Department of Canadian Heritage

"Canadian Content in a Digital World"

Cultural Policy Review

Stakeholder Submission:

Independent Music in the Canadian Cultural Economy

Canadian Independent Music Association (CIMA)

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CIMA

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1. Introduction

a) A 'Digital World' Must Encourage the Creation of New Canadian Content

Thank you for undertaking this welcome review of Canada's cultural policy toolkit. The Canadian Content in a Digital World consultation represents a promising chance to modernize Canada's communications laws and bring them into line with the technological and economic realities of how citizens share cultural content today. It has the potential to be a far-reaching (and long overdue) review of Canada's programs, legislation and regulations that support and govern our music industry and its creator cousins such as film, books and television.

The year ahead will prove to be a pivotal one for Canada's music industry, and indeed for all of our creative industries. What is at stake in the Canadian Heritage policy review is ensuring that modernized Canadian laws and media regulations are amended in order to help Canada's music industry promote and commercialize contemporary and original Canadian storytelling.

i. CIMA Background

By way of background, CIMA is the not-for-profit national trade association representing the English-language, Canadian-owned segment of the domestic music industry. We represent the interests of more than 260 Canadian-owned companies and professionals in every province and the Yukon Territory, including record producers, labels, recording studios, managers, agents, licensors, music video producers and directors, creative content owners, artist-entrepreneurs and other professionals from across the sound recording industry.

Our membership employs over 2,400 people and represents more than 6,200 Canadian artists. Outstanding artists supported by CIMA members include A Tribe Called Red, Carly Rae Jepsen, Tanya Tagaq, The Sheepdogs, Terra Lightfoot, Serena Ryder, Tegan and Sara, METRIC and countless more.

CIMA's purpose is to develop professional programs and services, to advocate for policies that will foster a more viable independent music industry and to raise the profile of Canadian music, domestically and abroad.

ii. Key Recommendations

In Canada, the continued success of our cultural industries depends on creators – the artists, songwriters, composers and Canadian-owned businesses that support them.

Our fellow stakeholders in broadcasting and digital companies, as well as fans and consumers at home and abroad, will all be disadvantaged by a lack of sustained, modernized government support for all types of creators in terms of policy, programs and stronger regulations to protect the creation, promotion and export of Canadian cultural content.

Accordingly, CIMA recommends that the Government of Canada:

1. Modernize Canada's broadcasting and telecommunications legislation to recognize "online broadcasting" and promote CanCon on digital platforms;
2. Increase the Canada Music Fund to $30 million, reviewed annually;
3. Establish a new annual $10 million music export fund;
4. Invest wireless spectrum auction proceeds into cultural development funds;
5. Adapt resources like the Canadian Media Fund to also facilitate music video production;
6. Close loopholes in the *Copyright Act* that limit the income and autonomy of music creators, including a $1.25 million commercial radio subsidy;
7. Empower the Copyright Board to make timelier, fair market-driven decisions;
8. Ensure that new cultural policies will be consistent with the 2017 *Copyright Act* review and suggested copyright reforms, including a Life Plus 70 Years term;
9. Level the playing field between analog and online 'broadcasters' by regulating digital companies and ISPs to contribute to the development of Canadian content.

iii. Cultural Policy in a Digital Media Context

Canada is the 39th largest country in the world by population, yet it is the 7th largest music market.[1] This fact testifies to the incredible talent of our artists, the acumen of the business teams that support them, as well as a Canadian society that values and wants to invest in the commercial development of our creative class.

While the Digital World policy consultation is a much-needed, positive step toward investigating and implementing new approaches to the promotion of Canadian culture in a

[1] International Federation of the Phonographic Industry (IFPI), *Global Music Report,* 2016. Available at: http://www.ifpi.org/downloads/GMR2016.pdf.
[2] The Foundation to Assist Canadian Talent on Records (FACTOR), 2016.

digital world, several jurisdictions – France, Spain and Australia among them – are currently farther ahead of Canada in developing solutions to the cultural threats posed by digital media technology.

France and Spain have implemented content quotas for "online broadcasters" (e.g. Netflix and YouTube), while the EU has added "value gap" regulations to its own Copyright Directive – requiring streaming services to adopt licensing practices that treat creators more fairly. Australia and New Zealand have amended their national tax laws, meanwhile, targeting digital providers like Google and enabling millions in additional revenue to supplement their tax bases.

