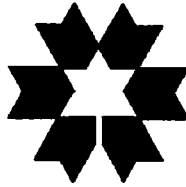


THE RIGHT OF PUBLIC PRESENTATION

A GUIDE TO THE
EXHIBITION RIGHT

Canadian Conference
of the Arts





The Canadian Conference of the Arts is Canada's major arts advocacy organization — a national, non-profit, non-governmental umbrella organization representing the interests of all artists and arts groups across Canada.

The whole issue of Copyright is one of the CCA's main concerns. The revisions to the *Copyright Act*, specifically, Public Lending Right, Neighbouring Rights, and, of course, the Right of Public Presentation, or Exhibition Right, are areas in which the CCA has acted as both advisor and advocate. It is thus with pleasure that we present this Guide, for the benefit of visual artists and exhibitors.

We hope that all visual artists will join us in our ongoing effort to make conditions in Canada more favourable to what artists do best: practise their art.

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A GUIDE TO THE EXHIBITION RIGHT

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TABLE OF CONTENTS

Notes	<i>iv</i>
Preface	<i>v</i>
What is copyright?	1
Basic copyright principles	2
History of the exhibition right	4
What is the exhibition right?	5
To what works does the right apply?	5
To what works does the right not apply?	6
When does the right apply?	6
(a) When is a presentation a presentation?	6
(b) When is an exhibition an exhibition?	7
(c) When is an exhibition a public exhibition?	8
When does the exhibition right not apply?	10
How to deal with the exhibition right	10
(a) Where the right remains with the artist	10
the role of the art dealer and commercial gallery	11
(b) Outright purchases	11
(c) Contract at time of purchase	12
(d) Collectives	13
(e) Unlocatable copyright owner	15
The artist's perspective	16
How to deal with particular situations	18
SAMPLE FORMS:	
Form 1 Outright Sale by Licence	21
2 Outright Sale by Assignment	23
3 One-Time Use	25
4 Conditions Set in Sale Contract	27
5 Collective and Exhibitor	29
6 Copyright Board Application for Unlocatable Copyright Owner	32
7 Loan To Permanent Collection	34
8 Bill of Sale	36
Useful addresses	37

NOTES

- Since the "right to present at a public exhibition" is known in the visual arts community as the "exhibition right", the latter phrase will be used throughout the guide.
- The Canadian Copyright Act was undergoing further revision when this guide was being prepared. Should you require further information on the revision process, contact one of the organizations or offices listed at the end of this guide for professional advice.

P R E F A C E

The purpose of this guide is to assist the art community in handling the exhibition right appropriately in various circumstances. The guide therefore suggests a procedure for balancing the viewpoints of copyright owners with those of users by providing an easy-to-use, practical method of exercising and administering the exhibition right.

WHAT IS COPYRIGHT?

Copyright is a right provided by law which gives creators, such as writers, visual artists, composers, film producers and record producers, the legal right to be paid for the use of their creations and to control when, where, and how they are used.

One category of work protected under the *Copyright Act* is "artistic works", which include paintings, sculptures, drawings, photographs and engravings. A pertinent example is an artist who paints a painting. The *Copyright Act* gives this artist sole and exclusive legal "rights" to deal with that painting. For example, the artist has the right to make copies of that painting and to present that painting at a public exhibition. These legal rights may be sold or licensed to museums, galleries, publishers and others in return for royalties paid to the artist.

The *Copyright Act* mentions other categories of works in addition to artistic works: literary, dramatic, musical, choreographic and cinematographic works, as well as sound recordings. Each category of work is protected in the same manner. The creator has legal "rights" which are set out in this Act. These "rights" include the right to authorize or disallow the doing of certain acts in relation to a work, for example, the reproduction or presentation of a work at a public exhibition. These legal rights belong to the artist, and compensation is negotiated for the privilege of using a work.

The rights last for the life of the artist plus 50 years. If anyone usurps any of these legal rights by, for example, holding a public exhibition without the artist's consent, then the right is violated or, in copyright jargon, "infringed". An infringer may be sued for damages, and an injunction may be obtained to stop further infringements.

BASIC COPYRIGHT PRINCIPLES

To fully understand the new exhibition right, it is necessary to know a few basic copyright principles.

Physical versus Intellectual Property

- When someone buys a painting or other artistic work, all that is purchased is the physical object.
- The copyright, including the rights to reproduction and exhibition, does not change hands.

Transfer of Copyright

- The *Copyright Act* specifically states that copyright may be assigned or licensed only in writing.

Ownership of Copyright

- Basic rule: the "author" or creator of a work is the first owner of the copyright.
- One exception involves works created by employees as part of their jobs: the first owner of copyright then is the employer.
- Another exception: for photographs generally, the first owner of the copyright is the owner of the original negative.
- Another exception: for commissioned photographs, engravings or portraits, the first owner is the person who commissioned the work.

Term of Copyright

- A copyright does not last forever. The basic rule is that a copyright lasts for the life of the creator plus 50 years.
- For photographs, a special rule applies: copyright lasts for 50 years from the date the negative was made.
- After life plus 50 years, all copyright to a work ceases and the work is said to be "in the public domain". The work can then be freely copied or exhibited with no legal restrictions.

