

COPYRIGHT AND BANKRUPTCY

OUT OF TOUCH AND POORLY DRAFTED: SOME COMMENTS ON SECTION 83 OF THE *BANKRUPTCY AND INSOLVENCY ACT*

by

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BANKRUPTCY AND INSOLVENCY ACT

COPYRIGHT AND MANUSCRIPT TO REVERT TO AUTHOR

83. (1) Notwithstanding anything in this Act or in any other statute, the author's manuscripts and any copyright or any interest in a copyright in whole or in part assigned to a publisher, printer, firm or person becoming bankrupt shall,

- (a) if the work covered by the copyright has not been published and put on the market at the time of the bankruptcy and no expense has been incurred in connection therewith, revert and be delivered to the author or his heirs, and any contract or agreement between the author or his heirs and the bankrupt shall then terminate and be void;**
- (b) if the work covered by the copyright has in whole or in part been put into type and expenses have been incurred by the bankrupt, revert and be delivered to the author on payment of the expenses so incurred and the product of those expenses shall also be delivered to**

LE DROIT D'AUTEUR ET LES MANUSCRITS RETOURNENT À L'AUTEUR

83. (1) Nonobstant les autres dispositions de la présente loi ou toute autre loi, les manuscrits de l'auteur et tout droit d'auteur ou intérêt dans un droit d'auteur totalement ou partiellement cédé à un éditeur, à un imprimeur, à une firme ou à une personne devenue en faillite:

- a) retournent et sont remis à l'auteur ou à ses héritiers, si l'ouvrage que couvre ce droit d'auteur n'a pas été publié et mis dans le commerce au moment de la faillite et s'il n'a pas occasionné de dépenses; tout contrat ou convention entre l'auteur ou ses héritiers et ce failli cesse alors et devient nul;**
- b) retournent et sont remis à l'auteur sur paiement des dépenses subies, si l'ouvrage que couvre ce droit d'auteur a été complètement ou partiellement composé en typographie et a occasionné des dépenses au failli, et le produit de ces dépenses est aussi remis à**

the author or his heirs and any contract or agreement between the author or his heirs and the bankrupt shall then terminate and be void, but if the author does not exercise his rights under this paragraph within six months of the date of the bankruptcy, the trustee may carry out the original contract; or

- (c) if the trustee at the expiration of six months from the date of the bankruptcy decides not to carry out the contract, revert without expense to the author and any contract or agreement between the author or his heirs and the bankrupt shall then terminate and be void.

IF COPIES OF THE WORK ARE ON THE MARKET

(2) Where, at the time of the bankruptcy referred to in subsection (1), the work was published and put on the market, the trustee is entitled to sell, or authorize the sale or reproduction of, any copies of the published work, or to perform or authorize the performance of the work, but

- (a) there shall be paid to the author or his heirs such sums by way of royalties or share of the profits as would have been payable by the bankrupt;
- (b) the trustee is not, without the written consent of the author or his heirs, entitled to assign the copyright or transfer the interest or to grant any interest therein by licence or otherwise, except on terms that will guarantee to the author or his heirs payment by way of royalties or share of the profits at a rate not less than the rate the bankrupt was liable to pay; and
- (c) any contract or agreement between the author or his heirs and the bankrupt shall then terminate

l'auteur ou à ses héritiers; tout contrat ou convention entre l'auteur ou ses héritiers et le failli cesse alors et devient nul; mais si l'auteur n'exerce pas, dans un délai de six mois à compter de la date de la faillite, la priorité que lui confère le présent alinéa, le syndic pourra mettre à exécution le contrat original;

- c) retourne à l'auteur sans frais, si le syndic, après un délai de six mois à compter de la date de la faillite, décide de ne pas mettre le contrat à exécution; tout contrat ou convention entre l'auteur ou ses héritiers et ce failli cesse alors et devient nul.

SI DES EXEMPLAIRES DE L'OUVRAGE SONT DANS LE COMMERCE

(2) Si, au moment de la faillite, l'ouvrage était publié et mis dans le commerce, le syndic a le pouvoir de vendre l'ouvrage publié ou d'en autoriser la vente ou la reproduction d'exemplaires, ou de représenter cet ouvrage ou d'en autoriser la représentation, mais:

- a) il est versé à l'auteur ou à ses héritiers les montants, sous forme de redevances ou de tantièmes sur les profits, qui auraient été payables par le failli;
- b) le syndic n'a pas le pouvoir, sans le consentement écrit de l'auteur ou de ses héritiers, de céder le droit d'auteur ou de transporter ou d'accorder un intérêt dans ce droit d'auteur par licence ou autrement, sauf à des termes qui garantissent à l'auteur ou à ses héritiers des paiements, sous forme de redevances ou de tantièmes sur les profits, à un taux non inférieur à celui que le failli était tenu de payer;
- c) tout contrat ou convention entre l'auteur ou ses héritiers et le failli cesse et devient nul, sauf en ce qui

and be void, except with respect to the disposal, under this subsection, of copies of the work published and put on the market before the bankruptcy.

concerne l'aliénation, sous l'autorité du présent paragraphe, des exemplaires de l'ouvrage publiés et mis dans le commerce avant la faillite.

MARKETABLE COPIES TO BE FIRST OFFERED FOR SALE TO THE AUTHOR

(3) The trustee shall offer in writing to the author or his heirs the right to purchase the manufactured or marketable copies of the copyright work comprised in the estate of the bankrupt at such price and on such terms and conditions as the trustee may deem fair and proper before disposing of the manufactured and marketable copies in the manner prescribed in this section.

LES EXEMPLAIRES DESTINÉS AU COMMERCE SONT D'ABORD OFFERTS EN VENTE À L'AUTEUR

(3) Avant d'aliéner, conformément au présent article, des exemplaires manufacturés et destinés au commerce de l'ouvrage faisant l'objet d'un droit d'auteur et qui tombe dans l'actif du failli, le syndic offre par écrit à l'auteur ou à ses héritiers l'option d'acheter ces exemplaires aux prix et conditions que le syndic peut juger justes et raisonnables.

R.S.C. 1985, c. B-3, s. 83

§1.0 Related Sections

Section 2—Definitions: "legal representatives", "performance", "work"; section 3—Definition of "copyright"; section 4—Definition of "publication"; section 13—Ownership of copyright; section 14—Limitation when author is first owner of copyright.

§2.0 Related Regulations

None.

§3.0 Legislative History

§3.1 Corresponding Section in Prior Legislation

Section 19(3) from 1920.07.07 to 1928.01.31; section 48 from 1928.02.01 to 1950.06.30; section 52 from 1940.07.01 to 1971.07.14; section 61 from 1971.07.15 to 1988.12.11; section 83 from 1988.12.12 to present.

§3.2 Legislative History

§3.2.1 S.C. 1919, c. 36, s. 19(3).

COPYRIGHT

(3) Where the property of a bankrupt or authorized assignor comprises the copyright in any work or any interest in such copyright, and he is liable to pay to the author of the work royalties or a share of the profits in respect thereof, the trustee shall not be entitled to sell, or authorize the sale of, any copies of the work, or to perform or authorize the performance of the work, except on the terms of paying to the author such sums by way of royalty or share of the profits as would have been payable by the bankrupt or authorized assignor, nor shall he, without the consent of the author or of the court, be entitled to assign the right or transfer the interest or to grant any interest in the right by license, except upon terms which will secure to the author payments by way of royalty or share of the profits at a rate not less than that which the bankrupt or authorized assignor was liable to pay.

DROITS D'AUTEUR

(3) Lorsque les biens d'un failli ou cédant autorisé comprennent les droits d'auteur de tout ouvrage ou un intérêt dans ces droits d'auteur, et lorsqu'il est tenu de payer à l'auteur de l'ouvrage des droits régaliers ou une part des profits à cet égard, le syndic n'a le droit de vendre ni d'autoriser la vente d'aucun exemplaire de l'ouvrage, ni de faire l'ouvrage, ni de donner l'autorisation de le faire, sauf à condition de payer à l'auteur les sommes, sous forme de droits régaliers ou de part des profits qui eussent été payables par le failli ou le cédant autorisé, et il n'est pas, sans le consentement de l'auteur ou du tribunal, admis à céder le droit, ni à transporter l'intérêt, ni à concéder un intérêt quelconque dans le droit par autorisation, sauf à des conditions qui assurent à l'auteur des paiements sous forme de droits régaliers ou de part des profits à un taux pas moindre que celui que le failli ou le cédant autorisé était tenu de payer.

§3.2.2 R.S.C. 1927, c. 11, s. 48.

COPYRIGHT

48. Where the property of a bankrupt or authorized assignor comprises the copyright in any work or any interest in such copyright, and he is liable to pay to the author of the work royalties or a share of the profits in respect thereof, the trustee shall not be entitled to sell, or authorize the sale of, any copies of the work, or to perform or authorize the performance of the work, except on the terms of paying to the author such sums by way of royalty or share of the profits as would have been payable by the bankrupt or authorized assignor, nor shall he, without the consent of the author or of the court, be entitled to assign the

DROIT D'AUTEUR

48. Lorsque les biens d'un failli ou cédant autorisé comprennent le droit d'auteur de tout ouvrage ou un intérêt dans ce droit d'auteur, et lorsqu'il est tenu de payer à l'auteur de l'ouvrage des tantièmes ou une part des profits à cet égard, le syndic n'a le droit de vendre ni d'autoriser la vente d'aucun exemplaire de l'ouvrage, ni de représenter l'ouvrage, ni d'en autoriser la représentation, sauf s'il paye à l'auteur les sommes, sous forme de tantièmes ou de part des profits qui eussent été payables par le failli ou le cédant autorisé, et il n'est pas, sans le consentement de l'auteur ou du tribunal,

right or transfer the interest or to grant any interest in the right by license, except upon terms which will secure to the author payments by way of royalty or share of the profits at a rate not less than that which the bankrupt or authorized assignor was liable to pay.

admis à céder le droit, ni à transporter l'intérêt, ni à concéder un intérêt quelconque dans le droit par un permis, sauf à des conditions qui assurent à l'auteur des paiements sous forme de tantièmes ou de part des profits à un taux non inférieur à celui que le failli ou le cédant autorisé était tenu de payer.

§3.2.3 S.C. 1949, c. 7, s. 52.

COPYRIGHT AND MANUSCRIPT TO REVERT TO AUTHOR

LE COPYRIGHT ET LES MANUSCRITS RETOURNENT À L'AUTEUR

52. (1) Notwithstanding anything in this Act or in any other statute, the author's manuscripts and any copyright or any interest in a copyright in whole or in part assigned to a publisher, printer, firm or person becoming bankrupt shall,

52. (1) Nonobstant toute disposition de la présente loi ou de tout autre statut, les manuscrits de l'auteur et tout droit d'auteur (*copyright*) ou intérêt dans un droit d'auteur totalement ou partiellement cédé à un éditeur, à un imprimeur, à une firme ou à une personne devenue en faillite:

(a) if the work covered by such copyright has not been published and put on the market at the time of the bankruptcy and no expense has been incurred in connection therewith, thereupon revert and be delivered to the author or his heirs, and any contract or agreement between the author or his heirs and such bankrupt shall then terminate and be null and void;

a) retournent automatiquement et doivent être remis à l'auteur ou à ses héritiers, si l'ouvrage que couvre ce droit d'auteur n'a pas été publié et mis dans le commerce au moment de la faillite et s'il n'a pas occasionné de dépenses; et tout contrat ou convention entre l'auteur ou ses héritiers et ce failli cesse alors et devient nulle et de nul effet;

(b) if the work covered by such copyright has in whole or in part been put into type and expenses have been incurred by the bankrupt, revert and be delivered to the author on payment of the expenses so incurred and the product of such expenses shall also be delivered to the author or his heirs and any contract or agreement between the author or his heirs and the bankrupt shall then terminate and be null and void; but if the author does not exercise his rights under this paragraph within six months of the date of the

b) retournent et doivent être remis à l'auteur sur paiement des dépenses subies, si l'ouvrage que couvre ce droit d'auteur a été complètement ou partiellement composé en typographie et a occasionné des dépenses au failli, et le produit de ces dépenses doit être aussi remis à l'auteur ou ses héritiers et tout contrat ou convention entre l'auteur ou ses héritiers et le failli cesse alors et devient nulle et de nul effet; mais si l'auteur n'exerce pas, dans un délai de six mois à compter de la date de la faillite, la priorité que lui confère le présent alinéa, le syndic pourra

bankruptcy, the trustee may carry out the original contract;

- (c) if the trustee at the expiration of six months from the date of the bankruptcy decides not to carry out the contract, revert without expense to the author and any contract or agreement between the author or his heirs and such bankrupt shall then terminate and be null and void.

IF COPIES OF THE WORK ARE ON THE MARKET

(2) Where, at the time of the bankruptcy, the work was published and put on the market, the trustee is entitled to sell, or authorize the sale or reproduction of, any copies of the published work, or to perform or authorize the performance of the said work, but there shall be paid to the author or his heirs such sums by way of royalties or share of the profits as would have been payable by the bankrupt; and the trustee is not, without the written consent of the author or his heirs, entitled to assign the copyright or transfer the interest or to grant any interest therein by licence or otherwise, except upon terms which will guarantee to the author or his heirs payment by way of royalties or share of the profits at a rate not less than that which such bankrupt was liable to pay, and any contract or agreement between the author or his heirs and such bankrupt shall then terminate and be null and void, except as to the disposal, under this subsection, of copies of the said work published and put on the market before the bankruptcy.

