, but in addition the CPRS had to appear before two Royal Commissions called to investigate its operation. The Royal Commissions would eventually lead to the establishment of the Copyright Appeal Board (now simply the Copyright Board) to deal with complaints. Despite the ongoing opposition, none of the adversaries have ever successfully challenged the dominant group, though they have influenced some outcomes. In fact, as Gramsci theorized would happen, most adversaries to the hegemony established by the performing rights collectives have ultimately been assimilated into the hegemony itself and have become part of that which they opposed. Indeed, that has been the overwhelming success of the hegemonic order.

As part of the working class, composers and performers have been dependent upon the labour of their bodies to forge an existence. Despite their historic lack of control over the processes of production and distribution, composers and performers have continued to participate in the industrial process even in the face of overwhelming evidence that industrial capital will take advantage of them at every opportunity. Paul McGuinness, manager of the pop band U2, noted in a speech to an international managers summit in 2008 that the music industry had a long history of abusing artists, and that both the band and McGuinness were consciously aware of that: “We were never interested in joining that long, humiliating list of miserable artists who made lousy deals, got exploited and ended up broke and with no control over how their life’s work was used, and no say in how their names

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48 Gramsci, above note 5 at 275–76 [footnote omitted].

and likenesses were bought and sold.”<sup>49</sup> The music industry continues such practices today, even as it complains bitterly about “piracy” and “theft” with respect to downloading and digital music issues. In the same speech, McGuinness cites the “360” deals being pushed by the current industry as evidence of the continued exploitation of the artist: “It’s ironic that, at a time when the majors are asking the artists to trust them to share advertising revenue they are also pushing the dreadful ‘360 model.’”<sup>50</sup>

The current crisis surrounding the downloading of digitized music and copyright generally seems to reflect a new mode of thought with respect to the conception of copyright, owning, and sharing, notions which were certainly not those being advocated by the dominant order. This new mode of thought can be seen to be much more reflective of the social classes that actually make use of the works. The way in which our contemporary society views copyright with respect to reuse and sharing within our social frames is very different from the way in which industrial concerns would like it to be seen. It is now quite common for young children to create works in various media and post them to the web. The author’s thirteen year-old son regularly creates various types of creative media on his smart phone and shares/reuses it with friends and strangers online. Contemporary theorists such as Lawrence Lessig, Siva Vaidyanathan, James Boyle, and Joanna Demers (to name just a few) have made clear that there is a distinct clash between the evolving user-generated culture and established industrial interests. The simple fact that intellectual property issues and policies have become an increasingly common source of debate and point of discussion in the popular media indicates a general awareness that simply did not exist twenty years ago. This new mode of thinking has led to a new discourse, which has begun to question the foundations of the dominant order and place the hegemony in question.

The prevalence of this new copyright discourse and the continued questioning of the dominant order’s ideology in regard to copyright seem

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49 Paul McGuinness, Address (Keynote address delivered at the Midem Music Industry Convention, Cannes, keynote address 28 January 2008), online: Digital Cowboys: Hired Hands for the 21st Century <http://digitalcowboys.com/2008/01/29/paul-mcguinness-u2s-manager-speaks-out-at-cannes>.

50 The term “360 deal” refers to an increasingly common practice in the music industry to sign an artist to deals that provide the industry label with a proportion of income from all aspects of the artist’s income, not simply those related to the music or recording. As such, the industry interests can also collect on any uses of the artist’s likeness, touring income, merchandise sales, and/or expansion into new fields (such as film or TV).

indicative of the organic crisis which Gramsci noted would be necessary for the overthrow of a dominant order. Given the prevailing social behaviours with respect to copyright it seems clear that “the great masses have become detached from their traditional ideologies . . . .”<sup>51</sup> The response to the proposed colleges and universities tariff request of Access Copyright seems a particularly poignant example of the masses having become disconnected from the traditional ideologies of the ruling hegemony. The July 2012 copyright pentalogy rulings of the Supreme Court of Canada may also be seen to indicate the disconnection between the ruling hegemony and the changing copyright discourse.<sup>52</sup> As Raymond Williams has noted, “[a] lived hegemony is always a process. It is not, except analytically, a system or a structure. It is a realized complex of experiences, relationships, and activities, with specific and changing pressures and limits.”<sup>53</sup> Thus, hegemony is a dialectic process, the “push and pull” of relationships and cultures within the social structure which impact, and are impacted by, the processes surrounding it—cultural, social, legal, and political. It is constantly shifting, changing, and negotiating, yet fundamentally driven by the ideology of the dominant group as it responds to challenges and crises. However, the detachment of the masses that seems to be taking place may lead to the organic crisis necessary to displace the ruling hegemony. Only time will tell.

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51 Gramsci, above note 5 at 275–76 [footnote omitted].

52 *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34; *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35; *Re:Sound v Motion Picture Theatre Associations of Canada*, 2012 SCC 38; *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36; *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37.

53 Raymond Williams, *Marxism and Literature* (Oxford: Oxford University Press, 1977) at 112.