Moral Rights and Economic Rights

- The *Copyright Act* provides two kinds of rights: moral and economic.
- Moral rights are: the right of an artist to claim authorship in a work, use a pseudonym or remain anonymous; the right to use a work in association with a product, service, cause or institution; and the right to prevent distortion, modification or mutilation of a work that may compromise the integrity of the work or be prejudicial to the reputation of the artist.
- Economic rights protect an artist's control over the use of a work: the artist's permission is required to do things, such as reproduce or exhibit a work, for which the artist may be compensated.
- A concern often raised regarding the exhibition right is that it is really a moral right. This concern is unjustified. The new exhibition right is an economic right designed to put money in the hands of artists. Confusion between moral and economic rights sometimes arises in connection with curatorial activities. One assertion is that an exhibition of a work by a curator in an unflattering way could be a moral-rights infringement. **THIS IS NOT TRUE.** A moral-rights infringement can occur only where there is a physical act in relation to the work: a "distortion, mutilation or other modification". An exhibition by a curator, however unflattering it may be in the artist's opinion, does not distort, mutilate or modify the work itself. Without one of these three actions, there cannot be a moral-rights infringement.

HISTORY OF THE EXHIBITION RIGHT

Visual artists have long claimed that they have not enjoyed the same right to economic benefit from their work as other creators. For example, unlike other copyrighted works, artistic works cannot be translated or performed in public. Visual artists claimed that they need a right which recognizes the unique nature of a work of art.

With the passage by Parliament of Bill C-60, *An Act to Amend the Copyright Act*, the law now recognizes this unique nature of artistic works. Under certain conditions, each time an artistic work is exhibited, its creator is entitled to a royalty. Thus, the exhibition right is now an integral part of copyright that can be exercised like any of the other economic rights set out in the *Copyright Act*.

Although relatively new to the Canadian *Copyright Act*, the issue, concept and practice of the exhibition right are not new to Canada. Before Bill C-60 was passed, most major public art galleries and museums voluntarily followed an exhibition fee schedule established by Canadian Artists' Representation (CARFAC). The schedule applied to artistic works loaned by an artist to an exhibitor, but did not apply to artistic works owned by an exhibitor or other owners. Bill C-60 now provides for the application of the exhibition right to all artistic works, regardless of who owns them. However, the new right applies only to works created after June 8, 1988, when the law came into force, and does not apply when art is exhibited in order to sell or lease it.

WHAT IS THE EXHIBITION RIGHT?

On June 8, 1988, the *Copyright Act* was amended to provide, among other things, a new exhibition right. According to the Act, the new right is:

to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after the coming into force of this paragraph, other than a map, chart or plan or cinematographic production that is protected as a photograph.

TO WHAT WORKS DOES THE RIGHT APPLY?

The new exhibition right applies to:

- all artistic works created after June 8, 1988; and,
- artistic works include paintings, sculptures, drawings, photographs and engravings.

If you are buying or selling an artistic work which was created after June 8, 1988, the right applies, and its application should be considered by both the buyer and the seller.

TO WHAT WORKS DOES THE RIGHT NOT APPLY?

The new exhibition right does not apply to:

- maps, charts and plans;
- a "cinematographic production that is protected as a photograph" (examples include sports and news programs).

WHEN DOES THE RIGHT APPLY?

(a) When is a presentation a presentation?

The new right applies to "presentations". The term "presentations" is not defined in the *Copyright Act*. Ultimately, it is for the courts to decide what is and what is not a "presentation". In doing so, the courts will look to the everyday meaning of the word. In fact, a rule used by the courts is that a law must be interpreted by adhering to the ordinary meaning of words.

- *Webster's* defines "presentation" as the act of setting forth for the notice or attention of the mind, as synonymous with display, exhibition and show.

- *Roget's Thesaurus* provides the following synonyms: display, demonstration, show, showing, presentment, exhibition, exhibit, exposition.

It is a further rule of legal interpretation that every word in a law has a meaning. Thus, it is significant that the word "presentation" is used instead of another word, such as "display". The use of the word "presentation" implies the overt act of taking a work of art from one state (a simple display of works leaning against a wall, for example) to another state by installing it or presenting it for special view or observation. A "presentation" in all likelihood is more than a mere exposure to public view. "To present" is an active verb as opposed to a passive one of observing or displaying.

(b) When is an exhibition an exhibition?

The new right applies only to presentations which take place at a "public exhibition". "Public exhibition" is another term not defined in the Act. Once again, it is for the courts to decide ultimately what is or what is not a "public exhibition". The courts will look at the everyday meaning of the words.

- *Webster's* defines "exhibition" as a public show or showing; a display especially of works of art or objects of manufacture—often used with "on". The example provided is: "the coin collection will be 'on exhibition' next week".

It is probably not enough that the artistic work be available for viewing. The courts will likely require a further step: a deliberate placing of an artistic work so as to draw attention to it. This is illustrated in the following comparison of two situations. A folder behind a door containing a form which could not be seen or read without opening the door and the folder is not an "exhibition" of the form. On the other hand, two documents lying loosely on the counter of a betting shop are "exhibited" because they were put there with the hope that everyone coming to the counter would be able to read them.

Whether a particular situation is an "exhibition" or not depends on the facts at hand. In the end, it is up to a court to decide what situations constitute an exhibition. In any given situation, one should consider the following factors when asked to determine if something is an "exhibition":

- what is the physical location of the work (behind a door or on an order desk)?

- did the exhibitor intend to attract attention to the work? Are there incentives in the form of segregated space, posters and information drawing people to the exhibition, or is the work a decoration?
- did the exhibition achieve its purpose by in fact getting the exhibited item noticed? In other words, did people stop to look or did they just walk by?

(c) When is an exhibition a public exhibition?

Not all "exhibitions" qualify for the new right. Only those exhibitions which are "public" qualify. The word "public" has been interpreted in court cases. However, the meaning of the word "public" in relation to an exhibition has never been judicially considered. Again, "public" is not defined in the Act.

