

PRESS PAUSE: COVID-19 STRATEGIES FOR ARTISTS

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11 June 2020

The music industry is confronting particularly harsh and long-term challenges in the wake of the global pandemic. Cancelled and postponed concerts and tours have led to a dramatic drop in revenue. That being said, the demand for streamed music and performances could not be stronger, with people looking for comfort and content as they isolate at home.

For insight into the many legal issues that surround this widespread industry upheaval, Gowling WLG's Entertainment and Sports Law Group - in partnership with CONNECT Music Licensing and Music Canada - is pleased to present a Q&A webinar. Featuring Susan Abramovitch, head of Gowling WLG's Entertainment and Sports Law Group, Catherine Jones, executive director of CONNECT Music Licensing, and moderated by Miranda Mulholland, JUNO-nominated artist and advocate.

Transcript

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Miranda: Okay. So it's 11:01. I think we're going to get started. As I said we're going to record this and post it later on Gowling's website and they have a news letter that you can subscribe to so you can keep up with all of the information. Again, thank you so much to everyone who submitted questions. We had such a wide range of questions and really, really thoughtful questions and we may not get to everyone's question today, but we'll sending out a follow up as well, that will address some of the questions that we didn't get to. Also, if you look in your Zoom there's a Q&A feature so if people have any questions as we go along you can type it in there. If we don't get it, again, get to them today we can address those later in the follow up. So I'm going to introduce my esteemed panel. We have Susan Abramovitch, the partner and head of entertainment and sports law at Gowling WLG, and Catherine Jones, Executive Director of CONNECT Music Licensing and I'm Miranda Mulholland, I'm an artist and an artist advocate. So I'm going to turn over to Susan to do a little bit of legal housekeeping.

Susan: Apologies, everybody. I'm forced to put this slide up although I'm told that I'm allowed to make fun of it. This is our, you know, the way we love to start by lawyers saying, "By the way, don't trust anything we say." So let's get rid of that slide right away.

Miranda: Excellent. Okay. Well, we're going to dive right in because we've only got an hour. Let's talk about copyright. Artists, we want our work out in the world to be discovered, but we want to make sure that it's protected. So what exactly is copyright, Susan?

Susan: Okay, well, let's start with it would be nothing without a particular piece of paper. A statute called the Copyright Act. It's really important for all of us to remember that because without the Copyright Act we'd have nothing. You'd sing a song that you wrote. It'd be out in the ether. Somebody could take it and do whatever they want to with it in the absence of that piece of paper that says, "No, you can't." So, when we talk about copyright reform everybody who makes their living, or otherwise, their musical works are important to them or their creative works are important to them, needs to pay attention to copyright reform. So right now where does copyright stand in that piece of paper called the Copyright Act? Copyright is a bundle of rights held by the owner of an original work of creation. That includes literary, dramatic, artistic and musical works. Musical works is the word used for musical compositions that you write. Sound recordings, performers'

performances, and as I say, it's a bundle of rights in the sense that it gives them a monopoly, or control to the owner, to do certain things like make reproductions, publicly perform, make the first publication, make the work public for the first time. But each of those rights, you think of a bundle of wheat, you can give a sheaf to one person, exclusively or non-exclusively. You can give one to somebody else. You can retain some for yourself. So you can sort of parse those rights out to different people.

Miranda: So it's also about consent. It's sort of I have this thing I did. You have to ask if me if you can use it and that consent piece, I agree, and this is how I agree. That is your copyright.

Susan: Right. It's control. So the person who owns it, which by the way the author of the work is the first owner by definition, unless they're employed by somebody else. The owner gets to control who uses it. So if you are not the owner, and you want to use something that has copyright, you have to get their permission or consent or a licence.

Miranda: Okay. So how do I, as an artist, I've written a song. I've uploaded it, how do I know? Do I mail it to myself? How do I know that it is protected and that someone can't say I did that?

Susan: The comforting, and maybe not so comforting, part of this is you don't have to do anything. You literally just have to reduce your work to, I'll use the word tangible, but not tangible. To some kind of form. So it can't just be in your head. It has to be recorded or written down or digitized in some way. So as soon as that happens, as soon as your work hits the paper so to speak, copyright is there and you are the owner as the author of that work. The question though is how do you prove that you're the owner? How do you pursue other people who make claim to be the owner? That's where registration comes in handy. The Canadian copyright office has a system of registration where you enter certain information. It's actually quite a simple form. It's not expensive and you get a certificate of registration. That's the good news. The bad news is that you don't submit a copy of your work with that registration. So some people get very frustrated and say, "Well, what's the point? If I put a title of my song, how am I going to be able to prove that later it's mine?" It's a good point. That being said the actual certificate creates a burden of proof on somebody to else to prove that you're not the owner of that work. So it does create evidentiary advantages. But if you want to create other bodies of evidence, first off there's an obligation on you to deposit your work with the National Library 7 days after first publication, in other words being made public. So that's one means to say, "Hey. That's my work." Secondly, people have this poor mans copyright where they mail it to themselves. All that is, is creating evidence and it's not a

really good way to create evidence, because what if they stamp, the point is there's a stamp on the letter that shows that this existed as of a certain date and had something to do with you. Well, what if the stamp doesn't show the date very well? What if you open it? Then that's the end. You can really only use it once as evidence. In today's digital age I think it's much better to use digital time stamps. That's just as good and they don't get ruined the first time you open it. All those means are good ways of creating a body of evidence, but it doesn't take away from the litigation benefits, if you ever have to use them of having burdens of proof shifted by virtue of the registration.

Miranda: Okay, that makes sense. Again, there's different ways we'll get to about where to register your work to get paid and that can also help with the evidence that you own this work and that you've created it.