MARKETABLE COPIES TO BE FIRST OFFERED FOR SALE TO THE AUTHOR

(3) The trustee shall offer in writing to the author or his heirs the right to purchase

mettre à exécution le contrat original;

- c) retournent à l'auteur sans frais, si le syndic, après un délai de six mois à compter de la date de la faillite, décide de ne pas mettre le contrat à exécution; et tout contrat ou convention entre l'auteur ou ses héritiers et ce failli cesse alors et devient nulle et de nul effet.

SI DES EXEMPLAIRES DE L'OUVRAGE SONT DANS LE COMMERCE

(2) Si, au moment de la faillite, l'ouvrage était publié et mis dans le commerce, le syndic a le pouvoir de vendre l'ouvrage publié ou d'en autoriser la vente ou la reproduction d'exemplaires, ou de représenter ledit ouvrage ou d'en autoriser la représentation, mais il doit être versé à l'auteur ou à ses héritiers les montants, sous forme de redevances ou de tantièmes sur les profits, qui auraient été payables par le failli; et le syndic n'a pas le pouvoir, sans le consentement écrit de l'auteur ou de ses héritiers, de céder le droit d'auteur ou de transporter ou d'accorder un intérêt dans ce droit d'auteur par licence ou autrement, sauf à des termes qui garantissent à l'auteur ou ses héritiers des paiements, sous forme de redevances ou de tantièmes sur les profits, à un taux non inférieur à celui que le failli était tenu de payer. Et tout contrat ou convention entre l'auteur ou ses héritiers et le failli cesse et devient nulle et de nul effet, sauf en ce qui concerne l'aliénation, sous l'autorité du présent paragraphe, des exemplaires dudit ouvrage publiés et mis dans le commerce avant la faillite.

LES EXEMPLAIRES DESTINÉS AU COMMERCE DOIVENT D'ABORD ÊTRE OFFERTS EN VENTE À L'AUTEUR

(3) Avant d'aliéner, de la manière prescrite au présent article, des

the manufactured or marketable copies of the copyright work comprised in the estate of the bankrupt at such price and upon such terms and conditions as the trustee may deem fair and proper before disposing of such manufactured and marketable copies in the manner prescribed in this section.

exemplaires manufacturés et destinés au commerce de l'ouvrage faisant l'objet d'un droit d'auteur et qui tombe dans l'actif du failli, le syndic doit offrir par écrit à l'auteur ou ses héritiers l'option d'acheter ces exemplaires au prix, aux termes et conditions que le syndic peut juger justes et raisonnables.

§3.2.4 R.S.C. 1952, c. 14, s. 52.

COPYRIGHT AND MANUSCRIPT TO REVERT TO AUTHOR

LE COPYRIGHT ET LES MANUSCRITS RETOURNENT À L'AUTEUR

52. (1) Notwithstanding anything contained in this Act or in any other statute, the author's manuscripts and any copyright or any interest in a copyright in whole or in part assigned to a publisher, printer, firm or person becoming bankrupt shall,

52. (1) Nonobstant toute disposition de la présente loi ou de tout autre statut, les manuscrits de l'auteur et tout droit d'auteur (*copyright*) ou intérêt dans un droit d'auteur totalement ou partiellement cédé à un éditeur, à un imprimeur, à une firme ou à une personne devenue en faillite:

(a) if the work covered by such copyright has not been published and put on the market at the time of the bankruptcy and no expense has been incurred in connection therewith thereupon revert and be delivered to the author or his heirs, and any contract or agreement between the author or his heirs and such bankrupt shall then terminate and be null and void;

a) retournent automatiquement et doivent être remis à l'auteur ou à ses héritiers, si l'ouvrage que couvre ce droit d'auteur n'a pas été publié et mis dans le commerce au moment de la faillite et s'il n'a pas occasionné de dépenses; et tout contrat ou convention entre l'auteur ou ses héritiers et ce failli cesse alors et devient nulle et de nul effet;

(b) if the work covered by such copyright has in whole or in part been put into type and expenses have been incurred by the bankrupt, revert and be delivered to the author on payment of the expenses so incurred and the product of such expenses shall also be delivered to the author or his heirs and any contract or agreement between the author or his heirs and the bankrupt shall then terminate and be null and void; Provided that if the author does not exercise his rights under this

b) retournent et doivent être remis à l'auteur sur paiement des dépenses subies, si l'ouvrage que couvre ce droit d'auteur a été complètement ou partiellement composé en typographie et a occasionné des dépenses au failli, et le produit de ces dépenses doit être aussi remis à l'auteur ou à ses héritiers; et tout contrat ou convention entre l'auteur ou ses héritiers et le failli cesse alors et devient nulle et de nul effet. Toutefois, si l'auteur n'exerce pas, dans un délai de six mois à compter de la date de la faillite, la priorité que

paragraph within six months of the date of the bankruptcy, the trustee may carry out the original contract;

lui confère le présent alinéa, le syndic pourra mettre à exécution le traité original;

(c) if the trustee at the expiration of six months from the date of the bankruptcy decides not to carry out the contract, revert without expense to the author and any contract or agreement between the author or his heirs and such bankrupt shall then terminate and be null and void.

c) retourne à l'auteur sans paiement, si le syndic, après un délai de six mois à compter de la date de la faillite, décide de ne pas mettre le traité à exécution; et tout contrat ou convention entre l'auteur ou ses héritiers et ce failli cesse alors et devient nulle et de nul effet.

IF COPIES OF THE WORK ARE ON THE MARKET

SI DES EXEMPLAIRES DE L'OUVRAGE SONT DANS LE COMMERCE

(2) If, at the time of the bankruptcy, the work was published and put on the market, the trustee shall be entitled to sell, or authorize the sale or reproduction of, any copies of the published work, or to perform or authorize the performance of the said work, provided that there shall be paid to the author or his heirs such sums by way of royalties or share of the profits as would have been payable by the bankrupt; and the trustee shall not, without the written consent of the author or his heirs, be entitled to assign the copyright or transfer the interest or to grant any interest therein by licence or otherwise, except upon terms that will guarantee to the author or his heirs payment by way of royalties or share of the profits at a rate not less than that which such bankrupt was liable to pay, and any contract or agreement between the author or his heirs and such bankrupt shall then terminate and be null and void, except as to the disposal, under this subsection, of copies of the said work published and put on the market before the bankruptcy.

(2) Si, au moment de la faillite, l'ouvrage était publié et mis dans le commerce, le syndic a le pouvoir de vendre l'ouvrage publié ou d'en autoriser la vente ou la reproduction d'exemplaires, ou de représenter ledit ouvrage ou d'en autoriser la représentation, à la condition de verser à l'auteur ou à ses héritiers les montants, sous forme de redevances ou de tantièmes sur les profits, que le failli lui ou leur aurait payés; et le syndic n'a pas le pouvoir, sans le consentement écrit de l'auteur ou de ses héritiers, de céder le droit d'auteur ou de transporter ou d'accorder un intérêt dans ce droit d'auteur par licence ou autrement, sauf à des termes qui garantissent à l'auteur ou ses héritiers des paiements, sous forme de redevances ou de tantièmes sur les profits, à un taux non inférieur à celui que le failli était tenu de payer. Et tout contrat ou convention entre l'auteur ou ses héritiers et le failli cesse et devient nulle et de nul effet, sauf en ce qui concerne la disposition, sous l'autorité du présent paragraphe, des exemplaires dudit ouvrage publiés et mis dans le commerce avant la faillite.

MARKETABLE COPIES TO BE FIRST OFFERED FOR SALE TO THE AUTHOR

LES EXEMPLAIRES DESTINÉS AU COMMERCE DOIVENT D'ABORD ÊTRE OFFERTS EN VENTE À L'AUTEUR

(3) The trustee shall offer in writing to the author or his heirs the right to purchase

(3) Avant de disposer, de la manière prescrite au présent article, des

the manufactured or marketable copies of the copyright work comprised in the estate of the bankrupt at such price and upon such terms and conditions as the trustee may deem fair and proper before disposing of the manufactured and marketable copies in the manner prescribed in this section.

exemplaires manufacturés et destinés au commerce de l'ouvrage faisant l'objet d'un droit d'auteur et qui tombe dans l'actif du failli, le syndic doit offrir par écrit à l'auteur ou ses héritiers l'option d'acheter ces exemplaires au prix, aux termes et conditions que le syndic peut juger justes et raisonnables.

§3.2.5 R.S.C. 1970, c. B-3, s. 61.

COPYRIGHT AND MANUSCRIPT TO REVERT TO AUTHOR

LE DROIT D'AUTEUR ET LES MANUSCRITS RETOURNENT À L'AUTEUR

61. (1) Notwithstanding anything in this Act or in any other statute, the author's manuscripts and any copyright or any interest in a copyright in whole or in part assigned to a publisher, printer, firm or person becoming bankrupt shall,

61. (1) Nonobstant toute disposition de la présente loi ou de toute autre loi, les manuscrits de l'auteur et tout droit d'auteur ou intérêt dans un droit d'auteur totalement ou partiellement cédé à un éditeur, à un imprimeur, à une firme ou à une personne devenue en faillite:

(a) if the work covered by such copyright has not been published and put on the market at the time of the bankruptcy and no expense has been incurred in connection therewith, thereupon revert and be delivered to the author or his heirs, and any contract or agreement between the author or his heirs and such bankrupt shall then terminate and be void;

a) retournent automatiquement et doivent être remis à l'auteur ou à ses héritiers, si l'ouvrage que couvre ce droit d'auteur n'a pas été publié et mis dans le commerce au moment de la faillite et s'il n'a pas occasionné de dépenses; et tout contrat ou convention entre l'auteur ou ses héritiers et ce failli cesse alors et devient nul;

(b) if the work covered by such copyright has in whole or in part been put into type and expenses have been incurred by the bankrupt, revert and be delivered to the author on payment of the expenses so incurred and the product of such expenses shall also be delivered to the author or his heirs and any contract or agreement between the author or his heirs and the bankrupt shall then terminate and be void; but if the author does not exercise his rights under this paragraph within six

b) retournent et doivent être remis à l'auteur sur paiement des dépenses subies, si l'ouvrage que couvre ce droit d'auteur a été complètement ou partiellement composé en typographie et a occasionné des dépenses au failli, et le produit de ces dépenses doit être aussi remis à l'auteur ou à ses héritiers; et tout contrat ou convention entre l'auteur ou ses héritiers et le failli cesse alors et devient nul; mais si l'auteur n'exerce pas, dans un délai de six mois à compter de la date de la faillite, la priorité que lui confère le présent

months of the date of the bankruptcy, the trustee may carry out the original contract;

- (c) if the trustee at the expiration of six months from the date of the bankruptcy decides not to carry out the contract, revert without expenses to the author and any contract or agreement between the author or his heirs and such bankrupt shall then terminate and be void.

IF COPIES OF THE WORK ARE ON THE MARKET

(2) Where, at the time of the bankruptcy, the work was published and put on the market, the trustee is entitled to sell, or authorize the sale or reproduction of, any copies of the published work, or to perform or authorize the performance of the said work, but there shall be paid to the author or his heirs such sums by way of royalties or share of the profits as would have been payable by the bankrupt; and the trustee is not, without the written consent of the author or his heirs, entitled to assign the copyright or transfer the interest or to grant any interest therein by licence or otherwise, except upon terms that will guarantee to the author or his heirs payment by way of royalties or share of the profits at a rate not less than that which such bankrupt was liable to pay, and any contract or agreement between the author or his heirs and such bankrupt shall then terminate and be void, except as to the disposal, under this subsection, of copies of the said work published and put on the market before the bankruptcy.

MARKETABLE COPIES TO BE FIRST OFFERED FOR SALE TO THE AUTHOR

- (3) The trustee shall offer in writing to the

alinéa, le syndic pourra mettre à exécution le contrat original;

- c) retournent à l'auteur sans frais, si le syndic, après un délai de six mois à compter de la date de la faillite, décide de ne pas mettre le contrat à exécution; et tout contrat ou convention entre l'auteur ou ses héritiers et ce failli cesse alors et devient nul.

SI DES EXEMPLAIRES DE L'OUVRAGE SONT DANS LE COMMERCE

(2) Si, au moment de la faillite, l'ouvrage était publié et mis dans le commerce, le syndic a le pouvoir de vendre l'ouvrage publié ou d'en autoriser la vente ou la reproduction d'exemplaires, ou de représenter ledit ouvrage ou d'en autoriser la représentation, mais il doit être versé à l'auteur ou à ses héritiers les montants, sous forme de redevances ou de tantièmes sur les profits, qui auraient été payables par le failli; et le syndic n'a pas le pouvoir, sans le consentement écrit de l'auteur ou de ses héritiers, de céder le droit d'auteur ou de transporter ou d'accorder un intérêt dans ce droit d'auteur par licence ou autrement, sauf à des termes qui garantissent à l'auteur ou ses héritiers des paiements, sous forme de redevances ou de tantièmes sur les profits, à un taux non inférieur à celui que le failli était tenu de payer. Et tout contrat ou convention entre l'auteur ou ses héritiers et le failli cesse et devient nul, sauf en ce qui concerne l'aliénation, sous l'autorité du présent paragraphe, des exemplaires dudit ouvrage publiés et mis dans le commerce avant la faillite.