- *Webster's* defines "public" in terms of **place** as "a place accessible or visible to all members of the community";
- *Webster's* defines "public" in terms of **people** as "a group of people distinguished by common interests or characteristics".

In any given situation one should consider the following factors when asked to decide whether something is "public":

- who is present? ("public" does not have to include all members of the public, but can include members of a smaller public connected by a common event, interest or characteristic);
- what is the size of the audience?
- who is the target audience?
- was there payment to view the exhibit (free admission is not conclusive that it is public)?
- would the audience pay to see the exhibition if it were held at another event or location?
- is the artist being paid?
- is there potential economic loss to the artist?

- what is the relationship of the audience to the exhibitor? (a domestic or quasi-domestic setting is not public);
- what kind of space is being used for the exhibition (exhibiting space need not be used only for public exhibitions)?

Summary

To establish when the exhibition right applies, one must consider three factors:

- presentation;
- exhibition;
- public.

In applying an evaluation of these three factors to specific situations, it is clear that an "exhibition" would not include a painting hung on a living-room wall. On the other hand, a show at the National Gallery would clearly be an exhibition within the parameters of the law.

Unfortunately, not all situations are as clear-cut as the examples given above. There are some situations or "grey areas" where it is not always possible to determine easily whether an exhibition is occurring. For instance, a painting hung at a bank may or may not be a public exhibition. Other grey areas involve corporate collections, professional offices, public buildings such as the Parliament Buildings or the corridors of the National Library, hotel rooms and restaurants. Whether a public exhibition exists in these locations would depend on the set of circumstances in each particular case.

WHEN DOES THE EXHIBITION RIGHT NOT APPLY?

The law expressly states that the new right does **not** apply:

- to works created before or on June 8, 1988;
- where an artistic work is presented for the purpose of "sale or hire".

As is evident, those engaged in the sale, rental or leasing of works of art are excluded from the exhibition right. For example, the sale or rental of works by commercial galleries, art dealers or museum boutiques clearly does not entail the exhibition right.

HOW TO DEAL WITH THE EXHIBITION RIGHT

There are five ways to deal with the exhibition right: (a) where the right remains with the artist; (b) outright purchase or sale; (c) separate contract for each presentation; (d) through a collective; and (e) licence from copyright board for unlocatable owners.

(a) WHERE THE RIGHT REMAINS WITH THE ARTIST

Each purchase of an artistic work must be examined within its own context. In some cases, an outright purchase of the exhibition right, along with the purchase of a painting or sculpture, may be the best option. In other cases, it may be

appropriate not to deal with the exhibition right at all. One example might be where an art dealer sells someone a work to hang in his or her living-room. The purchaser is not a collector nor does he or she ever expect to be. In such a situation, it may be unnecessary (and even unwise) for the purchaser to acquire the public exhibition right, for it is not needed for the anticipated use. It would be advisable, however, to know the name of the copyright owner at the time of purchase, and to inquire whether the copyright owner is represented by a collective.

Where the purpose of a collection is personal enjoyment, there is always potential for works to re-enter the market through resale or donation. It is therefore advisable, wherever possible, to deal with the exhibition right at the time a work changes hands.

The role of the art dealer and commercial gallery

One question of particular importance to art dealers and commercial art galleries is whether they have any legal responsibility to inform their customers about the existence of the new right. The answer is that their obligation is exactly the same as that relating to other rights in the *Copyright Act*. The reproduction right is a good example. It may be the role of the dealer or gallery to advise the purchaser of the interpretation or application of the *Copyright Act*. The dealer's or gallery's primary role is to deal with the physical property aspect of the artistic work and to represent the artist. In fact, the *Copyright Act* explicitly states that the right does not apply where a work is for "sale or hire". However, as a cautionary measure, the dealer or gallery owner might add a statement on the bill of sale that all rights under the *Copyright Act* belong to the artist or copyright owner. And he may also include on the bill that copyright owner's name and, if known, the fact that the copyright owner is represented by a collective.

(b) OUTRIGHT PURCHASES

Although the *Copyright Act* provides for the assignment of copyright, it is the underlying policy of the Act and the general practice that creators not make outright assignments of their copyright. For instance, it would be a rare case that an author of a book "assign" his or her copyright in that book to a publisher. Instead, the author grants a "licence" to the publisher to publish the book in specific locations (e.g. Canada) for a specific amount of time (e.g. ten years). The difference between an **assignment** and a **licence** is that in an assignment, the

creator relinquishes all rights in the work, whereas in a licence, the creator negotiates the terms and conditions of the use of the right in the work.

In some circumstances, the creator of an artistic work may feel justified to "grant" the entire exhibition right in a particular work to its purchaser. What this means is that the creator will no longer be entitled to a royalty each time the work is presented in public.

If the creator of an artistic work and its purchaser agree that the exhibition right be given entirely to the purchaser, then the transfer should be set out in a contract along with all the other negotiated terms and conditions of the sale. This can be accomplished in two ways:

- through a **licence** which grants the exhibition right for the full term of copyright and which applies around the world (see FORM 1); or
- by an **assignment** (see FORM 2)

For all economic rights created by the *Copyright Act*, the value of an outright purchase is determined through negotiations. This value may depend on several factors:

- the worth of the work to the purchaser;
- the bargaining strength of the parties;
- the ability of the purchaser to pay.

(c) CONTRACT AT TIME OF PURCHASE

Another option for exercising the exhibition right is a fee schedule for exhibition which can be included in the contract of purchase and sale. The contract could set out actual fee figures or incorporate a schedule of fees revised periodically by the associations representing artists and museums, galleries and so on, similar to the CARFAC Recommended Minimum Exhibition Fee Schedule. A model contract is provided in FORM 4.