Susan: Miranda, if I can just answer one very good point. People often get confused about registering copyright. A lot of people feel that registering with SOCAN or with these other collective societies is registration of copyright. It's not. As you say, it may create a body of evidence, but when we talk about registering copyright we're talking about registering it with the Canadian Intellectual Property Office. Sorry about that.

Miranda: Great. That's great. That's really good. We're going to get more about registering to various collecting bodies. But I have a question because I've been in a lot of bands and I've had different co-writing experiences. How does having one or more songwriters on a tune complicate things?

Susan: It doesn't have to complicate anything but it often does. The first thing is just because you went into a room and wrote a song together doesn't mean that you guys have agreed on how that joint ownership, if it is that, is split. My recommendation, always is, ideally before you go into the room or it depends on what happens in the room right after you leave the room, there's some kind of agreement. An agreement doesn't have to be fancy and use a lawyer. You could take a piece of paper and say, "We just co-wrote the following five songs. Here are the splits." and sign it. That at least shows that the parties turned their minds to what the splits are. In the absence of doing that, the Copyright Act would say that a work of joint ownership is owned in equal parts by the writers. So if that's not your intention you should make that clear. I know sometimes these conversations are uncomfortable, especially during the creative process, especially when you're exhausted after the creative process, but they're kind of important. A work of joint authorship is where you can't take the pieces apart from each other. You can't say the lyrics are here and the music is there but rather we all contributed to a whole. When that happens you're equal co-owners and you all, therefore, each one of you has to licence the

work in order to give somebody permission. So that does complicate things from the users point of view when they're like, "Okay. We really want to use this song in a big television commercial. It's going to be amazing." It's for a product that one of the co-writers doesn't believe in and they hold back, and the other co-writer who really just wants to make a bunch of money from the commercial licensing fees, the synchronization fees, really wants to do it. That could be complicated. One final thing, it also affects the length of term of copyright. Normally for a musical work the copyright lasts for the life of the author plus 50 years, so in other words, to the date of the death of the author plus 50 years to December 31st of that year, 50th year. But in a work of joint authorship it probably is good for the owners because the 50 years is measured from the death of the last to die of the joint authors.

Miranda: Oh.

Susan: So it could extend copyright just in case one of us dies early.

Miranda: Wow. Okay. This is good to know. I didn't know that. So one of the things that I think I'm taking away from here, and it's certainly been in my personal experience is, again to your point, it's very awkward to have these conversations but it saves so much time in the long run, and it's way more awkward to go back after years down the line and say, "Hey, I did that. That was my bridge." or whatever. You can't take the bridge out and go put in another song. I think that's really important and having those conversations with your bandmates. Sometimes it can be something where I think you can go in, even before the creative process, and get it out of the way and say, "If this, then this." and again, like you say, you don't need lawyers. Sorry. But you can do a very kind of brief write up. We're going to get into some royalties stuff right now, because I think all musicians are trying to figure out how to make the most of their intellectual property right now, and that they're signed up everywhere they need to be. When I have a royalty question I go right to Catherine. Sorry, Catherine. But she's going to lead us through the Gordian Knot that is royalties. Will you take it away?

Catherine: Absolutely. Sure. The royalty side of it is super complicated, and in Canada we make it even more complicated, by having numerous societies that manage all of these different rights. As Susan mentioned, there's this bundle of rights, and some rights are collectively managed and some are managed by the owner. But it's important to remember that in a song there's actually two copyrights that exist. One is for the composition or the written song, the lyrics and the music, etcetera, and that's totally separate from the actual sound recording itself. Or the master. So if you split those out, they're two halves of a whole, but they follow a very similar stream. When something

happens on one side it happens on the other side as well. So if you own both pieces you've got this nice little world where you can control everything. But some of the rights you have to assign to somebody else to collectively manage for you. For example, there's exclusive rights and non-exclusive rights. Exclusive rights would be the rights the maker licences out, so the owner of the sound recording and the owner of the song, and then the exclusive right is the right of reproduction. When you think of reproduction that's normally for a sale or a download. It kind of goes back to the old days on the publishing side of a mechanical reproduction. Where you actually physically reproduced vinyl or actually the drums for the pianos. I can get into the weeds even further on this. I've got a handy little guide that I'm going to be sending out to everybody.

Miranda: Yeah, this is kind of amazing and I think everybody is going to be very interested in seeing it. I just want to get really specific for one second.

Catherine: Sure.

Miranda: This is my CD. I made it. What am I? So I am a maker?

Catherine: So you are a maker. You are also a performer because there's performance rights that go directly to performers outside of the maker. You are a composer and you are a publisher. So you are all those four different hats. So you can control all those rights that are attached to each of those.

Miranda: Right. So I need to make sure that I'm signed up everywhere that I need to be.

Catherine: Right. So public performance, typically, when you ask an artist, "Are you signed up for public performance rights?" They say, "Yes, SOCAN." You say, "Great. But there's actually public performance for your recordings as well." That's collected in Canada by Re:Sound. So that's one of the collective management organizations in Canada. That was established in 1997. So some older acts may not even know that that exists. That's kind of the equivalent of SoundExchange in the US. Then through Re:Sound they have member organizations that manage the performer's rights. So ACTRA RACS, MROC, Artist in Quebec, manage that piece and then on the maker side it's the individual labels or through CONNECT. We manage that as well. Then a public performance on the publishing side is through SOCAN. Now, reproduction, is managed by CONNECT as another collective management organization and we licence, we blanket licence things like commercial radio and background music suppliers, non-commercial radio as well. Then, I should have had this written out on a chart because it gets so confusing, the CMRA and also SOCAN has a division that handles reproduction for publishing. Then on the, I already

talked about performance, SOCAN and Re:Sound, and then CONNECT and SOCAN in Quebec, and I think that's everything.