LES EXEMPLAIRES DESTINÉS AU COMMERCE DOIVENT D'ABORD ÊTRE OFFERTS EN VENTE À L'AUTEUR

- (3) Avant d'aliéner, de la manière

author or his heirs the right to purchase the manufactured or marketable copies of the copyright work comprised in the estate of the bankrupt at such price and upon such terms and conditions as the trustee may deem fair and proper before disposing of such manufactured and marketable copies in the manner prescribed in this section.

prescrite au présent article, des exemplaires manufacturés et destinés au commerce de l'ouvrage faisant l'objet d'un droit d'auteur et qui tombe dans l'actif du failli, le syndic doit offrir par écrit à l'auteur ou ses héritiers l'option d'acheter ces exemplaires aux prix et conditions que le syndic peut juger justes et raisonnables.

§3.3 Proposed Legislation

Insolvency Act (Bill C-17, 2nd Session, 32nd Parliament, 32 Elizabeth II, 1983-84), sections 193-195.

COPYRIGHT IN UNPUBLISHED WORK

193. (1) Notwithstanding any Act, rule of law, contract or agreement, where a copyright in a work of an interest in such copyright has been assigned in whole or in part and the assignee becomes a bankrupt before the work is published and put on the market,

- (a) the manuscript and the copyright or any interest therein reverts to the assignor,
- (b) any document in support thereof and the product or any expense that has been incurred vests in the assignor, and
- (c) any contract or agreement between the assignor and the assignee in connection with the copyright terminates

on request made in writing by the assignor to the trustee less than three months from the date of bankruptcy and on payment to the trustee before the expiry of such period of any consideration that had been given for the copyright or the interest therein and of all expenses in relation thereto that, at the date of bankruptcy, had been

DROIT D'AUTEUR SUR UNE ŒUVRE INÉDITE

193. (1) Nonobstant toute loi, règle de droit, contrat ou convention, lorsque, en cas de cession totale ou partielle du droit d'auteur ou de tout autre droit s'y rapportant, le cessionnaire est mis en faillite avant la publication ou la mise en vente de l'œuvre qui en fait l'objet:

- a) le manuscrit et le droit d'auteur ou tout droit s'y rapportant retournent au cédant,
- b) les documents relatifs au droit d'auteur ainsi que le produit provenant des dépenses effectuées dans le cadre de l'opération sont dévolus au cédant,
- c) tout contrat ou convention portant sur le droit d'auteur et conclu entre le cédant et le cessionnaire est résilié,

pourvu que le cédant en ait fait la demande écrite au syndic moins de trois mois après la date de la faillite et ait, avant l'expiration de ce délai, remis au syndic toute prestation reçue dans le cadre de la cession, ainsi que le montant des dépenses faites par le cessionnaire à la date de la faillite et non encore remboursées à celui-ci.

incurred by the assignee and for which he had not been paid.

NO CLAIM FOR DAMAGES

(2) Where a copyright or an interest in a copyright reverts to the assignor pursuant to subsection (1), neither party is entitled to claim damages from the other on account of the termination of the contract or agreement.

DISCLAIMER OF COPYRIGHT

194. (1) Where a copyright in a work or an interest in such copyright has been assigned in whole or in part and the assignee becomes a bankrupt before the work is published and put on the market and the assignor does not make a request to the trustee pursuant to subsection 193(1), the trustee is deemed to have disclaimed the contract or agreement assigning the copyright on the expiration of six months from the date of bankruptcy unless, before that time, the trustee elects to carry out the contract or agreement and so signifies, in writing, to the assignor.

ANNULMENT OF ELECTION

(2) Where a trustee elects to carry out a contract or agreement in connection with a copyright and the trustee fails to carry out the contract with reasonable diligence, the court may

- (a) annul the election on such terms and conditions as it thinks fit; or
- (b) take any other action it thinks fit.

COPYRIGHT IN PUBLISHED WORK

195. Where an assignee of the whole or a part of a copyright in a work or an

ABSENCE DE DOMMAGES-INTÉRÊTS

(2) Lorsque le droit d'auteur ou un droit s'y rapportant retourne au cédant conformément au paragraphe (1), aucune des parties ne peut réclamer des dommages-intérêts à l'autre en raison de la résiliation du contrat ou de la convention.

RENONCIATION À UN DROIT D'AUTEUR

194. (1) En cas de cession totale ou partielle du droit d'auteur ou d'un droit s'y rapportant, si le cessionnaire est mis en faillite avant la publication et la mise en vente de l'œuvre qui en fait l'objet et que le cédant ne présente pas au syndic la demande prévue au paragraphe 193(1), le syndic est réputé, à l'expiration de la période de six mois qui suit la date de la faillite, avoir renoncé à la cession sauf si, avant l'expiration de ce délai, il a choisi d'exécuter le contrat ou la convention et en a fait notification écrite au cédant.

ANNULATION DU CHOIX

(2) Lorsque le syndic, ayant choisi d'exécuter un contrat ou une convention relatif au droit d'auteur, néglige d'apporter une diligence raisonnable dans l'exécution, le tribunal peut:

- a) soit annuler, selon les modalités qu'il estime opportunes, le choix du syndic;
- b) soit prendre toute autre mesure qu'il estime opportune.

DROIT D'AUTEUR SUR UNE ŒUVRE PUBLIÉE

195. En cas de cession totale ou partielle du droit d'auteur ou d'un droit s'y

interest in such copyright becomes a bankrupt after the work is published and put on the market and the assignee is liable under the assignment to pay royalties or a share of the profits in respect of the work to the assignor, the trustee is not entitled,

rapportant, lorsque le cessionnaire est mis en faillite après la publication et la mise en vente de l'œuvre qui en fait l'objet et qu'il est tenu, en vertu de la cession, de verser au cédant des redevances ou une part des bénéfices de l'œuvre, le syndic, sauf après versement des redevances ou de la part des bénéfices que le cessionnaire doit payer en vertu de la cession ou avec l'accord du bénéficiaire des versements, ne peut :

- (a) to sell or authorize the sale or reproduction of any copies of the published work,
- (b) to perform or authorize the performance of the work, or
- (c) to transfer any right or interest in the copyright or to grant any interest therein by licence or otherwise

- a) vendre aucun exemplaire de l'œuvre publiée ni en autoriser la vente ou la reproduction;
- b) représenter l'œuvre ni en autoriser la représentation;
- c) transférer des droits découlant du droit d'auteur ni accorder sur ce droit des concessions moyennant licence ou autrement.

except on the payment of the royalties or the share of profits in respect of the work that the assignee was liable to pay under the assignment or with the consent of the person who is entitled to receive such payments.

§4.0 Purpose

Section 83 of the *Bankruptcy and Insolvency Act* (R.S.C. 1985, c B-3) provides for the reversion of an author's manuscript and any assigned copyright interest to the author in the event of the bankruptcy of the person to whom they were assigned as well as for the disposition of the marketable copies of the work.

§5.0 Commentary

§5.1 General

§5.1.1 Introduction

Le failli aura privilège comme tout autre auteur; mais l'exploitation de son privilège entrera dans la masse de ses biens mobiliers et sera dévolue à ses créanciers.

-Auguste-Charles RENOUARD, *Traité des droits d'auteurs dans la littérature, les sciences et les beaux-arts* (Paris, Jules Renouard et Cie, 1839), tome second, p. 207, no. 92.

This section supersedes the general rule of seizure by the trustee over the estate of the bankrupt by creating a distinct regime for that special kind of property which is copyright. "As a matter of grammar, the phrase "assigned to (a bankrupt person)" modifies each of the subjects "manuscript", "copyright" and "copyright interest" because there is no other connective between those subjects and the "bankrupt person". So, that section only applies in respect of such property interests that have been acquired by way of assignment from another." See *Song Corp. Re* (2002), 19 C.P.R. (4th) 235, Spence J. (Ont. S.C.J. (Commercial List)), at paragraph 24.

§5.1.2 Property

As a general rule, the property of a bankrupt divisible among his creditors shall comprise all property wherever situated of the bankrupt and such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit. Section 67 of the *Bankruptcy and Insolvency Act* reads as follows:

<p>67. (1) The property of a bankrupt divisible among his creditors shall not comprise,</p> <p>(a) property held by the bankrupt in trust for any other person,</p> <p>(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or</p> <p>(b.1) such goods and services tax</p>	<p>67. (1) Les biens d'un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants:</p> <p>a) les biens détenus par le failli en fiducie pour toute autre personne;</p> <p>b) les biens qui, à l'encontre du failli, sont exempts d'exécution ou de saisie sous le régime des lois applicables dans la province dans laquelle sont situés ces biens et où réside le failli;</p> <p>b.1) dans les circonstances prescrites, les paiements au</p>
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<p>credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (a) or (b),</p> <p>but it shall comprise</p> <p>(c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and</p> <p>(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.</p>	<p>titre de crédits de la taxe sur les produits et services et les paiements prescrits qui sont faits à des personnes physiques relativement à leurs besoins essentiels et qui ne sont pas visés aux alinéas a) et b),</p> <p>mais ils comprennent:</p> <p>c) tous les biens, où qu'ils soient situés, qui appartiennent au failli à la date de la faillite, ou qu'il peut acquérir ou qui peuvent lui être dévolus avant sa libération;</p> <p>d) les pouvoirs sur des biens ou à leur égard, qui auraient pu être exercés par le failli pour son propre bénéfice.</p>
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Section 2 of the *Bankruptcy and Insolvency Act* defines "property" as follows:

<p>"property" includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, and whether situated in Canada or elsewhere, and includes obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property;</p>	<p>«biens» Biens de toute nature, meubles ou immeubles, en droit ou en équité, qu'ils soient situés au Canada ou ailleurs. Leur sont assimilés les sommes d'argent, marchandises, droits incorporels et terres, ainsi que les obligations, servitudes et toute espèce de droits, d'intérêts ou de profits, présents ou futurs, acquis ou éventuels, dans des biens, ou en provenant ou s'y rattachant.</p>
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Therefore, copyright, grant of interest in a copyright or licence of a copyright are assets comprised in the property of a bankrupt.

§5.1.3 Crown

Section 4.1 of the *Bankruptcy and Insolvency Act* provides that the said Act is binding on Her Majesty in right of Canada or a province. Compare with section 12 of the *Copyright Act* which specifically reserves the rights and privileges of the Crown.

§5.2 History

This section was initially introduced as subsection 19(3) of the *Bankruptcy Act, 1919* (S.C. 1919, c. 36), the first comprehensive statute on bankruptcy enacted by the Parliament of Canada. Subsection 19(3) was a mere duplication of section 60 of the United Kingdom *Bankruptcy Act, 1914* and, save for grammatical changes, remained unaltered until 1949.

The *Bankruptcy Act* (S.C. 1949, c. 7), which came into force on July 1, 1950, was substantially modified and the actual section 83 then introduced as section 52.

As to the origin of the section, it was once written in NOTE, *Législation intérieure — Canada* (1950), 63 Le Droit d'Auteur 14:

Les différentes lois canadiennes ayant été remises en chantier aux fins d'une refonte générale, M. de Montigny en a profité pour faire proposer par le sénateur Athanase David, de ses amis, un amendement tendant à mettre les auteurs à l'abri des conséquences attachées à la faillite des éditeurs. Depuis la deuxième guerre mondiale, alors que les importations françaises avaient cessé, une bonne douzaine de maisons d'éditions s'étaient constituées au Canada qui obtinrent facilement du séquestre canadien des licences visant la réimpression des romans les plus populaires de France. Plusieurs de ces éditeurs improvisés publiaient aussi des ouvrages canadiens et se déclaraient en faillite dès que les profits ne répondaient plus à leur attente. Le *copyright* de l'auteur canadien tombait alors dans l'actif du failli, pour être vendu au mieux des intérêts des créanciers. C'est afin de protéger les auteurs contre de tels dommages que l'article 52 a été introduit dans la nouvelle législation canadienne traitant de la faillite.

Amendments to section 83 were proposed since at least 1980 (see *Insolvency Act* (Bill C-12, 1st Session, 32nd Parliament, 29 Elizabeth II, 1980), sections 193-195; *Insolvency Act* (Bill C-17, 2nd Session, 32nd Parliament, 32 Elizabeth II, 1983-84), sections 193-195), but, despite the recent amendments to the *Bankruptcy and Insolvency Act* (S.C. 1992, c. 1 and 1992, c. 27) were not carried out.

§5.3 Constitutional Issues

Subsection 91(21) of the *Constitution Act, 1867* confers upon the Parliament of Canada exclusive jurisdiction to enact laws in relation to “bankruptcy and insolvency”. The exercise of such a jurisdiction, as is the case with section 83, may affect property and civil rights which are of exclusive provincial jurisdiction under subsection 91(13) of the *Constitution Act, 1867*. However, as summarized by HOULDEN (Lloyd W.) et al., *Bankruptcy Law of Canada*, 3rd ed. (Toronto, Carswell, 1989), at p. 1-10.