There are two distinct advantages to this approach. First, the artist agrees to authorize the exhibition of the work as per the terms and conditions suggested in FORM 4. Thus the exhibitor need not obtain permission each time the work is to be exhibited. Second, payment would be required only when the public

exhibition occurs. Thus the possibility of buying something that might never be used is eliminated.

(d) COLLECTIVES

Introduction

The collective exercise of copyright is a method of administration which has been used effectively in the Canadian music industry for over 50 years. It has benefited both creators and users of copyright materials. The collective approach has more recently proven itself internationally to be very effective in the administration of other rights, such as the right to reproduce (as in photocopying). If the collective system were used to administer the exhibition right, similar benefits for both users and owners would arise in terms of efficiency, cost and reduced paperwork.

What Is A Collective?

To administer the exhibition right collectively, a group of artists would have to join together to create an association which they would empower to exercise the right on their behalf. The collective, in addition to administering the copyright of artists, may also administer the rights of artists' estates after their death (an artist's heirs retain copyright for 50 years after the artist's death), as well as those rights of collectors, museums, dealers and galleries that may also own part or all of an artist's copyright.

A collective would administer the exhibition right by negotiating licences with users. The licence would set out "royalty rates" and "terms and conditions" under which the licence operates. The royalty rates would be a schedule of fees for various types of exhibition, a system somewhat analogous to the CARFAC schedule. For example, rates would be negotiated for different kinds of exhibitions based on the number of artists involved (solo as opposed to a two-artist or group show), the duration of the show, whether it is touring or not, and whether it is regional, inter-regional, national or international.

Other factors important to both user and artist could also be discussed, negotiated and included as part of the collective licence — items like responsibility for obtaining and paying for insurance, responsibility for transportation, the venue of the exhibition, whether the exhibition is on the

exhibitor's own premises or whether some or all of the works exhibited have been borrowed by the exhibitor. If all of these things were negotiated on the same basis, the same standards and procedures would be used and would eventually become common practice.

How does a collective operate?

There are two types of licences which a collective can negotiate with users:

- blanket licences;
- specific-use licences.

A **blanket licence** is a licence which covers a repertoire of works and allows the licensee to do specified things with any work in the repertoire. A licensee would be able to use one work, some of the works, or all of the works in that repertoire because it has paid for the entire repertoire. If the amount of payment for the use of this repertoire cannot be agreed upon, the Copyright Board can be asked to set the payment.

A **specific-use licence** would require clearance and payment each time a work is exhibited.

Advantages of a collective

A collective licence has the advantage of being for a longer period of time, one year, for example. This provides certainty as to costs to users and income to artists. It allows for strategic planning for both. It also avoids having to negotiate a licence each time an exhibition is held, something which can be time-consuming and divisive, and can result in widely disparate fees. An accepted standard of terms and conditions and royalty rates is in everyone's interests. Use of the collective system would result in development and continual refinement of such accepted standards.

The licence fee for any one user under a collective system would be negotiated on the basis of the number and type of exhibitions held by the licensee, the number of works involved, and the number of artists. A general licence from the collective would cover all routine activities of the licensee. Special or individual licences would cover special events, with royalty rates and terms and conditions specially prepared for one-time exhibitions.

Disadvantages of a collective

From a practical perspective, collective administration also has some disadvantages. The first has to do with the time required to build up the works the collective is empowered to administer. The more works the collective has in its repertoire, the better service it can provide. A new collective starts from zero. It takes time to build, and, in the meantime, the collective cannot meet all the needs of its customers. This disadvantage could be reduced by the collective's taking an active role in facilitating the administration of the rights of copyright owners who are not members of the collective, for example, where a licence is sought to present the works of eight artists. If the collective administers the rights of only six of these artists, the collective could contact the rights owners for the other two artists and negotiate an agreement as a service to its customer. Such a policy would give the collective the opportunity to get new members for its collective. It would also reduce the user's administrative burden.

A second disadvantage with collectives is that the advantages of collective administration decrease as the number of collectives increases. The more collectives there are, the more time a user must spend to get a licence. Let us continue the previous example. An exhibitor wants to show the eight artists. Three are administered by Collective A, two by Collective B, two by Collective C, and one is not a member of any collective. The exhibitor must get four licences, one from each collective and one from the artist. This is a quadruplication of effort for the exhibitor. Ideally, one collective should administer all rights in any one area. More than one collective can only reduce the value and efficiency of the system.

Sample clauses for a standard general licence between a collective and user are set out in FORM 5.

(e) UNLOCATABLE COPYRIGHT OWNER

Bill C-60 created a new way to allow the use of works where the copyright owner cannot be found. The *Copyright Act* states:

where, an application to the Board by a person who wishes to obtain a licence to use a published work in which copyright subsists, the Board is satisfied that the applicant has made reasonable efforts to locate the owner of the copyright and that the owner cannot be located, the Board may issue to the applicant a licence ...

At the time this guide was prepared, this unlocatable copyright owner provision had never been used. There are no policies or guidelines on the degree of effort required to locate the copyright owner. However, because the provision gives permission, on behalf of copyright owners, to use copyright works, it is expected that the degree of effort will be high. Thus, to benefit from this provision, it is necessary to try diligently to find the copyright owner. For example, many phone calls should be made and recorded, and letters written with copies kept as evidence, before approaching the Board.

A suggested form for the application to the Board for an unlocatable copyright owner is set out in FORM 6.