Miranda: The handy thing is that you have this amazing chart that's almost done, and will be sent out to everybody who's on this webinar, because it's a perfect road map of if this, then this, and this is where you go and then over here.

Catherine: Yes.

Miranda: I think that will be really helpful. I learned a lot just looking at it and I feel like we're just sort of tantalizing everyone with this chart that we will be showing at some point. One of the things that I learned a lot about was where the master recording and composition and reproduction gets paid out with commercial radio, with SiriusXM, background music, DJ sets, Spotify, Facebook, Instagram and YouTube, I think that will be really revealing as to where people can get paid and where they can't get paid.

Catherine: Right. It's important to know where all your sources of revenue are and then how you collect them.

Miranda: Yeah. Absolutely. Another avenue for money right now is sync licencing and, obviously, TV shows are stalled, and maybe they're stalled a little bit, but there's also, again, who knew that bleach would suddenly have a huge budget for advertising? So there are some other options for sync licencing. So let's get into that. What is sync licencing? Help.

Susan: Right. So that was a question. Kind of broad but I'll start from the beginning and, Miranda, if you want to drill me down please feel free.

Miranda: Okay.

Susan: Sync stands for synchronization. Basically sync licencing is the permission that you give as the owner of either a sound recording or a musical composition. So just like Catherine said, there are two different rights there. On both sides to synchronize the sound recording, or the musical composition, with moving image. Whenever a producer of a TV show or movie uses a song in a film or a TV show, they need to go get a sync licence. If it's a re-record or they do their own recording, or the characters in the show sing the song themselves, then they just need to get a sync licence on the publishing side. In other words, for the musical composition, but if the TV show actually uses a master, regardless of whose master, whether it's the original or it's your version of Chris Isaak song, Miranda, whoever owns that master that's being synced, the version that they're using, they need to get a sync licence. Also, video gaming and any audio visual use of

music, sound recordings and musical compositions. So that's what a sync licence is. Nobody can do that without permission, except where there's a small user generated content exception in the Copyright Act, in the last round of reform. To my knowledge it hasn't been tested in court yet but it's for non-commercial use. So typically for our audience here, that would not apply, because people here would be doing it for commercial use. Whether they're making money from it or not. That's more for bar mitzvah video slide shows that I posted of my son's bar mitzvah, I think probably, would fall into that category. So anytime you want to pair audio visual content with sound recording and/or musical composition you need to get a sync licence. How do you do that? You've got find out who the owner is and you got to go to them and negotiate a deal. There is no collective. Possibly SOCAN, SODRAC, may still do that. I'm not sure because SODRAC, which was acquired by SOCAN, used to do some of this for some of it's membership. Typically, the general rule is, there's no collective that does it for you. So you have to go to the owner and say, "Hi. I'm doing an indie film. I have no money but I want to use this humongous song in my film. Will you give me the rights?" The audience is probably more owners than users, in this instance, but it may be the case that there are users as well. So when you go and you ask for permission for a sync licence the best approach is, especially if it's a big song, it's probably going to cost a lot of money, is to parse the rights. Just like I said you could parse the rights in copyright. Just because you need a sync licence doesn't mean it has to be for the world in perpetuity for all media. Right? That would be a very expensive licence. If all you want it for, initially, is to put in your film so you can show it at Hot Docs or at TIFF, then you can just say, "I just need it for this short window of time. Just for this film festival use." Typically, licensors will be very sensitive to the fact that you're just trying to get your film in a film festival. They won't charge you a lot. The trick there though is, fine, you have your really cheap licence just so that you can do it right and put it in a film festival, but then at the film festival a big distributor is going to discover you and then all of sudden's going to blow up, you want to be stuck negotiating the extension of the sync licence then. So a great idea then is to at the beginning say, "I just want to licence it for film festival but give me an option to broaden the rights to Canada, to the world, to a longer term, to more platforms to use it on. That way you have all the prices set out in the original licence. You don't have to pay them until you exercise the option. So there's some sync 101.

Miranda: Oh, tat's really good. It's interesting, I was watching Parenthood, re-watching Parenthood the TV show, and when I first saw it when it was first broadcast the theme song was a Bob Dylan song, and then when I watched it on Netflix it was a totally different song. I think that was probably a very similar instance of usage. Okay, so then I have a covers question for you. This is a two-parter. Number one, say I want to record a

cover song. Okay, I already did but we'll pretend that I didn't. My band's going to record Chris Isaak's 'Wicked Game' and I want to put it on an album. (A), what do I do. Then my (B) question will be can I pitch that to music supervisors knowing that I don't have Chris Isaak on the line? I can't get his permission. So, (A), (B).

Susan: Okay, (A). You did a cover. You recording it and you're putting it on your album. Technically, even just recording it probably requires permission before you even put it out into the market place. I don't know anybody who clears the right unless they want to make sure that before they spend money on recording they'll have the right to distribute it. That's a very important point. From a clearing of rights perspective, most of the time you skip that step, and you go straight to I need to get a mechanical licence. Catherine referred to that when she talked about the player piano roller things. That's where that term comes from. So you need the right to reproduce that musical composition on records that you're going to sell or authorize somebody else to sell for you. When I say records I mean digital, I mean any format. Now of course it's called the digital mechanical. When it's a physical record we still call it a mechanical licence. You have to go to the owner and get that. What's interesting here is there is a difference between Canada and the US on this. So if you said, "Susan, I'm only every going to sell this in the US. Never going to sell it anyplace else, on physical records." This musical composition has been previously released and made public, let's say the Chris Isaak song for example, then there is what's called a compulsory licencing regime in the US. No owner of a musical composition can stop you from recording it's song so long as you pay the required statutory royalty rate for reproducing records. That statutory rate is set in the US Act. We, in Canada, we used to but we no longer have a compulsory licencing regime. Actually, little do people know this but a copyright owner can stop you, regardless of whether it's the first use or it's already a song that's been put out into the market place, they can say no to a mechanical licence to you. In my 25 years of doing music law I can tell you that only happened once. Every other time there's an industry agreed rate for physical records that everybody seems to agree on. Once, somebody went and said, "I want to do a cover of this song." and there was bad blood between the people, to be honest.