Even the United States – which has less need to protect its national culture than Canada – has taken more proactive approaches cases to governing certain aspects of its cultural economy, such as through copyright reform and other statutory means. America uses a more proactive notice-and-takedown system to govern online copyright infringements, for example, compared to Canada's more passive notice-and-notice approach.

The U.S. Copyright Royalty Board must also render decisions within a fixed 2-year time frame, ensuring greater certainty and timelier decisions – a system benefitting music creators as well as those companies that commercialize music for their own businesses.

In February 2015, the Federal Communications Commission in the United States enacted a series of Open Internet rules – increasing government involvement in the regulation of Internet services to promote objectives that included free speech, innovation and the enfranchisement of more numerous minority communities.

At home, CIMA believes that the Canadian Heritage policy review should meaningfully improve the capacity of Canadian communications laws to address digital media technologies – the type of improvement that each of the aforementioned countries has demonstrated a willingness to achieve.

In 2016, the Department of Canadian Heritage must be a key player in bringing Canada to the world, by empowering a wide range of artists and companies to continue to create cultural content that reflects the total diversity of views and experiences that exists in Canadian culture. Commercial music grounded in Canadian values, experiences and storytelling, meanwhile, deserves our ongoing support, just as it did in previous decades, when our cultural policy infrastructure enabled Canadian storytelling at high levels of quality, inclusiveness and success.

As media technology shifts further toward digital consumption (e.g. online streaming), failure to meaningfully update our communications laws will deprive creators of the policy support they traditionally relied on to generate exciting cultural and commercial works. Leaving existing communications laws and cultural policies in their current form, meanwhile, will enable other interest groups – including online broadcasters and ISPs – to reap large profits by commercially exploiting the products of Canada's creative class, at the expense of our artists, songwriters, composers and the business teams who support them.

The reality is that today's 'content distributors' are largely fuelled by cultural products like music – content that can be commercially exploited by streaming services and other digital platforms while giving *les*s compensation to the authors or owners of those works. This is not a sustainable practice or fair business model for our talented Canadian creators. Accordingly, CIMA urges the Department of Canadian Heritage to view its consultations through a ***creator-centric lens*** and to ensure that the commercial and artistic needs of our creator classes are properly supported.

b) Economic Challenges for the Music Industry

A music company's main product is intangible intellectual property – performances, compositions and songs. As a result, the Canadian banking system is reluctant to provide capital to domestic music companies, limiting the availability of investment that is needed to foster Canadian artists, songwriters and composers.

This is why support programs such as the **Canada Music Fund** are so integral to the music industry, as they provide capital that our companies can leverage to invest in the discovery, development and promotion of Canadian music creators.

Through domestic and international touring, recording, artist development, marketing and promotion, independent companies shoulder much of the risk that is necessary to nurture innovative Canadian music. This can be a considerable burden when approximately 46% of the English-language industry is comprised of sole proprietorships.

Sustainable funding for creators and the legal means to receive compensation for their work must be preserved in Canada, in order to support the companies and individuals who undertake key investments to drive Canada's cultural economy.

Clearly, our system has been working well in Canada. Our traditional cultural programs, institutions and policies have long functioned in a cohesive, time-tested manner – making possible decades of compelling Canadian storytelling. This support system needs to not only be maintained, but also grow and expand to give domestic creators the ability to meet the competitive demands of a global cultural marketplace, today and well into the future.

In today's digital world, some of the aforementioned policy instruments are weakening, such as the private copying levy that provided $27.6 million for creators in 2008 but will fall to approximately $2 million by 2017 (and soon be depleted all together) as a result of the declining worldwide use of CDs and other physical recording media.

Additionally, it is anticipated that CRTC-mandated CCD funds (tangible benefits) from traditional radio broadcasters will drop steeply over the next several years. The bulk of private radio funding invested in the music industry through various national programs are derived from 'tangible benefits'. That is to say, when broadcast licenses are bought and sold, 6% of the value of the transaction must be channelled back to the music industry. Consolidation within the private radio sector, however, has reached a point over past decades where such acquisitions happen increasingly less often, limiting future tangible benefit investments in the music industry.

Making improvements to the laws and regulations at the core of Canada's cultural policy infrastructure, therefore, is the main outcome that must result from Canadian Heritage's Digital World consultation. Such updated rules must recognize that lucrative and influential forms of broadcasting now take place outside of the terrestrial model in Canada. Accordingly, digital broadcasters must be included in the same governance framework that requires analog TV and radio stations to help fund and popularize content like music. Anything less will leave our domestic cultural creators – and Canadian culture as a whole – in an unprecedentedly vulnerable condition.