THE ARTIST'S PERSPECTIVE

As a creator of copyright material, an artist has a variety of ways to deal with the exhibition right. The two main ways are self-administration and collective administration. Any administration of copyright is a complex matter because there is a wide variety of uses of any one copyright work, which can take place at the same time in different locations. For each use a royalty must be negotiated, together with a legal contract setting out the terms and conditions under which the work can be used. Under the collective approach and for the term of the agreement, the collective would administer the copyright. Using the self-administration approach, an artist would be required to do this each and every time a work is exhibited. On the other hand, the collective is designed to negotiate contracts on behalf of its members. A collective can conduct these negotiations more efficiently than an individual artist because it is acting for a large number of artists at the same time.

There is a variety of services a collective may offer. An artist should consider these services before deciding whether to choose any one collective. The following factors can be important in choosing a collective:

- what kind of works does it represent?; does it have a specialty?
- how many copyright holders does the collective represent?
- does it have reciprocal agreements with other collectives in Canada or in other countries?
- what is the financial position of the collective?
- how much money is spent on administration as opposed to royalties?
- what range of services does the collective provide to its members? (all copyright administration, lobbying, educational seminars and information exchanges, etc.);
- what royalty rates does the collective negotiate with users?
- what sort of royalty distribution is used by the collective?
- how often are royalties paid?
- what influence do members have on the operation, management, and policy of the collective?
- how is the collective structured, and who are the decision-makers within that structure?
- how accessible is the collective to its members?
- during the term of the agreement, how much control does the artist have over the management of the copyright?

HOW TO DEAL WITH PARTICULAR SITUATIONS

This section presents sample situations, and suggests options for exhibitors and copyright holders in dealing with them. The situations cover loans, sales and donations.

SITUATION	OPTIONS
A. EXHIBITION of a work in a collection where the exhibition right has not been cleared.	Call collective for a licence. FORM 5. or Negotiate an agreement for one-time use. FORM 3. or Negotiate an outright purchase. FORM 1 or 2.
B. LOAN by an artist to a public exhibitor where the artist has retained the exhibition right for temporary exhibitions.	Negotiate an agreement for one-time use. FORM 3. or Call collective for a licence. FORM 5.
C. LOAN by a private or corporate collector to a public exhibitor for a special exhibition.	Negotiate an agreement for one-time use. FORM 3. or Call collective for a licence. FORM 5.
D. LOAN by private or corporate collector to a public institution for its permanent collection.	Negotiate an outright sale by assignment or licence. FORM 1 or 2. or Negotiate an acquisition for permanent collection. FORM 7. or Call collective for a licence. FORM 5.
E. LOAN by one public exhibitor to another public exhibitor for temporary exhibition.	Negotiate an agreement for one-time use. FORM 3. or Call collective for a licence. FORM 5.

<p>F. SALE by an artist to anyone.</p>	<p>Artist retains exhibition right and negotiates individually for each exhibition. FORM 3.</p> <p>or Negotiate an outright sale or licence. FORM 1 or 2.</p> <p>or Negotiate conditions in sale contract. FORM 4.</p> <p>or Call collective for a licence. FORM 5.</p>
<p>G. SALE by private collector to a public exhibitor.</p>	<p>The right may be unnecessary.</p> <p>or Negotiate an outright sale by assignment or licence. FORM 1 or 2.</p> <p>or Negotiate conditions in sale contract. FORM 4.</p> <p>or Call collective for a licence. FORM 5.</p>
<p>H. SALE by an art dealer or commercial gallery to a public exhibitor.</p>	<p>Negotiate an outright sale by assignment or licence. FORM 1 or 2.</p> <p>or Negotiate conditions in sale contract. FORM 4.</p> <p>or Call collective for a licence. FORM 5.</p> <p>or Add clause to bill of sale. FORM 8.</p>
<p>I. SALE by an art dealer or commercial gallery to a private collector.</p>	<p>The right may be unnecessary.</p> <p>or Negotiate an outright sale by assignment or licence. FORM 1 or 2.</p> <p>or Negotiate conditions in sale contract. FORM 4.</p> <p>or Call collective for a licence. FORM 5.</p> <p>or Add clause to bill of sale. FORM 8.</p>
<p>J. DONATION by a private collector to a public exhibitor.</p>	<p>Negotiate an outright sale by assignment or licence. FORM 1 or 2.</p> <p>or Negotiate conditions in sale contract. FORM 4.</p> <p>or Call collective for a licence. FORM 5.</p>
<p>K. DONATION by artist to public exhibitor.</p>	<p>Negotiate an outright sale by assignment or licence. FORM 1 or 2.</p> <p>or Negotiate conditions in sale contract. FORM 4.</p> <p>or Call collective for a licence. FORM 5.</p>

FORMS

At the time this guide was prepared, no community-wide standard forms had been devised. The following forms are samples of ways to deal with the exhibition right as outlined in this guide. The forms do not constitute legal advice. In the case of a problem arising with respect to the exercise or administration of the exhibition right, proper advice should be sought.

FORM 1

Outright Sale by LICENCE

AGREEMENT dated the ____ day of _____, 19 ____, between
(name and address) _____

_____ ("copyright holder")

and (name and address) _____

_____ ("licensee")

regarding the following artistic work(s): _____

(include title, date of creation and brief description of each work)

In consideration of the covenants and conditions contained in this agreement,
the copyright holder and licensee agree as follows:

1. The copyright holder transfers to the licensee the ownership of the above-mentioned work(s), but the copyright holder retains all appertaining copyrights subject to the terms and conditions set out below.
2. The copyright holder grants to the licensee the right to present at a public exhibition as set out in the *Copyright Act*, the above-mentioned work(s), subject to the terms and conditions of this agreement. This grant shall be in effect for the full term of copyright, until 50 years after the creator's death, for world-wide usage. (If the creator is known, state his or her name; if he or she is deceased, state the date of death.)
3. The copyright holder retains all other rights. (**alternative:** The copyright holder retains all rights other than those specified in this agreement, except the right of reproduction, but only in relation to the reproduction of the work(s) for the purpose of including such reproduction(s) in a catalogue to accompany any public exhibition(s) of the work(s) specified herein.)
4. The licensee is responsible for the transportation, insurance and installation of any work(s), at its own expense.