In determining whether or not an enactment of Parliament is *intra vires* as coming within s. 91(21), or *ultra vires* as coming within s. 92(13), the general principle is that “the primary object and purpose” or the “pith and substance” of the legislation must be looked at. If the primary purpose or pith and substance of the legislation comes within one of the enumerated subjects in s. 91, even though it may *incidentally* trench upon a subject matter exclusively assigned to the provinces by s. 92 is *intra vires*. (Emphasis added.)

On general issues relating to the constitutionality of bankruptcy and insolvency legislation, see generally BEAUDOIN (Gérald-A.), *La Constitution du Canada* (Montréal, Wilson & Lafleur, 1990), at pp. 395-398; HOGG (Peter W.), *Constitutional Law of Canada*, 3rd ed. (Toronto, Carswell, 1992), at ch. 25; see also more specifically BOHÉMIER (Albert), *La faillite en droit constitutionnel canadien* (Montréal, P.U.M., 1972); CARIGNAN (Pierre), *La compétence législative en matière de faillite et d’insolvabilité* (1979), 57 Canadian Bar Review 47.

This question is of special interest in view of potential conflicts in the enforcement of contracts between authors and the copyright owner on one hand, and the copyright owner and publishers on the other. It is of even more acute interest since the enactment in Québec of *An Act respecting the Professional Status of Artists in the Visual Arts, Arts and Crafts and Literature, and their Contracts with Promoters* (S.Q. 1988, c. 69), section 36 of which sets its own consequence to the termination of a contract between a creator and a promoter in case of the bankruptcy of the latter. See DUBÉ (Marcel), *Le*

pouvoir québécois de légiférer en matière de contrat d'édition (1989), 1 Les cahiers de propriété intellectuelle 317; BEAUDOIN (Gérald-A.), *La Constitution du Canada* (Montréal, Wilson & Lafleur, 1990), at p. 397.

In any event, if there is a conflict between a provincial statute dealing with insolvency and the *Bankruptcy and Insolvency Act*, the latter prevails: see CARIGNAN (Pierre), *La compétence législative en matière de faillite et d'insolvabilité* (1979), 57 Canadian Bar Review 47, at pp. 64-73.

§5.4 General Operation of the Section

§5.4.1 On the market or not

Section 83 of the *Bankruptcy and Insolvency Act* deals with two situations, namely, when the work is not yet on the market (subsection 83(1)) and when the work is on the market (subsection 83(2)).

§5.4.2 State of publication

Subsection 83(1) makes further distinctions depending on the state of publication of the work, namely:

- a) when the work is not published: paragraph 83(1)(a),
- b) when the work has been put into type: paragraph 83(1)(b), and
- c) when the contract related to the work is not carried out: paragraph 83(1)(c).

§5.4.3 Obligations of the trustee

Subsection 83(2), deals with the obligations of the trustee when the work is on the market. Subsection 83(3) deals, for its part, with the general obligation of the trustee to first offer to the author the right to purchase the marketable copies of his work.

§5.4.4 Summary

Section	Conditions	Consequences
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First situation: the work is not yet on the market

Para. 83(1)(a)	- the work is not published - no expenses incurred	1) manuscript and copyright assigned revert to the author or his heirs 2) contract or agreement terminates and is void
para. 83(1)(b)	- the work, in whole or in part, is in type - expenses incurred	1) manuscript and copyright assigned revert to the author or his heirs 2) author, or his heirs, pays expenses incurred 3) the product in type is delivered to the author or his heirs 4) contract or agreement terminates and is void 5) above rights to be exercised by the author within six months of the bankruptcy date If the right is not exercised, the trustee may carry out the original contract
para. 83(1)(c)	- the trustee decides not to carry out the contract	1) manuscript and copyright assigned revert to the author or his heirs 2) there is no expense on the part of the author or his heirs 3) contract or agreement terminates and is void

Second situation: the work is published and on the market

para. 83(2)(a)	- the trustee pays royalties or share of	1) entitled to sell copies of the published work
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the profits to the author or his heirs

2) entitled to authorize the sale of copies of the published work

3) entitled to authorize the reproduction of copies of the published work

4) entitled to perform the work

5) entitled to authorize the performance of the work

6) contract or agreement terminates and is void

para.
83(2)(b)

- written consent is given by the author or his heirs, or

- rate of payment guaranteed

1) trustee may assign the copyright

2) trustee may transfer the interest in the copyright

3) trustee may grant an interest in the copyright by licence

4) trustee may grant an interest in the copyright otherwise

5) contract or agreement terminates and is void

Marketable copies to be first offered

Subsec.
83(3)

- the trustee offers in writing

- to the author or his heirs

- the right to purchase the

trustee may then dispose of the copies

marketable copies
of the work

- on fair conditions

§5.5 Reversion to Author: Subsection 83(1)

Subsection 83(1) is directed to the protection of the author (or his heirs) and not the copyright owner. In fact, it deals with the reversion of the manuscript and copyright in favour of the author and would appear to apply even though the author was not the first owner of the copyright (see, for instance, sections 10-13 of the *Copyright Act*), or has assigned his copyright, or has sold his manuscript to a party other than the bankrupt.

§5.5.1 “Notwithstanding anything in this Act”

The application of the provisions of section 83 is not restricted to the *Bankruptcy and Insolvency Act*: see the introductory words, “Notwithstanding anything in this (*Bankruptcy and Insolvency*) Act or in any other statute...”.

Contrary to the reversion provisions of section 14 of the *Copyright Act*, section 83 does not appear to be of public order. It would appear that nothing prohibits contractual derogation to this statutory prohibition or a waiver of the rights under section 83.

Furthermore, the last words of each of paragraphs 83(1)(a), 83(1)(b) and 83(1)(c) provide that any agreement between the author and the bankrupt shall be terminated, would not cover an agreement where a third party owner granted some copyright interest to the bankrupt.

§5.5.2 “Author’s manuscripts and any copyright”

The term “manuscript” is not defined in the *Bankruptcy and Insolvency Act* nor in the *Copyright Act*. Therefore, “manuscript” should be understood in its usual meaning, as defined for instance in the 1984 third revised edition of the *Shorter Oxford English Dictionary*: “a book, document, or the like, written by hand; a writing of any kind, as distinguished from printed matter”.

Such a term should encompass a photocopy of the manuscript, a typed text, a computer printed text, or a diskette but not the galleys or proofs of prints, whether annotated or not.

As far as the *corpus mechanicum* is concerned, the use of the word “manuscripts” evokes, at least *prima facie*, the concept of literary or dramatic works. It is dubious that “manuscripts” will cover artistic works such as cinematographs, photographs or even negatives. However, the synopsis or scenario of a film might very well qualify as manuscripts, but not the film itself. In such a case, the copyright in the film may very well revert to its author but not the film itself, which would then become an asset of the bankrupt.

The use of the plural form “author’s manuscripts” suggests that there can be more than one manuscript with respect to one work.

However, as reminded by Spence J. in *Song Corp., Re* (2002), 19 C.P.R. (4th) 235, Spence J. (Ont. S.C.J. (Commercial List), at paragraph 28: “It was submitted that s. 83 applies only to books and written works and not to musical works. The term “manuscript” may or may not readily fit the music industry, but s. 83 is not limited to manuscripts. It applies to copyrights and copyright interests.

§5.5.3 “assigned to”

For an assignment of copyright or a grant of copyright interest to be valid, it should be made in writing: see subsection 13(3) and section 58 of the *Copyright Act*. There is no such requirement for writing with respect to manuscripts. In Canada, it is to be noted that property of the manuscript would not convey property of the copyright thereto.

Section 83 does not cover the situation resulting from a licence nor from a distributorship or an agency agreement.

Finally, it should be noted that section 83 does not specify by whom such an assignment or grant of interest in the copyright should have been made and it would appear that the reversion provision will operate even if the author was not instrumental or party thereto.

§5.5.4 “a publisher, printer, firm or person”

Section 83 will apply irrespective of the quality of the assignee, be it a:

- a) *publisher* (which, according to the *Shorter Oxford English Dictionary*, is “one whose business is the issuing of books, periodicals, music, etc. as the agent of the author or of the owner; one who produces copies of such works, and distributes

- them to the booksellers and other dealers, or to the public; without qualification, usually a book publisher”),
- b) *printer* (“a person who produces (a book, picture, etc.) by applying to paper, vellum, etc. in a press or machine, inked types, blocks, or plates, bearing characters or designs, one whose business is the printing of books, etc.; the owner of a printing business”),
 - c) *firm* (which covers generally unincorporated business enterprises), or
 - d) *person* (which includes corporation),

as long as it is bankrupt, whether it trades in the book or print market, whether it is involved with any special activities of commercialization in regard to the work. For a larger view of the definition of “publisher”, see in *Song Corp., Re* (2002), 19 C.P.R. (4th) 235, Spence J. (Ont. S.C.J. (Commercial List), at paragraph 28.

§5.5.5 “becoming bankrupt”

“Becoming bankrupt” shall be understood in its statutory meaning under the *Bankruptcy and Insolvency Act* and not in its civil sense, as defined, for instance, in article 17(23) of the *Civil Code of Lower Canada*: see generally HOULDEN (Lloyd W.) et al., *Bankruptcy Law of Canada*, 3rd ed. (Toronto, Carswell, 1989).

The provisions of section 83 do not apply either with respect to the *Companies Creditors Arrangement Act* (R.S.C. 1985, c. C-36) or the *Winding-up Act* (R.S.C. 1985, c. W-11) and do not cover other insolvency situations.

§5.6 Work not Published: Subsection 83(1)(a)

§5.6.1 Conditions of application

For subsection 83(1)(a) to come into operation, several conditions are to be met at the time of the bankruptcy (and not thereafter), namely:

- a) the work has not been published, *and*
- b) the work has not been put on the market, *and*
- c) no expense has been incurred in connection therewith.

Then, the manuscripts and the copyrights or grants therein shall:

- a) revert to the author, *and*
- b) be delivered to the author.

§5.6.2 Publication

Contrary to the *Copyright Act*, the *Bankruptcy and Insolvency Act* does not define what constitutes the “publication” of a work.

Paragraph 15(2)(b) of the *Interpretation Act* (R.S.C. 1985, c. I-21) provides however that where an enactment contains an interpretation provision, this provision shall be read and construed as being applicable to all other enactments relating to the same subject matter unless the contrary intention appears.

This rule of contextual interpretation of related statutes (or “*in pari material*” rule) has been explained by CÔTÉ (Pierre-André), *The Interpretation of Legislation in Canada*, 2nd ed. (Cowansville, Blais, 1992), at pp. 282-292, in the following terms, at p. 288: “The legislature is deemed to enact statutes on a given subject that are coherent not only in their formulation but also in the policies which they implement”; see also DRIEDGER (Elmer A.), *Construction of Statutes*, 2nd ed. (Toronto, Butterworths, 1983), at pp. 158-159.

Reference should then be made to section 4 of the *Copyright Act* which indicates that publication of a work occurs when, with the consent of the author, copies of a work are issued or caused to be issued for sale to the public.

There is apparently no requirement that the work be published by the bankrupt himself, only that he be the owner of a grant of interest in the copyright at the time of the bankruptcy.

§5.6.3 “put on the market”

The words “put on the market” do not bear any particular meaning as, for instance, “supply the demand” (section 16 of the *Copyright Act*), “print and publish” (section 17 of the *Copyright Act*) or “keep on sale” (section 19 of the *Copyright Act*). It should be construed simply as selling or offering for sale.

Furthermore, it is to be noted that the publication of the work is not restricted to the Canadian market.

§5.6.4 “no expenses...incurred”

Are those expenses related only to the publication or marketing of the work or do they include any expenses relating to the manufacturing of copies of the

work, including the administration of the business of the bankrupt or of the person who publishes the work?

§5.6.5 “revert...to the author”

What would happen in the event that the author previously assigned his rights to a third party and this third party, in turn, assigned these rights to the bankrupt?

First interpretation. The wording used in subsection 83(1) may then lead to strange results. The word “author” does not equate with the word “owner” and, irrespective of any previous assignment, the copyrights and manuscripts should revert to the author. Furthermore, it could be argued that the words are clear and should be given their ordinary sense, and are applicable in favour of the author in any circumstances.

The section makes reference to the author or his heirs, which should not be confused with “legal representatives” as defined in subsection 2(16) of the *Copyright Act*, for an heir is always included in such a definition but a legal representative is not always an heir.

Second interpretation. A more logical interpretation would be that section 83 comes into operation only when the author has or his heirs have an ongoing contractual relationship with the bankrupt.

The reference in paragraphs 83(1)(a), (b), (c), and 83(2)(c) to the termination of any contract or agreement between the author or his heirs and the bankrupt, is support for this interpretation. Further support is found, in paragraphs 83(2)(a) and (b), “profits as would have been payable by the bankrupt” and “payment by way of royalties or share of the profits at a rate not less than the rate the bankrupt was liable to pay”.

In the absence of this ongoing contractual relationship between the bankrupt and the author or his heirs, there would seem to be no reason why the author or his heirs should be involved in the bankruptcy proceedings which exist only to settle matters between the debtor and his creditors. Section 83 would seem to transform what would otherwise be an ordinary debt of the author into a “quasi-secured debt”.

§5.6.6 “any...agreement...shall then terminate”

Upon bankruptcy, any agreement or contract (presumably, but not necessarily dealing with the grant of an interest in the copyright) between the

author (or his heirs) and the bankrupt (and not a third party) shall then be terminated and be void.