For the sake of Canadians who create and consume local content, federal cultural policies must be modernized and extended to include digital broadcasting. This will have the effect of leveling the playing field between terrestrial (TV and radio) broadcasters and their online, digital brethren.

Economically, Canadian cultural policies have stimulated the production, sale, licensing and consumption of intellectual products at home and in international markets – increasing the viability of Canadian artists and the companies who stand behind them. They have also delivered significant political benefits – shining a light on Canada's unique values, culture and diplomatic profile around the world.

They have delivered social benefits, as well, facilitating the exchange of ideas within and between Canadian communities, while ensuring that diverse viewpoints are reflected in our national media outlets. This diversity would not be possible unless domestic TV and radio license-holders were required by federal regulations to incorporate local content in their broadcasts.

For over 50 years, Canada has distinguished itself on the world stage by achieving marked economic, political and social progress through our cultural policymaking efforts. In 2016, the value of continuing this impressive policymaking tradition has not diminished. Rather, the fact that Canada's cultural industries – particularly in the commercial music sector – consistently punch above their weight means that federal laws, policies and regulations favourable to such creators are more important than ever.

2. Canadian Content Must Reach Global Audiences

a) Artists and Companies are Moving Beyond Traditional Revenue Sources and Need Access to Global Markets

2016 is indeed a critical time for the Canadian music industry. After suffering a dramatic and steady decline in revenues over the past 20 years, the music industry is tentatively looking ahead to more positive trends.

This means government support continues to be critically important to ensure that the music industry's fragile momentum is not lost. Canadian creators must continue to be competitive on the global market: selling music, pursuing business opportunities and expanding the fan bases for domestic artists – be it in Canada, the United States, Latin America, the UK, Europe, Australia, Japan or elsewhere.

Federal policies must furthermore keep pace with the changing media technologies that are now used to share and consume cultural products around the world. Each year, Canada generates thousands of new English-language albums. This productivity could be threatened, however, by technologies that limit the ability of music creators to monetize their artwork and manage their royalties – especially in a global market that is increasingly dominated by digital streaming services.

Contributions from terrestrial broadcasters have been integral to sustaining music industry funding tools like Canada's content development funds, FACTOR and Musicaction – but they are steadily decreasing, as previously stated. According to the CRTC's 2016 Communications Monitoring Report, commercial radio stations gave 28% fewer contributions to CCD in 2014-2015, approximately $19 million less than during the previous year.

Due to widespread consolidation in the broadcasting industry, moreover, private benefit contributions from the sale of licensed stations will continue declining to an almost negligible amount over the next several years. FACTOR's projections indicate that total "radio benefits" contributions will decrease up to 100% by 2020.[2]

Tangible benefits contributions will also fall approximately 62.5 per cent. Over and above contributions will drop even more steeply, reaching less than $1 million by 2020. It is anticipated that Musicaction will lose significant financing from tangible benefits over the same period. This is of great concern to the music industry, from coast to coast to coast, and will impact its ability to invest in the next generation of Canadian creators.

With regard to digital broadcasting, the CRTC found that 55**%** of Canadians relied on YouTube to watch music videos in 2015, while 23% listened to AM/FM radio through digital streaming, and 20% relied on other personalized music streaming services. In addition, the 2016 IFPI Global Music Report found that the popularity of music streaming services rose 45.2% from 2014 to 2015, having increased more than 380% since 2011.

RECOMMENDATION:

In light of the aforementioned trends, it is imperative that Internet Service Providers (ISPs), streaming companies, video-on-demand services (VODs) and other over-the-top (OTT) content providers be recognized for the powerful influence they exert on Canadian culture and governed as the "online broadcasters" that they truly are. Just as terrestrial radio broadcasters are required to do, companies operating as online broadcasters should invest a fair portion of their annual revenue in the production of Canadian cultural works (commensurate, for example, with the CCD policy that applies to domestic radio).

It is also imperative for 'creator-centric' funding strategies to be enacted through government programs such as the *Showcasing Canada's Cultural Industries to the World* initiative. These programs must be effective at launching new artists, as well as helping music companies to maximize the success of more established artists who require targeted support in order to 'break through' on a global level.