Miranda: What song?!

Susan: I'm not going to say. They demanded three times the normal mechanical rate that's industry, basically, agreed on. Which made it very, very prohibitively expensive. They said, "Too bad." They didn't say no they just said no by virtue of asking for too much money. So that's possible in Canada. It rarely happens. So that's physical records. When you sell digital downloads, or when you're streaming music online, you also have to pay

and get a licence for that. But that's typically taken care of by the platforms directly with the publishers. Typically, Spotify will have a deal with the publisher, if it's a big enough song, and they pay those royalties directly in Canada. That's called digital mechanical.

Miranda: Okay. So, Catherine, where do I go to ask for permission to record Chris Isaak's 'Wicked Game' and release it on a physical album?

Catherine: So the CMRA in Canada is the one that issues the mechanical licences and that's where you get it from. But as Susan just said, typically these days, the DSPs have a direct arrangement with the CMRA. As your song is streamed or sold through any of those services it automatically gets paid to them.

Miranda: Okay.

Catherine: Do you want me to just jump in there to (B)?

Miranda: Yeah.

Catherine: Yeah. So you can pitch your song. You own that recording. You can pitch it but you have to let them know that you only own half the song, because it goes back to those two copyrights, and you need permission from both sides. It would then be up to the music supervisor, whoever you're pitching it to, to reach out to the publisher of the song, directly, and get that piece of the licence. So that means that, let's say the full licensee was \$50,000.00, only \$25,000.00 would go to you for half of the song. The other \$25,000.00 would go to the publisher. Now what does sometimes happen, especially with cover songs and especially with super popular cover songs, is the publisher will ask for a higher amount of money than you might be willing to accept. Then it's up to you if you want to invoke what is called an MFN clause, or most favourite nations, which means that you would be paid equally what the other party in the joint ownership of the song would get. But sometimes, like with independent or a lesser known artist, they might be willing to waive that and take a lesser fee for the exposure and for the use.

Miranda: I'll let Chris Isaak take a lot of it. I'm happy with that. Before we go on I want to just ask a question.

Catherine: Susan's got something.

Susan: I just want to interject on what Catherine was saying. First of all, in the digital mechanicals, where there's a deal directly between the Spotifys and the publishers, if you are self-published it's very important for you to get a collective to collect those digital mechanicals for you. Because although Spotify should not be selling without having

those rights clear, that sort of happens and there's no real way to get the money directly from Spotify, other than through a collective like CMRA to collect digital mechanicals for you. So if you're not signed up, and you don't have to sign up with CMRA for everything, you can sign up for individual rights like just collect my digital mechanicals. That's actually kind of important to know if you are self-published. The other thing about pitching to music supervisors, if you sent them your recording of Chris Isaak, they'll know. You should say it but they're sophisticated so they'll know that you're not offering both parts. It would never be assumed that you pre-cleared so that you could do a deal for Chris Isaak's sync licence. You're pretty safe on that front yet, again, you're supposed to have cleared with Chris Isaak or his publisher the right to make that recording, but nobody really complains about that until it's made commercial.

Miranda: Okay, that's a great point. I can make my disco link and put in this is a cover, these are cover songs, and then send it to a music sup. Okay, that's really helpful. Before we go on I have a question, and I don't want to get stuck on this but, what are you talking about the player piano business and the drum?

<laughter>

Susan: This is historical but the term mechanical licence, it was because in the olden days when you made reproduced musical compositions, they way you did that was for player piano drum to have the hooks, again here is where I don't get very technical, to reproduce the song on the piano. That was because it was a reproduction, mechanically reproduced song, that was where the term came from.

Miranda: Okay. Thank you. Thanks for clearing that up. Another question about covers, because this has come up a couple times and I think a lot of people actually ask this question in preparation for this webinar, but if I was going to perform by cover, 'Wicked Game', Chris Isaak's getting a lot of air play today, but if I was to perform that on the National Arts Center Facebook Live, do I need to do anything?

Speaker2 First of all, I forgot to mention that your rendition of that song is supremely beautiful, I should have mentioned that.

Miranda: Awww. Thanks, Susan.

Speaker2 Really, it's one of the best versions I've ever heard of that song. Look, if it really is a live stream, and Catherine correct me if I'm wrong on this with your beautiful chart, but if it really is a live stream, and there's no reproduction technically made along the way and that's a big question, then really that's just about public performance and you

don't really need to clear it with him. SOCAN will take care of making sure the public performance royalties eventually get to him or his publisher.

Catherine: That's true. But if they're recording it and it's going to be rebroadcast then you need that licence.

Susan: Right. So that's the big difference between truly live stream versus a recording being streamed. There's a fine line in between. I once had a file a few years ago where there were music concerts done by Unilever of women singers and they live streamed through straight to cinemas. So it was an event. There was a live concert and then they live streamed it to movie theatres. I spent a lot of time figuring out what does that mean live stream to movie theatres? Technically, are there reproductions being made along the way to facilitate that live broadcast in the movie theatres? That became a very technical question. I get a little nervous when I say a live stream, yeah, no problem. It's just public performance because if there are recordings being made, reproductions made in order to facilitate that live stream? There may be a different answer.