Absent a specific prohibition (such as in section 14, for instance), this would not appear to be a provision of public order and an author should be entitled to waive his right in respect thereto. The wording “become void” (in French “devient nul”) is most unfortunate as it leaves open many questions as to the nature of the termination and its effects on the payment or repayment of the moneys (royalties, advances, etc.) due under the contract.

Furthermore, this provision relates to the termination of a contract between the author and the bankrupt. It does not deal with a contract, as the case may be, between the previous copyright owner and the bankrupt, which will not be terminated and not cancelled. Depending on the interpretation given to section 83, it could be that a copyright reverts to the author and royalties are payable by the trustee to the author while the previous owner of copyright has a claim as creditor of the bankrupt for unpaid royalties. Such a potential situation would seem to be an additional support for the second interpretation of section 83 (see Commentary under §5.6.5, *supra*).

§5.7 Work Put into Type: Paragraph 83(1)(b)

§5.7.1 Conditions of application

For paragraph 83(1)(b) to come into operation, several conditions are to be met at the time of the bankruptcy (and not thereafter), namely:

- a) the work has been put into type, in whole or in part, *and*
- b) expenses have been incurred by the bankrupt.

Then the manuscripts and the copyrights or grants therein:

- a) revert to the author (or his heirs) *and*
- b) shall be delivered to the author *and*
- c) the product of these expenses shall be delivered to the author.

§5.7.2 “into type”

“Put into type” refers to setting up for printing (in French, “composé en typographie”) and refers principally to literary work even though it may also apply to musical works (see subsection 2(20)) and to some artistic works as engravings (see subsection 2(11)) or books (see subsection 2(4)). Such a term, it is submitted, could hardly apply to cinematographic works or video production.

However, it is not necessary that all the copies of the whole edition of the work be completed or that the work be completely typesetted. From a literal construction, it would appear that this subsection applies as soon as the printing process starts, irrespective of the stage it is at.

§5.7.3 “expenses have been incurred”

Does the term “incurred expenses” refer to any part of the preparation, publishing, marketing or distribution process or does it relate only to typesetting?

First interpretation. The text of paragraph 83(1)(b) is general and could cover any related expenses, as is the case with paragraph 83(1)(a), where the French text definitely links the expense unincurred with the “work” (in French, “l’ouvrage”) and not with the “publishing” or “marketing” efforts. Therefore the expenses not incurred under paragraph 83(1)(a) should not relate solely to the publishing and marketing efforts. The wording of paragraph 83(1)(b) is not as clear but could be interpreted as referring to a situation contrary to that of paragraph 83(1)(a), where expenses relate not only to typesetting but to the work (in French “l’ouvrage”) in general. In other words, paragraph 83(1)(a) deals with a situation where no expenses have been incurred with respect to a work, while paragraph 83(1)(b) deals with a situation where expenses have been incurred, whatever their nature.

The expenses have to have been incurred by the bankrupt and not a third party or the trustee.

Second interpretation. Another interpretation would be that the author only has to reimburse the expenses incurred to put the work covered by copyright, in a whole or in part, into type. This interpretation is supported by the use of the word “so” before the word “incurred”. Further support is found in the stated obligation of the trustee to deliver to the author, upon reimbursement, “the product of those expenses”; this “product” should be nothing else but the typographic composition of the work. The legislator would seem to want the author, under those circumstances, to recuperate not only his copyright and manuscript but composition of his work at whatever stage that composition is at: see also the French text of paragraph 83(1)(b) “l’ouvrage” (...) composé en typographie et a occasionné des dépenses au failli, et le produit de ces dépenses est aussi remis à l’auteur ...”

However, it was held by Spence J. in *Song Corp., Re* (2002), 19 C.P.R. (4th) 235 (Ont. S.C.J. (Commercial List)), at paragraph 30, that:

In the scheme of s. 83(1), if a work has “been put into type and expenses have been incurred by the bankrupt”, para. (b),

enables the bankrupt to recover those expenses either from the author or by carrying out the original contract. It appears that the intent is that, if the bankrupt had incurred expenses that resulted in work product specific to the production of the work in question for purposes of its public marketing (as opposed to, say, general overhead expenses), those expenses should be recoverable.

§5.7.4 Payment and time

Furthermore, for this section to operate, two conditions are to be met by the author, namely:

- a) the incurred expenses are paid
- and*
- b) the option is exercised within six months of the bankruptcy.

Should the author or his heirs not exercise their rights under the said subsection, the trustee is free to carry out the contract under reserve of subsections 83(2) and 83(3). The use of the term “may” clearly indicates that the trustee is under no obligation to execute the contract and continue the publication and related activities with respect to the work.

§5.7.5 “product...shall be also delivered”

The use of the word “also” is a reminder that subsection 83(1) introductory provides for the return to the author (or his heirs) of the manuscript and the copyright. Paragraph 83(1)(b) deals more specifically with the return of the typographic composition, whether completed or not, of the work.

Depending on the interpretation given to paragraph 83(1)(b) (see Commentary under §5.7.3, *infra*), the word “product” could be understood as covering, in addition, the physical result of expenses such as the plates, the films or negatives, the bindings, the artwork or the cover, and the like. Arguably, it could be construed as covering also any receipts flowing from these activities.

§5.7.6 “any agreement...shall then...terminate”

Upon bankruptcy, any agreement or contract (presumably, but not necessarily, dealing with the grant of an interest in the copyright) between the author (or his heirs) and the bankrupt (and not a third party) shall then be terminated and be void.

Absent a specific prohibition (such as, for instance, in section 14), this would not appear to be a provision of public order and an author should be entitled to waive his right in respect thereto. The wording “become void” (in French, “devient nul”) is most unfortunate as it leaves open many questions as to the nature of the termination and its effects on the payment or repayment of the moneys (royalties, advances, etc.) due under the contract.

Furthermore, this provision relates to the termination of a contract between the author and the bankrupt. It does not deal with the termination of a contract, as the case may be, between a copyright owner and a bankrupt.

§5.8 Work not Carried Out: Paragraph 83(1)(c)

§5.8.1 Conditions of application

If, within six months of the bankruptcy, the trustee does not carry out the contract, then the manuscripts and the copyrights or grants therein revert *without expense* to the author (or his heirs).

§5.8.2 “not to carry out the contract”

This subsection is drafted in the negative and refers to the intent of the trustee rather than to the actual execution of the contract.

In this context, what does the terms “carry out the contract” mean? Does it include the full process of typing, correcting, reviewing, printing, distributing, marketing, selling and keeping on sale? The subsection is also silent on the consequences of an incomplete or faulty execution of the contract by the trustee.

§5.8.3 “revert...to the author”

Contrary to paragraph 83(1)(b) which refers to reversion and delivery to the author, subsection 83(1)(c) only refers to reversion. Again, it must be stressed that the copyright and the manuscripts revert, presumably in full ownership, to the author, even though he may never have been the owner of the manuscript as a physical object or of the copyright therein.

Depending on the interpretation given to subsections 83(1) and (2) (see Commentary under §5.7.3, *infra*) this reversion may lead indeed to strange results and contractual liabilities. Let us illustrate. An author A assigned,

against royalties, his copyright to an editor B, who, in turn, assigned the said copyright to a publisher C, who became bankrupt. In view of one interpretation of paragraph 83(2)(c), the copyright will return to author A who will be free to dispose of them; editor B, however, will still be liable to pay to A the agreed-upon royalties, even though the copyright has reverted to A.

When paragraph 83(1)(c) applies, the reversion and delivery of the manuscripts and the copyrights are without payment by the author or his heirs.

§5.8.4 “any...agreement...shall then terminate”

Upon bankruptcy, any agreement or contract (presumably, but not necessarily, dealing with the grant of an interest in the copyright) between the author (or his heirs) and the bankrupt (and not a third party) shall then be terminated and be void.

Absent a specific prohibition (such as, for instance, in section 14), this would not appear to be a provision of public order and an author should be entitled to waive his right in respect thereto. The wording “become void” (in French, “devient nul”) is most unfortunate as it leaves open many questions as to the nature of the termination and its effects on the payment or repayment of the moneys (royalties, guest fees, advances, etc.) due under the contract.

Furthermore, this provision relates to the termination of a contract between the author and the bankrupt. It does not deal with the termination of a contract, as the case may be, between a copyright owner and a bankrupt.

§5.9 Work published: Subsection 83(2)

Subsection 83(2) applies in regard to copies of works which, *at the time of the bankruptcy* (and not thereafter), have been published *and* put on the market.

§5.9.1 Exploitation by trustee: Paragraph 83(2)(a)

The trustee is entitled:

- a) to sell any copies of the published work, or
- b) to authorize the sale of any copies of the published work, or
- c) to authorize the reproduction of any copies of the published work, or

- d) to perform the work, or
- e) to authorize the performance of the work.

However, for such uses to be allowed, the author shall be paid his royalties or share of profit *as would have been payable by the bankrupt*. But payable to whom? This subsection is ambiguous, in its French and English texts, and could be construed in several ways. In fact, paragraph 83(2)(a) refers to payment to the author but does not state that the said royalties should be those payable to the author by the bankrupt; it merely indicates that the author shall receive the royalties that the bankrupt should have paid to whoever was entitled to them. Again, section 83 was drafted assuming that the author dealt directly with the bankrupt, which is not necessarily the case. "Section 83(2) does not purport to limit the application of s. 67 in the case of copyright interests, but only to provide for the ways in which the Trustee may realize upon those interests": *Song Corp. Re* (2002), 19 C.P.R. (4th) 235, Spence J. (Ont. S.C.J. (Commercial List)), at paragraph 35.

§5.9.2 Assignment by the trustee: Paragraph 83(2)(b)

Under paragraph 83(2)(b), the trustee is entitled:

- a) to assign the copyright, or
- b) to transfer the interest in the copyright, or
- c) to grant any interest in the copyright by licence, or
- d) to grant any interest in the copyright otherwise.

However, for such transfer to be allowed:

- a) the trustee shall obtain the *written* consent of the author or his heirs, apparently irrespective of the relationship between the author and the bankrupt, or
- b) the trustee does not have to obtain such a consent unless the author (or his heirs) is guaranteed payment of royalties or share in the profits at a rate not less than what the bankrupt would have paid (see discussion under §5.9.1, *supra*).

In a decision rendered with respect to section 60 of the United Kingdom *Copyright Act, 1914*, it was held that the author was entitled to such royalties, even if the author was not contracting directly with the bankrupt publisher. It was further held that the said publisher could not, by transferring his interest to another publisher before his bankruptcy, in consideration of a royalty payable to him, defeat the right of the author to payment in full: see *Henham v. Alston Rivers Ltd.* (1916), (1911-16) MacG. Cop. Cas. 330 (Ch. D.) Younger J., at p. 333.

In order to transfer an interest in the copyright, the trustee shall also abide with the requirement of a writing, as provided under subsection 13(3) of the *Copyright Act*. Such a writing may not be directed specifically to a given copyright, but may be drafted in terms that will allow for proper identification: see section 58 and *Re His Master's Voice Copyright* (1921), (1917-28) MacG. Cop. Cas. 250 (Ch. D.) Peterson J., at p. 251.

It should also be noted that nothing prevents a trustee to cause to be recorded in his favour any copyright of the bankrupt: see sections 55 and 57.

"Specifically, in respect of a proposed assignment by the Trustee to a third party, s. 83(2)(b) imposes no restrictions on the nature or the aspects of the constituent copyright interests that may be assigned but only on the conditions that must be satisfied for an assignment to be permitted": *Song Corp. Re* (2002), 19 C.P.R. (4th) 235, Spence J. (Ont. S.C.J. (Commercial List)), at paragraph 35.

§5.9.3 "any...agreement...shall then terminate": Paragraph 83(2)(c)

Upon bankruptcy, any agreement or contract (presumably, but not necessarily, dealing with the grant of an interest in the copyright) between the author (or his heirs) and the bankrupt (and not a third party) shall then be terminated and be void.

Absent a specific prohibition (such as, for instance, in section 14), this would not appear to be a provision of public order and an author should be entitled to waive his right in respect thereto. The wording "become void" (in French, "devient nul") is most unfortunate as it leaves open many questions as to the nature of the termination and its effects on the payment or repayment of the moneys (royalties, advances, etc.) due under the contract.

Furthermore, this provision relates to the termination of a contract between the author and the bankrupt. It does not deal with the termination of a contract, as the case may be, between a copyright owner and a bankrupt. However, it should be borne in mind that paragraph 83(2)(c) comes into operation only after the requirements of paragraph 83(2)(a) and 83(2)(b) have been complied with.

§5.9.4 Disposal of marketable copies: Paragraph 83(2)(c)

Any agreement or contract between the author (or his heirs) and the bankrupt shall then be terminated and be void save the disposal of copies of

the work published *before* the bankruptcy *and* put on the market *before* the bankruptcy.

§5.10 Marketable Copies to be offered: Subsection 83(3)

Subsection 83(3) provides for a right of first refusal in favour of the author or his heirs.

§5.10.1 “shall offer in writing”

The offer of the trustee to the author (or his heirs) shall be *in writing*: see definition of “writing” under subsection 35(1) of the *Interpretation Act* (R.S.C. 1985, c. I-21). Such an offer shall be made to the author before the trustee disposes of the copies of the works.