Such funding will enable music companies to leverage investment from the government, while also developing new business models and broader market opportunities. It will enable the Canadian music industry to maintain the impressive momentum it has generated over the years, and engage domestic artists on a global scale. Moreover, such investments will allow the ongoing creation of high quality Canadian music – giving commercial entities that 'broadcast' music more of the content that their businesses depend on.

[2] The Foundation to Assist Canadian Talent on Records (FACTOR), 2016.

b) Increase the Canada Music Fund to $30 million, with Staged Increases for Inflation and Growth

The music industry in Canada punches above its weight globally, while also making a powerful contribution to the Canadian economy as a whole. In 2015, independent companies represented an over 21% share of the business being conducted in this industry, and more than 60% of sales from Canadian-owned music businesses were of music by Canadian artists.[3] As only 7.6% of sales from multinational record labels operating in Canada were generated by Canadian artists, it is evident that Canada's economy relies on having a prosperous Canadian-owned music sector that can facilitate the discovery, development and promotion of local talent nationally and around the world.[4]

Cash flow and access to capital are two of the biggest obstacles facing the independent music sector today. The average cost of breaking an artist into a major market ranges between $200,000 and $500,000 (USD)[5]. This cost is highly burdensome, especially as some 46% of the music industry in English Canada is comprised of sole proprietorships.[6]

Support from the Government of Canada is integral to promoting the fitness and expansion of the Canadian music industry. Indeed, the Canada Music Fund (CMF) enables a wide cross-section of artists and entrepreneurs to access capital that is necessary to finance Canadian musicians' professional and artistic development.

The Canada Music Fund helps to preserve a burgeoning Canadian music sphere, in which artists and entrepreneurs can receive much-needed funding for sound recordings, music videos, touring, showcasing, marketing and promotional projects – enabling them to compete in an increasingly global, digital marketplace.[7]

RECOMMENDATION:

The CMF is central to facilitating a wide array of Canadian success stories, including the international careers of METRIC, Feist, Carly Rae Jepsen, The Weeknd and many, many more. As a result, independent music companies generated approximately $400 million in annual GDP for the Canadian economy (2011 figures).[8] For every dollar received in federal

[3] Worldwide Independent Network (WIN). 2016. *WINTEL 2015;* Statistics Canada, *Sound recording and music publishing, total sales of recordings by country of control, every 2 years (dollars),* CANSIM (Table 361-0061).
[4] Ibid.
[5] IFPI, *Investing In Music*, 2014.
[6] Canadian Independent Music Association (CIMA), *Sound Analysis*, 2013. Available at: http://www.nordicity.com/media/201336fjtnrdeunp.pdf.
[7] Government of Canada. "Canadian Heritage: Canada Music Fund". Updated September 30, 2015. Available at: http://www.pch.gc.ca/eng/1267201611990.
[8] CIMA, *Sound Analysis.*

and provincial support, they return approximately $1.42 through tax contributions. To maximize this striking return on investment – and address the inflationary pressures that continue to bear on the music industry – **CIMA recommends immediately increasing the CMF to $30 million with staged annual increases over the next five years.**

Through CMF programming, music creators (in part) receive assistance from granting bodies like FACTOR and Musication, which are co-supported by private radio broadcasters. As previously noted, the bulk of radio payments to these funds are triggered by the sale of licensed radio stations in Canada, meaning that peak consolidation within the broadcast industry has made them less dependable as long-term sources of support.

At the same time, cultural content is increasingly delivered through media outlets that are neither licensed nor regulated as "broadcasters", meaning revenue from the online communications sector is not proportionately contributing to Canadian content creation, reducing the amount of capital that can be used to leverage domestic cultural content production.

As contributions from terrestrial broadcasters to content development funds decrease year after year, raising CMF funding by $5 million – with annual staged increases to keep pace with inflation and the costs of growth – will permit the music industry to keep providing a substantial return on investment for the Canadian economy.

c) Establish Permanent Dedicated $10 Million Music Export Fund

In order to continue competing and expanding, Canada's music companies must increasingly engage foreign markets. At the moment, however, existing federal programs that support music exporting are extensively over-subscribed and underfunded.

In the Canadian music industry, the current value of being able to identify and capitalize on global markets cannot be overstated. Music industry research confirms that exporting beyond Canada becomes more central to the survival of artists and the companies who support them.