Miranda: I think we're also living in a time where it's sort of the ask for forgiveness don't ask for permission, from a lot of the tech companies too. Again, this is just another reason why it's really helpful for artists to know their rights and where to go. What about background music? What licencing is required to broadcast an event with background music?

Catherine: Do you mean background music that's playing in a restaurant? Or?

Miranda: Yeah. This is one of the questions that came in. Just different tariffs that cover this.

Catherine: Yeah. There are different tariffs for public performance for SOCAN and for Re:Sound. Again, there may also be reproduction if there is a music licencing company or background music service that is providing that music to that establishment. That gets licenced through us.

Susan: That's if it's background music, but if the background music is then captured in a recording and then, I guess the question was broadcast or streamed.

Catherine: Okay. So phemoral type.

Susan: Yeah. It's actually kind of a big question. It doesn't say this in the question but they may be assuming that there's a recording being made in order for it to be broadcast. If there's a recording made then you have to worry about those

synchronization rights, assuming it's audio or visual as opposed to just audio because, again, if it's just background music and it's just audio only, is there such a thing? If you're recording an event and there's background music then really you have to start from needing the sync, clearing the rights, it's still a sync even if it's not front and center.

Catherine: But if you think about something like a hockey game. Right? There's that background music that gets captured when it's being broadcast on television. So technically that's been covered by the performance licence at the actual venue. It's live broadcast. They obviously rebroadcast those games. So typically it's allowing for a time difference. But if they air it again, a year down the road or like what they're doing on TSN where they're rebroadcasting old hockey games, technically they should be clearing everything that's in that program. But they don't. It's kind of common practice. Just accepted. It's one of those really funny gray areas. As a copyright owner you could absolutely go after them. Try to get them to clear it.

Miranda: I'll check out those hockey games and see if they're playing any of my Celtic music.

<laughter>

Miranda: Let's talk about contracts, because it can be really daunting, and obviously artists want the gig and I think there's a lot of pressure to sign things and a lot of language. Obviously right now, we really want to be protected more than ever. We've been hearing a lot about force majeure. Maybe you could just explain what that is?

Susan: Okay. Let me dive into that one. I realize that people are struggling financially right now so it's hard to hire a lawyer to help you through these types of provisions. I'll try to do as much as I can. Unfortunately, back to my legal disclaimer side, when it comes to force majeure it's all about the wording of the clause. There is no general answer. I can give you ideas of how to read a clause but it really, really is technically what is that your clause say. It's been very fun or interesting for contract lawyers these days because about three months ago, and before that, we used to just throw that boiler plate clause in and not think about it too much, because when would a pandemic ever hit? Or a war? We just thought we were immune to those kinds of things. You put the clause but you wouldn't really pay attention to it. Well, we're offering webinar after webinar and we're parsing words and this is going to become a course in law school, force majeure clauses, after the pandemic. You have to look at the clause, but basically the idea is, and not just the force majeure clause. A force majeure clause is a clause that deals with unforeseeable events happening that impact the ability of the parties to execute their obligations under the agreement. That's generally what the clause is. It's important to

know which jurisdiction governs the interpretation of your contract because in Quebec, of course they have a civil code jurisdiction where there's a code, a statute that lays out basically all the law, and there's a clause in there that reads in force majeure clauses to every contract, even if your contract doesn't have one. In the rest of Canada that's not the case. If you don't have a clause you don't benefit from a force majeure argument. So that's number one. Number two, you need to look at, and as an aside there may be other clauses other than force majeure clauses that you can draw on, or the other party can draw on the other hand. So there may be rights of termination in certain events. There may be excusable conditions. There may be right to delay or suspend an agreement. Everybody knows in their recording agreements if something happens to the artist where they can't record, there's usually a provision that says, "Well, we can suspend." So that's not a force majeure clause but it's another clause that gives one of the parties the ability to change around the natural flow of the contract. So you should look at other clauses as well to see how events can impact the flow of the contract. The force majeure clause, the first thing is you have to figure out if this event, this pandemic, triggers the clause. So what does the clause say? Does it say in the event of a pandemic, da da da? Or does it say in the event of an act of God or force majeure? Well those don't have defined meanings. Those are defined by courts and interpreting contracts. So if the word pandemic or government shutdown, because that's happened here. Live venues cannot be open right now so that would be another thing. If it says that government mandated or legislation that requires this to become impossible. Take a look at whether this situation actually fits the wording. The second thing is, is it truly impossible to perform? So a lot of these clauses say if an act of God or a pandemic something happens that makes the performance of the contract impossible. Then what does that mean, impossible? If it's way more expensive to do it but it's still possible is that impossible? Probably not. So that's another thing you have to look at in terms of the wording of the contract. Finally, is the force majeure foreseeable or not? Again, if the word pandemic is in there, or COVID-19 as I like to put in specifically in my clauses now, isn't there the whole point of the force majeure clause is that these events were not foreseeable and therefore people should be excused from their obligations. Well, if I enter into a contract today and I say force majeure and I don't talk about COVID specifically, COVID-19 is not unforeseeable right now. We know it's happening and we know it could affect everything for a long time. Those are kind of the principals of clauses, that you may be interpreting in the past, you of course can now draft clauses very specifically to address these things in some contracts. So you want to say pandemic. You want to say COVID-19. Again, if you want to be excused from your obligations. You want to say maybe that it becomes commercially unreasonable to perform your obligations as opposed to impossible. Again, if you're on that side. If you're