§5.10.2 “to the author”

The right is created in favour of the author (or his heirs) and not in favour of the copyright owner.

§5.10.3 “the right to purchase”

The right conferred by subsection 83(3) is a right to purchase the manufactured copies of the work *comprised in the estate of the bankrupt*. Presumably, the words “manufactured” and “marketable” are not intended to describe two different categories of copies: for more clarity, compare with the French text where the disjunctive element “or” is absent: “exemplaires manufacturés et destinés au commerce.” The word “or” is also absent in the English text when the expressions “manufactured” and “marketable” are used for a second time in the section. The word “or” is replaced by the word “and”. Therefore the subsection deals with only one category of copies which is manufactured and marketable.

This subsection does not give to the author a right to participate in the marketing process or in the commercialization of the work; it only makes it possible for him to purchase the marketable copies of his work to use as he sees fit.

Whether or not the author has to purchase all the copies of the work which are manufactured, or only part of them, is not clear. However, this section does give to the trustee the discretion to establish the price, terms and the

conditions of the sale. The answer to the question may then vary according to the terms and conditions of the offer made by the trustee.

§5.10.4 “at such price”

The price and terms of the options are to be set by the trustee, presumably in his offer, and shall be in his opinion, “fair and proper”, which is quite vague a qualification.

§5.10.5 “in the manner prescribed”

Should the author choose not to exercise his option, the trustee may dispose of the marketable copies of the work but has to respect the other provisions of section 83, amongst which are those relating to the payment of royalties: see paragraph 83(2)(a).

§6.0 Case Law

§6.1 Canada

1. *Éditions MCS Ltée v. Association des compositeurs, auteurs et éditeurs du Canada Ltée*, (1987) R.J.Q. 403, Belleville J. (Que. Sup. Ct.).

L’article 2 de la Loi sur la faillite (S.R.C. 1970, c. B-3) définit le mot “biens” comme suit:

“ ‘biens’ comprend les sommes d’argent , marchandises, droits incorporels, terres, et biens de toute nature, réels ou personnels, meubles ou immeubles, en droit ou en *equity*, qu’ils soient situés au Canada ou ailleurs, ainsi que les obligations, servitudes et toute espèce de droits, d’intérêts ou de profits, présents ou futurs, actuels ou éventuels, dans des biens, ou en provenant ou s’y rattachant.”

Il s’agit d’une définition fort large qui englobe le catalogue des œuvres du failli.

En vertu de l’art. 47 de la Loi sur la faillite, le catalogue des œuvres du failli fait partie des biens du failli, constituant le patrimoine attribué à ses créanciers.

Le syndic, conformément aux pouvoirs qui lui sont octroyés par la Loi sur la faillite, doit voir à l’administration des biens du failli, dans le meilleur intérêt de la masse des créanciers. Il avait le pouvoir de vendre le catalogue des œuvres du failli de façon à diminuer le fardeau financier des créanciers. Suite à cette transaction intervenue entre la requérante et le mis-en-cause (R-1), la requérante est saisie de tous les droits de propriété, en droit et en *equity* du failli dans le catalogue des œuvres (art. 62).

De plus, en vertu de l'art. 12(4) de la Loi sur le droit d'auteur (S.R.C. 1970, c C-30) "le titulaire du droit d'auteur sur une œuvre peut céder ce droit en totalité...".

Enfin, en vertu de l'art. 6 (bis) de la Convention de Rome sur le droit d'auteur 1928, l'auteur-compositeur peut faire cession des dits droits (S.R.C. 1970, c C-30, Sched. III).

En faisant cession de ses biens, le failli abandonnait ses biens à ses créanciers, y compris le catalogue de ses œuvres.

Le syndic se devait d'agir conformément à la Loi sur la faillite et pour le meilleur bénéfice des créanciers à la faillite.

Le contrat de vente de créances R-1 est conforme à la Loi sur la faillite, à la Loi sur le droit d'auteur, ainsi qu'aux articles 1570 et suivants du Code civil (du Bas-Canada).

Il n'y a aucune disposition dans le contrat R-1 intervenu entre le failli et l'intimée qui interdit cette cession.

La thèse avancée par l'intimée dans son mémoire, à l'effet que s'il y a reconnaissance de cette cession, il y aura violation des règlements internes de répartition liant la requérante en tant que membre éditeur et la Capac, ne saurait être retenue par le Tribunal.

C'est en sa qualité de membre éditeur que la requérante a signé son contrat avec l'intimée et non comme auteur ou compositeur. Comme membre éditeur, elle reçoit donc la moitié des droits d'exécution publique des œuvres faisant partie de son répertoire, et ce, conformément à son contrat. Or, ce n'est pas en tant que membre de la Capac qu'elle s'est portée acquéreur du catalogue des œuvres du failli, mais comme un simple acheteur.

Le fait que la requérante soit elle-même à contrat avec l'intimée ne change rien à la situation, car ce n'est pas au même titre. Par cette vente, la requérante ne possède que les droits du failli, rien de plus: soit 25 pour-cent comme auteur, 25 pour-cent comme compositeur et 50 pour-cent comme membre éditeur, en vertu de son contrat. Il y a donc respect des règlements de la Capac.

Dans l'opinion du Tribunal, l'intimée n'est pas propriétaire du droit d'exécution publique des œuvres du failli. Son rôle consiste à percevoir des droits d'exécution publique, des œuvres de membres qu'elle gère et de les distribuer suivant des proportions déjà établies. Sa fonction en est une de gestionnaire. (at pp. 404-405)

2. *De Groot v. Éditions Martell Ltée* (1982), J.E. 82-439, Renaud J. (Que. Sup. Ct.).

Aucune disposition légale ou conventionnelle ne lie la Banque Mercantile du Canada à l'auteur. L'objet de la garantie obtenue par la Banque

Mercantile du Canada pour le remboursement du prêt consenti à l'éditeur n'a pas été la cession de droit d'auteur du demandeur mais les livres reproduisant son œuvre.

L'obligation de payer des droits d'auteur découle de l'engagement de l'éditeur et non de ceux qui, par la suite, se procurent l'œuvre dans les cours ordinaire des affaires, sauf en matière de faillite où la loi prévoit spécifiquement une exception. (at p. 5)

De plus, l'entente, en vertu de laquelle l'auteur cédait son droit d'auteur à l'éditeur, prévoit qu'au cas de "défaut par l'éditeur d'effectuer le paiement des droits d'auteur approprié après un délai d'un an et mise en demeure de l'auteur constitue une rupture de la présente convention. L'auteur recouvre alors les droits d'auteur cédés en vertu des présentes *sans cependant que les droits auparavant cédés à des tiers en soient affectés.*" (les soulignés sont du soussigné)

Cette clause permet à l'auteur de reprendre possession de son droit d'auteur et de mettre fin à l'association, en plus d'exiger le paiement des droits d'auteur dus par l'éditeur, mais ne procure aucun privilège à l'auteur sur les droits que l'éditeur a pu céder auparavant à des tiers. (at p. 7)

3. *Re Le Groupe Morrow Inc. v. La fabrique d'image Itée* (1992), (1993) R.J.Q. 161 (Q.S.C.).

Section 83(2) permits the trustee of a bankrupt publisher to sell or authorize the sale of a work which at the time of the bankruptcy had been published and put on the market, subject to the obligation of remitting to the author such "royalties or share of profits" as would have been payable to the latter were it not for the bankruptcy. (...)

Secondly, there is no question here of royalties or share of profits by the bankrupt; there was a firm contract price commitment as between the bankrupt and the petitioner. A fixed fee is not a royalty as we shall see shortly. (at p. 164)

4. *Neudorf v. Netzwerk Productions Ltd.* (2000), 8 C.P.R. (4th) 154, Cohen J. (B.C.S.C.-Costs).

(3) In this application, the defendants seek two orders. One is for special costs, or alternatively increased costs, or alternatively costs on scale 5, and double costs. The other has to do with the fact that the plaintiff filed an assignment in bankruptcy on April 11, 2000. The amount of the defendants' claim for costs is shown as "unknown" on the plaintiff's Statement of Affairs. In order to prove their claim against the plaintiff's estate, the defendants' claim for costs must be quantified. Accordingly, the defendants seek an order and declaration that section 69.3 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "Act"), no longer operates in respect to the defendants pursuant to section 69.4 of the *Act*. (...)

(4) According to the affidavit of Ms. Jennifer L. Conkie, the defendants' counsel, sworn May 4, 2000, the defendants wish to obtain a ruling on their

entitlement to costs without further delay and therefore seek a lifting of the stay for that purpose.

(6) Dealing first then with the defendants' application to lift the stay, that application is granted on the basis of the authority in *Fairview Electronics Ltd. v. De Boer International Limited* (1983), 48 C.B.R. (N.S.) 102 (Ont. S.C.). See also *Possian v. Canadian Olympic Assn.* (13 March 1998), Toronto T-884-96 (Fed. T.D.), (1998) F.C.J. No. 361 (QL). In *Fairview*, after the defendant was awarded its costs of the action the plaintiff became a bankrupt. The trustee in bankruptcy submitted at the taxation of the defendant's costs that the taxation should not proceed because it was stayed by the *Act*. In holding that the taxation was not to be stayed, Donkin, Taxing Office, said, in part, as follows (at pp. 102-103):

Counsel for the trustee in bankruptcy of the plaintiff appeared as amicus curiae and submitted that the taxation should not proceed because it was stayed by s. 49(1) of the Bankruptcy Act, R.S.C. 1970, c. B-3. That section reads in part:

... upon the bankruptcy of any debtor, no creditor *with a claim provable in bankruptcy* ... shall commence or continue any *action, execution or other proceedings for the recovery of a claim provable in bankruptcy* ... unless with the leave of the court... (The italics are mine).

It is clear that this action is not an "action for the recovery of a claim provable in bankruptcy" because it is not an action against a debtor who is now bankrupt, but rather an action by a person who is now bankrupt in which he attempted to establish a claim.

Counsel for the trustee suggested that the taxation itself was a "proceeding to recover a claim provable in bankruptcy". I reject this submission on three grounds. First, the action itself is what is stayed or not stayed; not each step in the action. Secondly, I question whether an unquantified claim for costs is a "claim provable in bankruptcy". Thirdly, the taxation itself is not a "proceeding for the recovery" of a claim, but merely a step to quantify that claim which has already been established.

5. *Keddy Motor Inns Ltd., Re*, 2000 CarswellNS 286, Nunn J. (N.S.S.C. (In Chambers)).

(1) This is an appeal by the Society of Composers, Authors and Music Publishers of Canada ("SOCAN") from the disallowance by the Trustee of a claim against the bankrupt estate by SOCAN.

(17) It is not unreasonable to conclude that the acceptance of the post-dated cheques and a cheque for costs would, in these circumstances, amount to a complete satisfaction of that part of the settlement agreement. The result, of course, is that the bankrupt is entitled to a satisfaction piece releasing the whole of the judgment and no claim for profits under the judgment survives.

(18) If I am wrong in my interpretation of the contract I would still find against SOCAN on the basis of estoppel. SOCAN's conduct throughout the period involved here with regard to the agreement, already discussed, and its failure to invoke any of the provisions for the timely resolution of any problems relating to past amounts with which it was concerned together with the acceptance of the various post-dated cheques and the cheque for payment of costs, its failure to submit to the Reference directed in the judgment, and its failure to even mention any intention to pursue a claim for profits under the judgment directly until very late in the relationship all operate to create an estoppel. It would not be just to permit SOCAN to claim this very large sum of money under the aegis that a claim for profits under the judgment still exists. In my view SOCAN is estoppel from asserting this claim.

(23) In my view it would be most unfair to simply assess the amount claimed by SOCAN as the amount of damages under the profits aspect of the judgment. It would be unfair to the bankrupt when other evidence might very well be produced by the Trustee but also it would be unfair to the other creditors.

(24) Therefore, to conclude, rather than assess this damage claim I would order, if my dismissal of the claim were set aside, that there be an assessment of damages in the Supreme Court of Nova Scotia to determine the actual profits earned which are attributable to the profits aspect of the judgment for the period it related to.

6. *Song Corp. Re* (2002), 19 C.P.R. (4th) 235, Spence J. (Ont. S.C.J. (Commercial List)).

(24) Section 83 of the Act applies only to "the author's manuscript and any copyright or any copyright interest in whole or part assigned to" a bankrupt person. (Emphasis added). As a matter of grammar, the phrase "assigned to (a bankrupt person)" modifies each of the subjects "manuscript", "copyright" and "copyright interest" because there is no other connective between those subjects and the "bankrupt person". So, the section only applies in respect of such property interests that have been acquired by way of assignment from another. This application of the section is also evident from the design of the operative parts of the provision, which deal with the respective interests of the assignee bankrupts and the assignor authors. Accordingly, the section would not apply to copyright interests of the type mentioned in (b) above (i.e., Copyright interests in sound recordings by reason of being the maker of such recordings, pursuant to s. 18(1) of the *Copyright Act*.), because those interests are acquired through the originating activity of making, and not by way of assignment from another.

(25) On this basis, the result could be that the companies' copyrights, as maker, in the sound recordings is not subject to s. 83 but (subject to what is said below) its interest in the assigned copyrights to the musical works is subject to s. 83.