FORM 1 - Outright Sale by LICENCE cont'd

- 5. During any public exhibition, the name of the artist, title of the work(s) and date of the work(s) shall be clearly identified with the work(s).
- 6. In exchange for the granting of the right to present at a public exhibition, the licensee agrees to pay to the copyright holder the following amounts of money, on or before the date this agreement becomes effective:

\$ _____ for the work(s)

\$ _____ for the right to present at a public exhibition

(if applicable, add:) \$ _____ for the reproduction right

- 7. This agreement does not constitute a waiver of moral rights.
- 8. This agreement is subject to the laws of (name province).
- 9. This agreement shall become null and void if either party becomes insolvent or signs a petition into bankruptcy.

IN WITNESS WHEREOF, the parties have signed this agreement in (city, province) this _____ day of _____, 19 _____ .

Witness _____ Copyright Holder _____

Witness _____ Licensee _____

FORM 2

Outright Sale by ASSIGNMENT

AGREEMENT dated the ____ day of _____, 19____, between
(name and address) _____

_____ ("copyright holder")

and (name and address) _____

_____ ("assignee")

regarding the following artistic work(s): _____

(include title, date of creation and brief description of each work)

In consideration of the covenants and conditions contained in this agreement,
the copyright holder and assignee agree as follows:

1. The copyright holder transfers to the assignee the ownership of the above-mentioned work(s), but the copyright holder retains all appertaining copyrights subject to the terms and conditions set out below.
2. The copyright holder assigns to the assignee the right to present at a public exhibition, as set out in the *Copyright Act*, the above-specified work(s), subject to the terms and conditions of this agreement. This assignment shall be in effect for the full term of copyright, until 50 years after the creator's death, for world-wide usage. (If the creator is known, state his or her name; if he or she is deceased, state the date of death.)
3. The copyright holder retains all other rights. (alternative: The copyright holder retains all rights other than those specified in this agreement, except the right of reproduction but only in relation to the reproduction of the work(s) for the purpose of including such reproduction(s) in a catalogue to accompany the public exhibition.)
4. The assignee is responsible for the transportation, insurance and installation of any work(s), at its own expense.

FORM 2 - Outright Sale by ASSIGNMENT cont'd

5. During any public exhibition, the name of the artist, title of the work(s) and date of the work(s) shall be clearly identified with the work(s).

6. In exchange for the assignment of the right to present at a public exhibition, the assignee agrees to pay to the copyright holder the following amounts of money, on or before the date this agreement becomes effective:

\$ _____ for the work(s)

\$ _____ for the right to present at
a public exhibition

(if applicable, add:) \$ _____ for the reproduction right

7. This agreement does not constitute a waiver of moral rights.

8. This agreement is subject to the laws of (name province).

9. This agreement shall become null and void if either party becomes insolvent or signs a petition into bankruptcy.

IN WITNESS WHEREOF, the parties have signed this agreement in (city, province) this _____ day of _____, 19 _____ .

Witness _____ Copyright Holder _____

Witness _____ Assignee _____

FORM 3

One-Time Use

AGREEMENT dated the ____ day of _____, 19 _____, between
(name and address) _____

_____ ("copyright holder")

and (name and address) _____

_____ ("exhibitor")

regarding the following artistic work(s): _____

(include title, date of creation and brief description of each work)

In consideration of the covenants and conditions contained in this agreement,
the copyright holder and exhibitor agree as follows:

1. The copyright holder grants to the exhibitor the right to present at a public exhibition the above-specified work(s), subject to the terms and conditions of this agreement. The exhibition shall take place on or after (month, day, year) and shall end on or before (month, day, year) at (name of location, if any, and address). Any additional duration of exhibition or additional location other than those specified herein shall be determined by a separate agreement. The exhibitor cannot assign this permission. The exhibitor is responsible, at its own expense, for the transportation, insurance and installation subject to the copyright holder's approval.
2. During the public exhibition, the name of the artist, title of the work(s) and date of the work(s) shall be clearly identified with the work(s).
3. In exchange for the permission, the exhibitor agrees to pay to the copyright holder \$ _____ on or before the first date of the public exhibition.
4. The copyright holder retains all other rights. (**alternative:** The copyright holder retains all rights other than those specified in this agreement, except the right of reproduction but only in relation to the reproduction of the work(s) for

FORM 3 - One-Time Use cont'd

the purpose of including such reproduction(s) in a catalogue to accompany the public exhibition.)

5. This agreement does not constitute a waiver of moral rights.
6. This agreement is subject to the laws of (name province).
7. This agreement shall become null and void if either party becomes insolvent or signs a petition into bankruptcy.

IN WITNESS WHEREOF, the parties have signed this agreement in (city, province) this _____ day of _____, 19 ____ .

Witness _____ Copyright Holder _____

Witness _____ Exhibitor _____

FORM 4

Conditions Set in Sale Contract

(NOTE: This contract should not be used when only the work, without the copyright, is being sold.)