the one who wants the contract to go on then you don't want to put any of these things in. The other thing you have to look at is what's the remedy? Great. The force majeure clause is triggered, we decide, so what? Does the contract end? Do you have to return money that's been paid to you because the contract comes to an end? Do you have to give notice to the other party that you're invoking it? Do the obligations get suspended? Is there a right to terminate after a period of suspension? So there's a lot of different things that can happen as a remedy for the invoking of the force majeure clause. So those are things to look for in your clauses. If you're entering into contracts now, think about it. How do you want to allocate the risk? Would you rather this contract go on if something happens because of COVID or some other act of force majeure? Or would you rather be excused from your obligations? The parties are not aligned, right? Very often parties want different results based on what's going on in the world. One other thing I'll just say, even without a force majeure clause in the non-Quebec jurisdictions, there's a common law concept. That means it's not in a statute, and it doesn't have to be in a contract, called frustration. The doctrine of frustration. Which is applicable if there's an, it's very similar to force majeure, if there's an unforeseen situation that makes performance radically different than that which was undertaken by the contract, the very high bar and you have to be careful before you would invoke it if it is available, because what the remedy for frustration if you can prove that it applies, is that the contract basically is ripped up. So, if you were paid a deposit for a performance, but now the performance can't go on and you rip up the contract, you're no longer entitled to that money. It's like you go back to where you were the day before you signed the contract. Those are kind of some basic principals. As you can see it's a bit complicated and very fact specific. I'm sorry. I'm not trying to sell my services but on this one, if you do care about the force majeure clause, you probably need legal advice.

Miranda: Yeah. Absolutely. I think I'm looking for a remedy for frustration right now as well.

Susan: Hopefully not over my long winded version of what force majeure is.

Miranda: No. That was perfect. I'm wondering too. Just imagine I'm an artist. I had a show that was supposed to happen in September and the government says you cannot perform. Then you cannot. What advice would you give me?

Susan: Well, first of all the government hasn't said that yet. So you raise a very good question of timing. Timing is very important in terms of what your rights and remedies might be. If you're the artist and you say, "Okay, I don't know what's going to happen. May be they'll be open but it won't be a good environment because everybody is

6 feet apart from each other. I don't want to perform in that environment." That's different than if the venue is closed in September. Right now we don't know if the venue's going to be closed in September. I'm not sure in any Province we know that yet. If the presenter of the venue, whoever you contracted with, wants the show to go on, at least for now, for you to assert that you'd like to back out of the contract on the basis of frustration or a force majeure clause, you probably won't succeed. I wouldn't recommend that. What I do recommend, until there really is an impossibility of performing that show, is go to the other side and have a conversation, and again, you can do that without lawyer. I think everybody has been quite sensitive to what's going on here, and you never know, if you can't reach a middle ground maybe they don't want the show to go on. Maybe you can postpone it if that's good for you and for them. So you might be able to negotiate a solution apart from force majeure and frustration and being legal about it.

Miranda: Okay. That's helpful. I'm very conscious of the risk that's going to be mitigated onto the artists in the wake of this. I want to mention that we're putting out a survey that's going to be part of the advocacy study that Music Canada did a couple of weeks ago, which was how will audiences return to the concert halls, if ever? Will they fly? Will they go to the States? Probably not. But we're doing an artist focus one so we can also send the survey out. I think it's going out today so we can send it out in our follow ups to this webinar. Specifically for artists and share widely. We want to get as much data as possible to figure out how artists feel about going back. Going back to life on the road and all of those contact points and travel and hotels and all the venues. Then I'm wondering about say a COVID rider. What do we have as rights as artists? If there anything we can do to say, "Until you have these measures in place we don't feel comfortable going on your stages." and would we have some sort of a measure to invoke that?

Susan: I think it's a great idea. In contract, pretty much, you can put whatever you want in as long as it's not illegal or something like that. If you are not in the contract, yet, although you could try to negotiate an amendment to build this in, but for certainly for contracts going forward if you have, kind of here's my artist bill of rights for going back, and you put it in like a rider in addition to your green M&M's, that becomes an enforceable obligation. Again, you need to make sure that you say what if those items in, what I'm calling the bill of rights, aren't fulfilled what are the remedies? So you want to not just say do this everybody. You also want to say if that's not fair then I get to keep my deposit? Or I don't get to keep my deposit? I can back out. I can postpone. What exactly happens? You always have to remember in a contract not just to set out what you want to happen, what lawyers are good at is, okay and when that doesn't happen what should happen? So

you need to have the corresponding remedy very specifically set out based on what you're prepared to do.

Miranda: Yeah. That's really great. Both Susan and I are on the Board of Governors for Massey/Roy Thomson Halls and this has been obviously coming up in a lot of our board meetings as we prepare for audiences who are older. At Roy Thomson, specifically, also for me as an artist, I would feel so terrible if there was an event, I did a concert and that became a super spreader event or something like that. I know this is all very top of mind. More contract stuff. Let's see. Oh, this is a good one. This is about publishing and self-publishing. Right now, I wonder if we can just sort of walk through some publishing options, because is this a good time to sign with a publisher? Maybe looking for some money coming through there. Or should we still go the other route? Or what are the kind of options about publishing? Maybe we could walk through a couple of those and things that you've seen, and Catherine, if you have any comments on this well. This is really helpful.