(28) It was submitted that s. 83 applies only to books and written works and not to musical works. The term "manuscript" may or may not readily fit the

music industry, but s. 83 is not limited to manuscripts. It applies to copyrights and copyright interests. These are recognized in s. 3 of the Copyright Act to pertain to musical works, among others. The term “publisher” is used in s. 83, but that term is not limited by the *Copyright Act* to book publishers. Indeed it is used in s. 3 of the Copyright Act in respect of musical works.

(29) The words “put into type” in s. 83(1) would seem not to apply very aptly to the music industry. Indeed, with changes in technology, they may not apply very aptly to book publishing. A reading of s. 83 in its entirety suggests that it is intended to deal with copyright interests generally, without distinction as to kind. So it would seem unduly restrictive to allow the words “put into type” to narrow the application of the section to exclude musical works, without the most careful consideration.

(30) In the scheme of s. 83(1), if a work has “been put into type and expenses have been incurred by the bankrupt”, para. (b), enables the bankrupt to recover those expenses either from the author or by carrying out the original contract. It appears that the intent is that, if the bankrupt had incurred expenses that resulted in work product specific to the production of the work in question for purposes of its public marketing (as opposed to, say, general overhead expenses), those expenses should be recoverable.

(31) This intent may not be expressed as well as possible in the section, having regard to changes in technology and differing practices of production in respect of different kinds of copyright works. That should not be allowed to impede the reasonable application of the Act.

7. *Song Corp. Re* (2002), 19 C.P.R. (4th) 235, Spence J. (Ont. S.C.J. (Commercial List)).

(35) The Trustee submits that, on the basis of the initial part of s. 83(2), i.e. the part prior to para. (a), s. 83(2) is to be interpreted as granting only rights to sell copies of the work and to perform the work and not to other aspects of copyright which are equally important in the case of musical works, such as the synchronization of the work in cinematographical works. Section 83(2) cannot be interpreted in a piecemeal fashion. When read in its entirety, s. 83(2) must, like all provisions of the Act, be read in the light of s. 67 of the Act which vests all of the bankrupt’s property in the Trustee. Section 83(2) does not purport to limit the application of s. 67 in the case of copyright interests, but only to provide for the ways in which the Trustee may realize upon those interests. Specifically, in respect of a proposed assignment by the Trustee to a third party, s. 83(2)(b) imposes no restrictions on the nature or the aspects of the constituent copyright interests that may be assigned but only on the conditions that must be satisfied for an assignment to be permitted. In the present case, the Trustee seeks to realize on the copyright interests by assigning them to the proposed buyer; subject to what is said below, this is consistent in principle with the scheme in s. 83(2).

(36) The Trustee submits that s. 83(2)(c) would work a hardship upon the Trustee by leaving it without compensation for the amounts previously paid by the bankrupt companies. It is not evident how the situation would be different from that of a bankrupt book publisher in such circumstances.

Section 83(2)(c) comes into operation only after the requirements of subparas. 83(2)(a) and (b) have been complied with and satisfied.

8. *Song Corp. Re* (2002), 19 C.P.R. (4th) 235, Spence J. (Ont. S.C.J. (Commercial List)).

(47) (...) Here the question to be addressed concerns the proper application of s. 83 in circumstances involving the music industry. Nothing in the terms of s. 83 by itself suggests the court is to exercise a discretion as to how the competing interests of authors and other creditors are to be weighed, for purposes of determining whether the Act applies to copyright interests in the music industry. Indeed, a reading of s. 83 suggests that on the contrary, Parliament has tried to set out a regime applicable to all assigned copyright interests regardless of the particular industry involved and that the court is directed to follow that regime. It is correctly said that in interpreting and applying the *Bankruptcy and Insolvency Act* the court should try to achieve a result that makes sense commercially, but that admonition should not be taken as an invitation to the court to exercise a discretionary authority to balance competing interests where the statutory provision does not create such an authority with reference to the particular matter in issue.

§6.2 United Kingdom

1. *Millar v. Taylor* (1769), 4 Burr. 2303, Willes J. (K.B.).

This is not the case of an unpublished manuscript taken in execution by creditors, or claimed by assignees under a commission against a bankrupt-author. When a question of that sort arises, the Court will consider what is right. And the same question may equally arise upon the term granted by the Act of Parliament. And therefore this is not a doubt which subsists merely on the common law right.

If the copy of the book belonged to the author, there is no doubt but that he might transfer it to the plaintiff. And if the plaintiff, by the transfer, is become the proprietor of the copy, there is as little doubt that the defendant has done him an injury, and violated his right: for which, this action is the proper remedy. (at p. 2311)

2. *Gibson v. Carruthers* (1842), 8 M. & W. 343, Abinger J. (Ex.).

Suppose, for example, that a man of wealth, by way of encouraging bankers whom he wishes to patronize, should agree with them for a certain term of years to keep his cash with them, upon the faith of which agreement they take a shop, purchase strong boxes, and incur other expenses necessary to carry on the trade. Upon their bankruptcy, their assignees would surely have no right to insist upon keeping his cash for the remainder of the term, or upon their right to find him a banker. An instance of another kind, but depending on the same principle, occurred between the late Sir Walter Scott and his booksellers, who had become bankrupts.

He had engaged to write a novel, which they were to have the benefit of publishing, in consideration of which they were to pay him £4000, for which they had given him their acceptances in anticipation. Before the work was finished they became bankrupt, whereupon Sir Walter Scott took up all the bills he had negotiated. Upon the conclusion of his work, when it was ready for the press, the assignees contended, that by virtue of the contract they had a right to the profit of publishing it, which they were ready to undertake. Sir Walter Scott suggested several grounds to show that the credit, the skill, the judgment, integrity, and personal character and reputation of a publisher were matters of great importance to an author, on which the success and reputation of his works might greatly depend, and therefore insisted that, the consideration for his contract having respect to the personal credit and qualities of the bookseller, he was by their bankruptcy discharged from his contract. I must own that his reasoning appeared satisfactory to me; but a more obvious illustration of the principle on which it rested would have been afforded by reversing the case, and supposing that Sir Walter Scott had been the bankrupt and his booksellers solvent, would they have been content to pay their £4000, and take the risk of publishing a novel written by the assignees of the novelist? Without, therefore, presuming to suggest any rule that would govern all possible contracts upon the event of the insolvency of either party, I shall confine myself to the single case of a contract for the sale of goods, where the bankruptcy or insolvency of the buyer intervenes before the period for the payment has arrived, and before the goods have come to the actual possession of the buyer or his assignees, or to the ultimate place of their destination. In other words, I confine myself to the single case where the right of stoppage in transitu, after the transit has commenced, may be exercised; and it appears to me very plain, that wherever that right may be exercised, it is a proof, a fortiori, that the vendor is discharged by the insolvency of the vendee from the obligation of delivering the goods at all, and consequently from the obligation of making the transitus commence.

If it be necessary to look for any principle on which this right depends, it may be found in the implied condition in every sale of goods, that the buyer if he lives, or his estate if he dies, will be able to pay for them. To him and to his ability alone the vendor trusts, and he is not bound to take the credit of any other man. He may, if he think fit, dispatch the goods to the assignees upon their request, and take them for his paymasters; but if he does so he makes a new contract with them. In the case where the vendor is not to part with his personal possession of the goods till he is paid, it is clear that neither the bankrupt nor his assignees can have the goods without payment. There credit is no part of the contract, and the position of the vendor is not changed by the insolvency. But where the goods are to be paid for at a future day, or where the vendor is to part with the actual possession of them by sending them by a carrier, though he is to receive the money upon delivery after their arrival, in either of these cases he trusts to the credit of the bankrupt; the assignees are not bound to pay for the goods when they arrive. The vendor has not contracted either to give them credit, or to take the risk of their responsibility or their pleasure. The only consideration for his agreement to dispatch the goods is the credit he gives to the personal ability of the vendee to pay for them when they arrive, and if that consideration fails, the contract is voidable at his pleasure. (at pp. 343-345)

3. *Barker v. Stickney* (1918), (1919) 1 K.B. 121, Scrutton J. and Warrington J. (C.A.).

In my opinion the right of the appellant under the original assignment of January 11, 1912, rests in contract only. According to well-known principles of law he cannot enforce against an assignee of his grantee the obligations entered into by his grantee in the original assignment. This is true in equity as well as at law. The equitable principle in accordance with which restrictive covenants are enforced against a purchaser with notice is confined strictly to such covenants, and does not extend to affirmative covenants: *Haywood v. Brunswick Building Society* ((1881) 8 Q.B.D. 403). The appellant, however, insists that he is entitled royalties being paid, and only assignable if they are provided for. As the present case stands the appellant fails, and the appeal must be dismissed. (Warrington J., at pp. 128-129)

When I look at this particular document I see that the transferees were to be the sole owners of the copyright in consideration of 1500 shares and future royalties, some of which have no reference to the price realised on sale, because they are in respect of copies given away. Reading the document carefully, I find in it no intention to reserve to the transferor any interest, legal or equitable, in the chose in action transferred. Consequently there is no equitable charge in the nature of a vendor's lien which the Court can enforce when the chose in action is in the hands of someone not a party to the instrument. It is said that this leaves authors in a difficult position, because a usual way of publishing books is to assign the copyright in consideration of royalties. An instance of this hardship came before the Courts in *In re Richards* ((1907) 2 K.B. 33), where the transferee of the copyright became bankrupt; and it was held, in accordance with legal principles, that the trustee in bankruptcy could not be made to pay the royalties. This was remedied by s. 60 of the Bankruptcy Act, 1914. Authors might perhaps seek similar protection against assignees who publish without paying the royalties. Otherwise let them keep the copyright themselves, and assign no more than a right to publish conditional upon royalties being paid, and only assignable if they are provided for. (Scrutton J., at pp. 133-134)

4. *Re Richards: Ex parte Deeping*, (1907) 2 K.B. 33, Bigham J. (K.B.D.).

I think this application must be dismissed. Mr. Deeping wrote a book, and he was entitled to the copyright of that book; that was all the property that he possessed. He then desired to sell it, and he sold the copyright to Mr. Grant Richards, who was a publisher, by the agreement of April 23, 1903. The first clause of that agreement is in these words. (The learned judge read the clause, and continue: —). Now by those words I think Mr. Deeping divested himself of the only property he had in the book, namely, the entire copyright. He stipulated for a price to be paid for that which he was selling, just as a man who is selling goods would stipulate for the price to be paid for his goods. The price was to depend upon certain events, and was to vary according to those events. Mr. Grant Richards then became a bankrupt. What is the effect of that? In my opinion the effect is to vest in the trustee that which was vested in the bankrupt, namely, the property in the

copyright to do with it what he pleased. The contractual obligation which had been created by the contract forms the basis of a claim against the bankrupt, for which Mr. Deeping can prove against the estate. The amount of the proof may be difficult to ascertain. It must be ascertained with reference to the damages which Mr. Deeping may be said to have sustained by the breach of contract to pay the royalties. For the purposes of this case I regard the transaction as analogous to a sale of goods upon the terms that they are to be paid for according to different scales in different events. Mr. Deeping's claim, therefore, must be limited to a claim for the damages he has sustained by the breach of the agreement. (at p. 35)

5. *Performing Right Society Ltd. v. Rowland*, (1997) All E.R. 336, Walker J. (Eng. Ch. Div.).

(50) I now come back to the important issue of the pre-bankruptcy works. I have already set out my preliminary view that the right to distributions from the Society in respect of completed pre-bankruptcy works is (in line with *Re Trytel* ((1952) 2 TLR 32)) a transmissible property right, not depending on the performance of further obligations on the part of the writer-member, and so vesting in the trustee on his appointment.

(52) The second submission seems to me to show a misunderstanding of *Re Trytel* ((1952) 2 TLR 32). In that case the composer had not assigned his copyrights (existing or future) to this company, but had made an oral agreement (recorded in a minute) that "all income accruing to him personally for fees, copyrights, royalties and performing rights in respect of his compositions and writings should be the income of the company." So in that case the composer agreed to give up ownership of the fruit of the tree without ceasing to be the owner of the tree itself (except so far as he had passed that ownership to the Society).

§7.0 List of Cases

§7.1 Canada

1. *Chappel Music Ltd. v. GRT of Canada Ltd.* (1979), 45 C.P.R. (2d) 145 (F.C.T.D.); (1980), 53 C.P.R. (2d) 196 (F.C.T.D.—supplementary reasons for judgment).
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4. *Mortil v. International Phasor Telecom Ltd.* (1988), 23 B.C.L.R. (2d) 354 (B.C. Co. Ct.).