AGREEMENT dated the ____ day of _____, 19 ____, between
(name and address) _____

_____ ("copyright holder")

and (name and address) _____

_____ ("purchaser")

regarding the following artistic work(s): _____

(include title, date of creation and brief description of each work)

In consideration of the covenants and conditions contained in this agreement, the copyright holder and purchaser agree as follows:

1. The copyright holder transfers to the purchaser the ownership of the above-mentioned work(s), but the copyright holder retains all appertaining copyrights subject to the terms and conditions set out below.
2. The copyright holder grants to the purchaser the right to present the above-specified work(s) at a public exhibition, subject to the terms and conditions of this agreement and the annex attached hereto. The permission shall be effective for the full term of copyright, until 50 years after the creator's death. Any exhibitions not provided for in the annex* shall be the subject of a new and separate agreement. (If the creator is known, state his or her name; if he or she is deceased, state the date of death.)
3. The purchaser is responsible, at its own expense, for the transportation, insurance and installation subject to the copyright holder's approval.
4. During the public exhibition, the name of the artist, title of the work(s) and date of the work(s) shall be clearly identified with the work(s).

FORM 4 - Conditions Set in Sale Contract cont'd

5. In exchange for the permission, the purchaser agrees to pay to the copyright holder the amount of \$ _____ on the signing of this agreement. In addition, the purchaser agrees to pay to the copyright holder the amounts specified in the annex* attached hereto, on or before the opening of any such exhibition.
6. The copyright holder retains all other rights. (alternative: The copyright holder retains all rights other than those specified in this agreement, except the right of reproduction, but only in relation to the reproduction of the work(s) for the purpose of including such reproduction(s) in a catalogue to accompany any public exhibition herein authorized.)
7. This agreement does not constitute a waiver of moral rights.
8. This agreement cannot be assigned without the permission of the copyright holder.
9. This agreement is subject to the laws of (name province).
10. This agreement shall become null and void if either party becomes insolvent or signs a petition into bankruptcy.

* The annex should set out an agreed royalty rate for each exhibition. This rate could be a flat rate, a progressive rate, or based on any rate-setting formula agreed upon. In addition, the rate could be related to the characteristics of the exhibition - for example, its venue, its duration, or its size.

IN WITNESS WHEREOF, the parties have signed this agreement in (city, province) this _____ day of _____, 19 _____ .

Witness _____ Copyright Holder _____

Witness _____ Purchaser _____

FORM 5

Collective and Exhibitor

It is beyond the scope of this guide to set out an agreement which a collective would use to give an exhibitor permission to exercise the right of exhibition. Such a collective must consult its members and legal counsel and draft an agreement upon which they can negotiate a royalty fee for the exhibition of artistic works. In some cases, this has already been done. If more than one collective exists for the exercise of the exhibition right, it is likely that each collective will have its own agreement. What is important from the artist's and the exhibitor's point of view is that certain issues are dealt with in the collective agreement. Below is a checklist to ensure that essential points are covered.

1. Parties to the Agreement

- name and addresses of the collective and exhibitor

2. Definitions

- definitions of key terms and concepts such as "artistic works", "presentation", "public exhibition", "to present at a public exhibition"

3. Subject of Agreement

- for a "public presentation" or exhibition

4. Types of Exhibitions

- the agreement could cover all exhibitions by the exhibitor or, alternatively, specify certain types of exhibitions to be covered by the agreement, e.g. national or international, touring or non-touring, etc.

5. Types of Licence

- the agreement should specify whether it is a blanket licence or an individual licence for each exhibition

6. Other Rights

- except for the exhibition right, all other rights remain with the copyright holder
- **note:** collective may deal with other rights such as the right of reproduction for inclusion of the work in a catalogue

7. Moral Rights

- the agreement does not constitute a waiver of moral rights

FORM 5 - Collective and Exhibitor cont'd

8. Authorization

- the collective must warrant that it has authority to represent its members
- a list of members should be annexed to the agreement

9. Obligations of Collective

- provide periodical update of repertoire
- attempt to locate non-members for permission
- protect exhibitor from any legal liability arising from the use of a work under this agreement

10. Obligations of Exhibitor

- will attribute authorship of each work
- will pay fees set out in the agreement
- will transport, insure and install (subject to the copyright holder's approval) the work, at its own expense
- will consult collective before restoring or repairing any work subject to the agreement

11. Other Works

- exhibitor may negotiate licences with individuals or other collectives for the use of works outside the particular collective's repertoire

12. Royalty Rate

- this clause should specify the amount of the royalty and when and how it is to be paid

13. Records

- the exhibitor should keep records of all public exhibitions, and such records should be open to inspection by the collective

14. No Assignment

- the agreement can be assigned only with the consent of both parties

15. Disputes

- if the agreement cannot be interpreted clearly, provision should be made for an arbitrator to interpret it

16. Termination

- the agreement may be terminated if either party breaches any term in it

17. Insolvency or Bankruptcy

- the agreement may be terminated if either party cannot pay its liabilities when due or becomes insolvent or bankrupt

FORM 5 - Collective and Exhibitor cont'd

18. Governing Law

- the province of governing law should be provided

19. Successors

- the agreement should be binding on successors, legal representatives and permitted assignees

20. Term

- the term of agreement should be stated
- a clause indicating the time to commence negotiations for a new agreement might be added

21. Signature of Parties

- dated and witnessed

FORM 6

Copyright Board Application for Unlocatable Copyright Owner

To: Copyright Board
Vanguard Building, Suite 501
171 Slater Street
Ottawa, Ontario
K1A 0C9

1. I, (name of applicant), the applicant, hereby apply to the Copyright Board to obtain a licence to use (if use is specific, i.e., to reproduce, to present at a public exhibition, etc., then specify the intended use(s)) the following work(s):

Name of Work	Author	Copyright Owner	Date of Publication
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(If the above information is unknown, briefly describe the work(s))

2. I have made reasonable efforts to locate the owner of the copyright of the above-mentioned work(s) and find that the owner cannot be located. In particular, I have (briefly describe steps taken to locate the copyright owner; if necessary, annex the details to this application).