Susan: The question was geared towards is this a good time or a bad time for publishing deals, and I don't think this is either a good time or a bad time, any different than any other. This time meaning COVID time. It's become a good time to have a publishing agreement in the sense that, as you can see from Catherine's presentation and when you see her flow chart, it's kind of complicated to collect from all the different sources these days, and as clear as her chart will be, there's a lot of places, there's a lot of sign ups, there's a lot of watching over to make sure that everybody has the right information, getting the medidata in and all that. So from that perspective, COVID or no COVID, that's one good reason to do a publishing deal. Just to get, what we call the administration, out of your hands because you may want to spend more time creating music or, hopefully soon, performing or doing that kind of thing. But basically my answer to client's questions, "Should I enter into a publishing deal or not?" hasn't really changed all that much over the years. It really is a question of where you're at. So when you write a song you're the first owner, we talked about that, and therefore you're also the first publisher, as Catherine mentioned, Miranda, you're also a publisher. You can do it all yourself. You don't need a publisher to go collect. Catherine's chart will tell you who you need to sign up with and you're an entrepreneur as well, so you don't mind the hard work of getting everything signed up in the right places. So you can do it and then you're completely in control, of course, and when people come to you to request permission to use your works, it's you who answers. Nobody else. But there's other situations where either people need money by way of advances. So that's one good reason to do a publishing agreement, or they like the idea of the publisher getting in there and helping

with either the craft, by connecting the writer with other writers on the roster or otherwise, who may have more access to pitch songs to recording artists or TV shows or music supervisors. Publishers may offer a range of services that you need because you're in your room and you can't really access that yourself. The bad part about publishing agreements is, with very few exceptions and they were very exceptional, publishers will never guarantee, "Yeah, I'm going to do all this work to pitch to music supervisor." They may say it to you but it will never be in the contract. Right? I once got a provision in there that said if sync income does not reach X level then we have the right to get out of the contract. That would be like, remember when I talked about you do this and here's the remedy if you don't? Well, that's an example. It's like, "Okay, you're going to pitch me to music supervisors, great. If you don't, because I haven't made that much money in music supervision, I have the right to terminate." That's the remedy. That's extremely rare in publishing agreements. So, really, if they're going to do the work for you it's going to be about trust, and how you feel about them, and what they're willing to show you before you enter into the publishing agreement. There's two kinds of agreements. You can do publishing agreements, or co-publishing agreements are more common, where you split ownership of the copyright with the music publisher but the music publisher administers your rights exclusively. So, again, they have control over who they will licence to it, who they don't. If you want to have any control over certain types of things you need to build in approval rights. Or you can not give up copyright and you can just say, "Here. Just administer for me for a period of time." The difference there is the publisher is not getting a stake in the equity of the ownership of the copyright and also the splits will be less for an administration deal versus a co-publishing deal. So that may disincentivize the publisher from really going out, and spending a bunch of money to knock on the doors of music supervisors to get your covers and syncs, but they will do a good job of just bringing your money in. So there's different choices even doing a publishing deal. There's different choices about the level of control you give up. The amount of net receipts you're giving up and therefore the corresponding what are they going to do for me that you may be giving up or giving to them.

Miranda: Would you recommend to add in the time clause. 4, 5 years you can administer my work and at the end of 5 years we have a period of time where we can discuss whether we want to continue this relationship? Or?

Susan: Right. So it's important to distinguish two temporal concepts in music publishing agreements. There's the period of time that you're quote/unquote exclusively writing for that publisher. In other words, all the songs that you write during that period of time exclusively go to that publisher, but then at the end of that period of time, whether it's

5 years or a series of shorter options that they exercise, at the end of that term you're free to write for anybody else or for yourself. So, let's say it's 5 years, at 5 years plus 1 day, the song you write that day this publisher doesn't get. That's different than all those songs that you delivered during the 5 years, how long does the publisher get to continue to have rights in it? Those are two different concepts. Typically, in a co-publishing agreement the second concept, they try to make it perpetual. So anything you write for them, whatever rights they, they have in perpetuity. Sometimes you can negotiate reversions after a period of time, post-term. So 10, 15, 20 years post-term. But they will have those rights for a very long time, even though you're now free to write and publish yourself, or let some other publisher publish your songs.

Miranda: Okay. That's very helpful. I had a question that came in and I'm wondering, Catherine, if you could take this one. Again, I think Entandem is now a new conglomerate.

Catherine: Yeah. So as I mentioned before it's complicated in Canada by the virtue of having numerous collective management organizations. SOCAN manages public performance for compositions. Re:Sound manages the same right but for the sound recordings so they have joined forces to collectively licence businesses, bars, restaurants, etcetera to make it easier for people to get a public performance licence. So it's a one stop shop. Two licences. They act as almost as a licencing and collection agency where they issue the licence to take the money and it gets parsed out to the two organizations and they take care of paying their members.

Miranda: Okay. Well, that's very helpful. I hope that answered the question.

Catherine: Sorry. I'll just add something. One, I was on an international Zoom at 7 o'clock this morning and collective licencing and making it easier for businesses, especially in a post-pandemic world, was a big topic. Actually, 53% of organizations around the world are working together.

Miranda: Oh, that's good. This is totally random but is there any talk about licencing for podcasts? Has that come up in any of the international Zooms?

Catherine: That's a dirty word.

Miranda: I know!

Catherine: Thank you. Very, very difficult in the podcast world. Owners of recordings. It falls under the bucket, and Susan you could back me up on this, of third party licencing and typically, in contracts, there is approval in that section. For podcast licencing, the label

and the artist would have the right to approve on an individual basis, based on host, topic, not different to the use of a song in a television commercial or a movie. If you don't want your song associated with gas powered vehicles then you don't have to sign. You don't want to licence your song to a podcast that's sponsored by Ford or Dodge. So there's still some control concerns about podcast licencing. I always joke at these types of things. If I could solve that I can retire.