5. *156694 Canada Inc. v. Pfeiffer* (1989), J.E. 89-1429 (Que. Sup. Ct.).
6. *Re Le Groupe Morrow Inc. v. La fabrique d'image Itée* (1992), (1993) R.J.Q. 161, 22 C.B.R. (3d) 195 (Que. Sup. Ct.); in appeal 500-09-000028-936 (Que. C.A.).
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8. *Lapointe (Faillite de)* (1988), REJB 98-09986 (Que. Sup. Ct.).
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10. *Distribution exclusive DEP Itée v. Les Disques Gamma (Québec) Itée*, (1999) J.Q. 1497 (Que. Sup. Ct.).
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13. *Song Corp., Re* (2002), 2002 CarswellOnt 5, Spence J. (Ont. S.C.J. - Hill Reversion); (2002), 19 C.P.R. (4th) 235, Spence J. (Ont. S.C.J. (Commercial List) – Trustee’s Motion).
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§7.2 United Kingdom

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2. *Mawman v. Tegg* (1826), 2 Russ. 385 (Ch.).
3. *Gibson v. Carruthers* (1842), 8 M. & W. 343, 11 L.J. Ex. 139, 151 E.R. 1061 (Ex.).
4. *Re Curry: Ex parte Lever* (1849), 2 Ir. Eq. R. 382 (Bankruptcy).
5. *Re Johnson* (1866), 15 W.R. 160 (Bankruptcy).
6. *Re Prince: Ex parte Graves* (1868), 3 L.R. 642 (Ch. App.).
7. *Lucas v. Moncrieff* (1905), 21 T.L.R. 683, (1905-10) MacG. Cop. Cas. 12 (Ch. D.).

8. *Re Sims: Ex parte The Official Receiver*, (1907) 2 K.B. 36 (K.B.D.).
9. *Re Richards: Ex parte Deeping*, (1907) 2 K.B. 33, 76 L.J.K.B. 643, 96 L.T. 712, (1905-10) MacG. Cop. Cas. 82 (K.B.D.).
10. *Henham v. Alston Rivers Ltd.* (1916), (1911-16) MacG. Cop. Cas. 330 (Ch. D.).
11. *Matthew Bell & Co. Ltd. v. Stanley Paul & Co. Ltd.* (1918), (1917-23) MacG. Cop. Cas. 504 (City of London Court).
12. *Barker v. Stickney*, (1918) 2 K.B. 356 (K.B.); aff'd (1918), (1919) 1 K.B. 121, 88 L.J.K.B. 315, 120 L.T. 172, 62 Sol. Jo. 536, (1917-23) MacG. Cop. Cas. 68 (C.A.).
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14. *Re His Master's Voice Copyright* (1921), (1917-28) MacG. Cop. Cas. 250 (Ch. D.).
15. *Re Health Promotion, Ltd.* (1931), (1932) Ch. 65, 101 L.J. Ch. 790, 146 L.T. 211, (1928-35) MacG. Cop. Cas. 473 (Ch. D.).
16. *Re Trytel: Ex parte The Trustee of the Property of the Bankrupt v. Performing Right Society, Ltd.*, (1952) 2 T.L.R. 32, (1952) W.N. 355 (Ch. D.).
17. *Performing Right Society Ltd. v. Rowland*, (1997) 3 All E.R. 336 (Eng. Ch. Div.).

§7.3 United States

1. *Re Waterson, Berlin & Snyder Co.* (1929), 36 F. 2d 94, (1928-35) MacG. Cop. Cas. 232 (N.Y.D.C.).

§7.4 France

1. *Nabokov v. The Olympia Press* (1968), 60 R.I.D.A. 144 (C.A. Paris—1^{re} chambre, 1968.02.14); aff'd (1969), 64 R.I.D.A. 143 (Cassation commerciale, 1969.10.27).

§8.0 Authors

§8.1 Canada

§8.1.1 Copyright issues

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11. FOX (Harold George), *The Canadian Law of Copyright and Industrial Design*, 2nd ed. (Toronto Carswell, 1967), at pp. 295-296, 565-568 and 589-590.
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§9.0 Comparative Legislation

§9.1 Comparative Legislation - Québec

§9.1.1 An Act respecting the Professional Status of Artists in the Visual Arts, Arts and Crafts and Literature, and their Contracts with Promoters, S.Q. 1988, c. 69, s. 36:

The contract (between an artist and a promoter which has a work of the artist as its object) shall be terminated if the promoter commits an act of bankruptcy or has a receiver order issued against him pursuant to the Bankruptcy and Insolvency Act (Statutes of Canada), if his property is taken possession according to law or, in the case of a legal person, if such legal person is liquidated.

§9.2 Comparative Legislation - United Kingdom

§9.2.1 Bankruptcy Act, 1914, s. 60:

60. Where the property of a bankrupt comprises the copyright in any work or any interest in such copyright, and he is liable to pay to the author of the work royalties or a share of the profits in respect thereof, the trustee shall not be entitled to sell, or authorise the sale of, any copies of the work, or to perform or authorise the performance of the work, except on the terms of paying to the author such sums by way of royalty or share of the profits as would have been payable by the bankrupt, nor shall he, without the consent of the author or of the Court, be entitled to assign the right or transfer the interest or to grant any interest in the right by licence, except upon terms which will secure to the author payments by way of royalty or share of the profits at a rate not less than that which the bankrupt was liable to pay.

§9.2.2 *Insolvency Act, 1986, c. 45, Sch. 11, s. 15.*

15. Where a person who is adjudged bankrupt on a petition presented on or after the appointed day is liable, by virtue of a transaction entered into before that day, to pay royalties or a share of the profits to any person in respect of any copyright or interest in copyright comprised in the bankrupt's estate, section 60 of the Bankruptcy Act 1914 (limitation on trustee's powers in relation to copyright) applies in relation to the trustee of that estate as it applies in relation to a trustee in bankruptcy under the Act of 1914.

§9.2.2 *Insolvency Act, 1986, c. 45, Sch. 11, s. 15:*

§9.3 *Comparative Legislation - France*

§9.3.1 *Copyright Act, 1957, s. 61:*

§9.3.1 *Copyright Act, 1957, s. 61:*

Ni la faillite, ni le règlement judiciaire de l'éditeur n'entraînent la résolution du contrat.

Si l'exploitation du fonds est continuée par le syndic, dans les conditions prévues aux articles 61 et suivants du décret n° 55-583 du 20 mai 1955, le syndic est tenu de toutes les obligations de l'éditeur.

En cas de vente du fonds de commerce, dans les termes de l'article 62 du décret n° 55-583 du 20 mai 1955, l'acquéreur est, de même, tenu des obligations du cédant.

Lorsque l'exploitation du fonds n'est pas continuée par le syndic et qu'aucune cession dudit fonds n'est intervenue dans le délai d'une année à partir du jugement déclaratif de faillite, le contrat d'édition peut, à la demande de l'auteur, être résilié.

Le syndic ne peut procéder à la vente en solde des exemplaires fabriqués ni à leur réalisation dans les conditions prévues aux articles 61 et 62 du décret n° 55-583 du 20 mai 1955, que quinze jours au moins après avoir averti l'auteur de son intention, par lettre recommandée avec demande d'accusé de réception.

L'auteur possède, sur tout ou partie des exemplaires, un droit de préemption. A défaut d'accord, le prix de rachat sera fixé à dire d'experts.

§9.3.2 *Le code de la propriété intellectuelle*

Article L132-15

Le redressement judiciaire de l'éditeur n'entraîne pas la résiliation du contrat.

Lorsque l'activité est poursuivie en application des articles 31 et suivants de la loi n° 85-98 du 25 janvier 1985 relative au redressement et à la liquidation judiciaires des entreprises, toutes les obligations de l'éditeur à l'égard de l'auteur doivent être respectées.

En cas de cession de l'entreprise d'édition en application des articles 81 et suivants de la loi n° 85-98 du 25 janvier 1985 précitée, l'acquéreur est tenu des obligations du cédant.

Lorsque l'activité de l'entreprise a cessé depuis plus de trois mois ou lorsque la liquidation judiciaire est prononcée, l'auteur peut demander la résiliation du contrat.

Le liquidateur ne peut procéder à la vente en solde des exemplaires fabriqués ni à leur réalisation dans les conditions prévues aux articles 155 et 156 de la loi n° 85-98 du 25 janvier 1985 précitée que quinze jours après avoir averti l'auteur de son intention, par lettre recommandée avec demande d'accusé de réception.

L'auteur possède, sur tout ou partie des exemplaires, un droit de préemption. A défaut d'accord, le prix de rachat sera fixé à dire d'expert.

Article L132-30

Le redressement judiciaire du producteur n'entraîne pas la résiliation du contrat de production audiovisuelle.

Lorsque la réalisation ou l'exploitation de l'oeuvre est continuée en application des articles 31 et suivants de la loi n° 85-98 du 25 janvier 1985 relative au redressement et à la liquidation judiciaires des entreprises, l'administrateur est tenu au respect de toutes les obligations du producteur, notamment à l'égard des coauteurs.

En cas de cession de tout ou partie de l'entreprise ou de liquidation, l'administrateur, le débiteur, le liquidateur, selon le cas, est tenu d'établir un lot distinct pour chaque oeuvre audiovisuelle pouvant faire l'objet d'une cession ou d'une vente aux enchères. Il a l'obligation d'aviser, à peine de nullité, chacun des auteurs et des coproducteurs de l'oeuvre par lettre recommandée, un mois avant toute décision sur la cession ou toute procédure de licitation. L'acquéreur est, de même, tenu aux obligations du cédant.

L'auteur et les coauteurs possèdent un droit de préemption sur l'oeuvre, sauf si l'un des coproducteurs se déclare acquéreur. A défaut d'accord, le prix d'achat est fixé à dire d'expert.

Lorsque l'activité de l'entreprise a cessé depuis plus de trois mois ou lorsque la liquidation est prononcée, l'auteur et les coauteurs peuvent demander la résiliation du contrat de production audiovisuelle.

§9.4 Comparative Legislation - Australia

§9.4.1 Bankruptcy Act 1966 , c. 33, s. 138:

138 Limitation of trustee's power in respect of copyright, patents etc.

(1) Where:

(a) the property of a bankrupt includes rights in respect of industrial property; and

(b) the bankrupt is liable to pay royalties or a share of profits to a person in respect of those rights; the trustee is not entitled:

(c) to exercise those rights except upon condition that he or she pays to that person such sums by way of royalty or share of profits as would have been payable by the bankrupt; or

(d) without the consent of that person or of the Court, to assign or transfer, or grant any licence or permission in respect of, those rights, except upon terms that will secure to that person payments by way of royalty or share of profits at a rate not less than that at which the bankrupt was liable to pay.

(2) In this section: *industrial property* means:

(a) the copyright in any work;

(b) a patent in respect of an invention;

(c) a registered trade mark; or

(d) the copyright in a registered design.

registered design means a design registered under a law of the Commonwealth relating to industrial designs.

registered trade mark means a trade mark registered under a law of the Commonwealth relating to trade marks.

§9.5 Comparative Legislation - Germany

§9.5.1 Act Concerning the Law of Publication of June 19, 1901, s. 36-37:

§36. (Bankruptcy of the Publisher)

(1) Where the publisher is declared bankrupt, the provisions of Section 17 of the Bankruptcy Act shall apply, even where the work had been delivered before the bankruptcy proceedings were begun.

(2) Where the trustee in bankruptcy insists on the fulfilment of the contract and transfers the rights of publisher to another person, the transferee shall become responsible, in lieu of the bankrupt estate, for all the obligations arising out of the contract. The bankrupt estate, however shall be liable, in the manner of a surety who has waived the right, to require that recourse first be taken against the primary obligor, for damages to be paid by the transferee, if the transferee does not fulfil his obligations. Where the proceedings in bankruptcy are terminated, security must be given for the claims of the author against the bankrupt estate, growing out of its liability.

(3) Where at the time of commencing the bankruptcy proceedings, the multiplication had not begun, the author may rescind the contract.

§37. (Provisions Relating to the Rescission of Contracts)

The provisions of Sections 346 to 356 of the Civil Code, relative to the rescission of contracts, shall apply to the right of rescission provided in Sections 17, 30, 35 and 36. Where rescission takes place through a circumstance for which the other party is not to be held responsible, such party shall be liable only in accordance with the provisions relative to restitution for unjust enrichment.

§9.6 Belgium

§9.6.1 Loi du 30 juin 1994 relative au droit d'auteur et aux droits voisins, article 30

En cas de faillite, d'octroi d'un concordat ou de mise en liquidation de l'entreprise de l'éditeur, l'auteur peut dénoncer immédiatement le contrat original, par pli recommandé à la poste avec accusé de réception.

Tous les exemplaires, copies ou reproductions qui font l'objet du droit d'auteur doivent, de préférence, être offerts à l'achat à l'auteur, moyennant un prix qui, en cas de désaccord entre le curateur et l'auteur, sera déterminé par le juge saisi, à la requête de la partie la plus diligente, le curateur ou l'auteur dûment appelés, et, le cas échéant, sur avis d'un ou plusieurs experts.

L'auteur perd son droit de préférence s'il ne fait pas connaître au curateur sa volonté d'en faire usage dans les trente jours de la réception de l'offre. L'offre et l'acceptation doivent être faites, sous peine de nullité, par exploit d'huissier ou par pli recommandé à la poste avec accusé de réception. L'auteur de l'oeuvre pourra renoncer à son droit de préférence, par exploit d'huissier ou par pli recommandé à la poste adressé au curateur.

Lorsqu'il a été recouru à la procédure prévue à l'alinéa 2, l'auteur pourra renoncer, selon les mêmes voies, à l'offre qui lui est faite dans un délai de quinze jours, à dater de la notification qui lui sera faite, sous pli recommandé à la poste, par le ou les experts de la copie certifiée conforme du rapport.

Les frais d'expertise seront partagés entre la masse et l'auteur.