3. I request the Copyright Board to issue me a licence to use (or reproduce, exhibit, etc.) the work(s) mentioned above for a period of _____ (days, months or years) commencing on the _____ day of _____, 19 _____.

4. I agree to abide by the terms and conditions set out in the licence issued by the Copyright Board. I understand that this licence is non-exclusive and that others may be given a licence similar to the one I may receive under this application.

5. I understand that the licence issued under this application is in no manner whatsoever a waiver of the moral rights the author has in the above-mentioned works, and I agree to respect such moral rights.

FORM 6 - Copyright Board Application for Unlocatable Copyright Owner cont'd

6. I understand that I am liable to pay any royalties (as set out in any licence issued by the Copyright Board) to the copyright owner for a period of five years following the expiration of this licence, and that, in default of such payment, I may be liable in an action by the copyright owner to recover such royalties in a court of competent jurisdiction.

(name)
(address)

_____ (signature)

_____ (date)

FORM 7

Loan To Permanent Collection

AGREEMENT dated the ____ day of _____, 19 ____, between
(name and address) _____

_____ ("loaner")

and (name and address) _____

_____ ("exhibitor")

regarding the following artistic work(s): _____

_____ (include title, date of creation and brief description of each work)

In consideration of the covenants and conditions contained in this agreement, the loaner and exhibitor agree as follows:

1. The loaner loans to the exhibitor the above-mentioned work(s) for a period of (specify length of loan) for the purposes of the exhibitor including such work(s) in its permanent collection.
2. The loaner warrants that it owns all copyright in the above-specified work(s). The loaner retains all copyright in the work(s) subject to the terms and conditions set out below.
3. The loaner grants the exhibitor the right to present at a public exhibition, as set out in the *Copyright Act*, the above-specified work(s), subject to the terms and conditions of this agreement. This assignment shall be in effect for the full term of the loan as specified in clause (1) above. This grant is effective world-wide for any type of exhibition. **(The loaner may also want to grant the exhibitor the right of reproduction along with the right of exhibition.)**
4. The exhibitor is responsible for the transportation, insurance and installation of any work(s), at its own expense.

FORM 8

Bill of Sale

As each art dealer and commercial gallery has its own preference and style for its bills of sale, a sample bill of sale will not be provided here. However, those clauses relating to copyright are set out below and are suggested as examples of ones which may be incorporated into such bills.

1. All copyright in the specified work(s) belongs to the artist of the work or, alternatively, to _____ (name the copyright owner).
2. If any rights, as set out in the *Copyright Act*, including the right to reproduce and the right to present at a public exhibition, are to be used, prior written permission is required from the artist (or other copyright owner).
3. **Add this clause if necessary:** The rights in this work may be cleared through the following copyright collective: (name and address of such collective).

USEFUL ADDRESSES

Canadian Conference of the Arts
189 Laurier Avenue East
Ottawa, Ontario
K1N 6P1
(613) 238-3561
FAX: (613) 238-4849

Canadian Artists' Representation (CARFAC)
189 Laurier Avenue East
Ottawa, Ontario
K1N 6P1
(613) 235-6277
FAX: (613) 235-7425
or contact CARFAC provincial
office/representatives

Canadian Artists' Representation
Copyright Collective Inc.
183 Bathurst Street
Toronto, Ontario
M5T 2R7
(416) 366-1902
FAX: (416) 360-0781

La Société des droits d'auteurs en arts
visuels inc. (SODAV)
1231 Panet St., 2nd Floor
Montréal, Quebec
H2L 2Y6
(514) 525-5201

VIS-ART Copyright Collective
379 Adelaide Street West, Unit M1
Toronto, Ontario
M5V 1S5
(416) 366-3337
FAX: (416) 366-6635

VIS'ART Québec Droit d'auteur
(Québec Office)
3575 Boul. St-Laurent
Ste 811-12
Montréal, Québec
(514) 271-0683

Association of National Non-Profit
Artist Centres (ANNPAC)
183 Bathurst Street, Main floor
Toronto, Ontario
M5T 2R7
(416) 869-1275
FAX: (416) 360-0781

Copyright Office (registration)
50 Victoria Street
Place du Portage, Tower I
Hull, Quebec
K1A 0C9
(613) 997-1657

Department of Communications
(Copyright Directorate)
300 Slater Street
Ottawa, Ontario
K1A 0C8
(613) 990-4220

Copyright Board
Michel Léger, Secretary
Vanguard Building, Suite 501
171 Slater Street
K1A 0C9
(613) 952-8621
FAX: (613) 952-8630

Professional Art Dealers Association
of Canada Inc. (PADAC)
296 Richmond Street West, Suite 305
Toronto, Ontario
M5V 1X2
(416) 979-1276
FAX: (416) 979-8766

Canadian Museums Association (CMA)
280 Metcalfe Street, Suite 400
Ottawa, Ontario
K2P 1R7
(613) 233-5653
FAX: (613) 233-5438

Canadian Art Museums Directors'
Organization (CAMDO)
c/o Art Gallery of Greater Victoria
1040 Moss Street
Victoria, British Columbia
V8V 4P1
(604) 384-4101
FAX: (604) 361-3995

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