Miranda: Keep working on it. Keep it up. I feel like so many of these rules and laws and everything are, again, we're running so far behind where they are walking, that things are changing so quickly and here's another example of that. This one affects me quite a lot, which is the sound recording definition in the Copyright Act, where I played fiddle on every episode of Republic of Doyle, that crazy cop shenanigan TV show set in Newfoundland, and because of that particular definition of sound recording in the Copyright Act, I am not paid when that show is played all over the world in various countries. But I was paid for the one time studio fee that I got to go in. So this is something that we have been very active on and lobbying in Ottawa for. This is one of the questions that came in so there hasn't been any move on this in terms of we haven't seen that this is going to change. It hasn't changed as of this point. But that said, again, what is it? Never waste an opportunity? Never waste a crisis? I don't know. This is a good time when we can push for copyright reform because there is an ear in Ottawa who is hearing us and saying, "Okay. This system was broken before and now is a good time to try to fix some systemic problems." So there has been some progress made. They're listening. This is something that could be done and so we're active on that. In my capacity as a consultant to Music Canada and the lobbying efforts in Ottawa. I don't know if anyone wants to add anything to that particular nugget.

Susan: No. But thank you for your efforts on that.

Miranda: You are welcome.

Catherine: Absolutely. It goes back to what I was saying earlier, whether two slices of the pie, or two pieces of the puzzle, what happens on one side should happen on the other side and in that particular case it's not. It's unbalanced.

Miranda: Yeah. It's interesting, I mean for me I'm a baby lobbyist, I don't know anything about this. But I'm learning. But I feel like what's interesting to me is looking at who is saying no to the other side, and trying to figure out what that carrot is that obviously they need dangling, and why they're resisting. So that kind of leaves us, we've got only a few more minutes left, but again we had some great questions I think we can do a follow up, a round up of these questions and answer some of the ones that didn't get

answered, that were submitted beforehand as well. But I wanted to just briefly touch on some of the financial support from the public and private sectors for artists, specifically. Obviously there's a lot of campaigning going around, trying to extend CERB, I mean right now we can't go back to work the way that we would and so obviously that's top of mind, and we're monitoring that very closely. But what other places can artists go for support?

Susan: Again, if we're talking about individual artists versus artists organizations, there's a distinction being made. Unfortunately, for individual artists we really are looking at CERB. Unfortunately, I was reading in the paper this morning about how their ex post facto, not that any of us would ever do this, but they're putting ex post facto penalties on people who made errors or they're saying they're not errors. People who did frauds. That's going to be interesting. I don't think a lot of defense lawyers and civil liberties heads of CCLA's who I know, took issue with being able to put a penalty on behaviour that was not penalized on the day that you did it. Anyway.

Miranda: What does ex post facto mean?

Susan: You like that, eh?

Miranda: What does it mean?!

Susan: After the fact.

Miranda: Okay. Okay. Thank you.

Susan: Okay. There's also all the other general funding and wage subsidy that may be some of our audience has been able to access because they have employees. So that's been available and apparently has not been completely subscribed, surprisingly. There's some loans available but the one that's specific to the arts community was this \$500,000,000.00 fund, Emergency Support Fund for Cultural, Heritage and Sports Organizations. That hasn't been completely flushed out. It's going to be distributed in two phases. Phase one has been announced that it will go through existing departmental programs and agencies that are already distributing money. Like through the Canada Music Fund and Canada Council for the Arts. It's only going to people who have already been funded and they're going to be topped up. In general, that's what's going on there. If you don't have that funding already you're probably out of luck on that one. But in Phase 2, which has not been flushed out, there will be additional support probably to organizations, hopefully individual artists, who don't already receive funding. So we have to see about that. There will be some requirements for getting this funding. Again, we don't know what Phase 2 exactly is going to be, but you have to need the funding to ensure continuity of

your operations, you need to remain in operation. You can't just take the money and then close up shop. You can't be getting money from various sources. All the things that you would expect to avoid. Double dipping and fraud or just taking too much from other mouths. Then there's also other organizations beyond the Federal government and private companies, like Spotify announced incentives through its COVID-19 Music Relief Project. It's going to match donations to specific organizations up to \$10,000,000.00 and they've picked the Unison Benevolent Fund. Then there's other relief funds. There's probably better sources that you can direct people to, Miranda, but some of them are SOCAN's Encore Program for Facebook live streamed concerts. Unison Music Together offer artists emergency relief funds. So maybe you have better sources to direct people to find to out what's available as of today.

Miranda: Yeah. This is a good time to wrap this up. Thank you so much for your time and expertise. This has been really fascinating. I've learned so much. Catherine, did you want to say something before?

Catherine: I just wanted to add that we on connectmusic.ca under member resources, there's a list of all those resources that you can access.

Miranda: Fantastic and sign up for the Gowling newsletter.

Susan: Oh, thank you, Miranda.

Miranda: You're welcome, and we'll be sending out all of this and we'll have this whole webinar posted in a few days. Again, I just wanted to myth bust a little bit with Unison because Unison Benevolent Fund is an amazing organization and they have a 24/7 mental health hotline that's available for members of the Canadian music industry and their immediate family. It's free and as well they have financial assistance. One of the things that they've been getting all these great donations, and again Spotify's been matching, but it's undersubscribed because people, I think, are worried that it will affect their being eligible for CERB, which it won't. So if you need it that's the place and resource to go and get it. Thank you so much you guys. This has been amazing. Thanks for everybody who sent in questions and for your participation. We really appreciate it.

Susan: Thanks, everyone.

Catherine: Thank you.

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