A 2016 CIMA-commissioned study by Nordicity, *Music In Motion*, found that exports were "extremely important" to Canadian music companies, especially the small-to-medium-sized businesses that make up the greatest share of Canada's independent music industry.[9] Fully 87% of such businesses reported that music exporting was a key part of their business

[9] CIMA, *Music In Motion: An Analysis of Exporting Canadian Independent Music,* 2016.

models, while another 59% went on to define it as “critical for their survival”.[10] The costs of touring and promotion in foreign markets were found to be ***twice as high*** as conducting similar activities in Canada, amounting to the single largest obstacle that Canadian music companies experience when investing in their artists’ careers internationally.

Canada’s music industry enjoys a particularly long history of achieving success in foreign markets. This success can be leveraged even further through the establishment of a dedicated funding stream, most notably through the government’s renewed investment in cultural exports.

For the majority of the exporting strategies currently employed by the domestic music industry, there is a need for more robust and flexible funding from government programs. Limitations in Canada’s current export programs – including a lack of multi-year support and funding caps that can halt access to capital at critical investment points – constitute a significant barrier to success for Canadian music companies and the artists who they seek to export, issues brought into relief by the *Music in Motion* study.[11]

RECOMMENDATION:

CIMA recommends that the Government establish an annual, dedicated $10 million fund for Canadian music sector exports – with the flexibility to address the exporting needs of independent emerging artists, as well as those more advanced in their careers.

This permanent export program will stimulate confidence, investment, risk-taking and long-term planning in the domestic music industry. CIMA also recommends that the government allocate such funding on a multi-year basis, as it does for other non-cultural sectors, to ensure that support matches the investment cycles of the music industry, while helping creators respond to changing market forces and opportunities.

CIMA recommends that the government establish and grow the music export fund over the next three years. Currently, the government has budgeted $10 million for cultural exports this year, and another $25 million the next fiscal year, through its *Showcasing Canada’s Cultural Industries to the World* program. **CIMA recommends that the Canadian music industry be allocated between $3 million to $4 million this fiscal year; $7 million of the following year’s $25 million budget; and in year three and beyond, increased to $10 million annually in a permanent music export fund.**

[10] Ibid.
[11] Ibid.

The aforementioned program should promote the growth of emerging artist as well as more established Canadian independent artists and music companies. A more diverse funding program would capitalize on positive momentum within the industry, and establish a stronger commercial environment in which all music professionals (including new artists) can advance their careers.

When a healthy ecosystem of recording artists, labels, studios and performance venues exists in Canada, it uplifts music sector productivity across the board. Providing a robust and flexible funding envelope for established and emerging artists is necessary for such an ecosystem to thrive. As a result, Canadian musicians and artists who have already attained a degree of industry success will be empowered to fully 'break through' and become Canada's next international icons, following in the footsteps of Arcade Fire, Sarah McLachlan, Drake and The Weeknd.

d) Invest Spectrum Auction Proceeds into Cultural Development Funds

In Canada, wireless spectrum frequencies are a vital public resource that have generated more than $8 billion since 2014 from auctioning the bandwidth to private broadcasters.

Wireless spectrum frequency auctions provide citizens with faster, steadier networks that "deliver the downloads, streaming content and services they need."[12] Music will arguably comprise a large percentage of the content transmitted over the wireless spectrum by media companies in Canada, much the same way that terrestrial radio stations broadcast songs by Canadian artists.[13]

In February 2014, the government reported raising $5.27 billion through an auction of the 700 MHz frequencies. The auction of the SSFE-3 spectrum in March 2015, moreover, raised $2.11 billion, with the 2500 MHz Broadband Radio Services auction in April and May 2015 generating an additional $755 million. The government is also expected to assess the sale of frequencies in the 600 MHz range.[14]

Together with the residual 700 MHz frequencies and AWS-3 bands sold in August 2015, the $8 billion derived from these sales represents a substantial source of revenue that can be

[12] Government of Canada. 2015. "AWS-3 Wireless Auction a Win for Consumers". Available at: http://news.gc.ca/web/article-en.do?nid=944669.
[13] Canadian Spectrum Policy Research (website). Available at: http://canadianspectrumpolicyresearch.org/. [Accessed November 22, 2016].
[14] Ibid.; Gregory Taylor, "Spectrum Issues: Spectrum Policy in Canada", *IEEE Wireless Communications,* Vol. 22 (6) 2015.

leveraged to fund domestic cultural productivity in the spirit of Canada's longstanding media regulation tradition.

RECOMMENDATION:

CIMA recommends that the government direct revenue from the auction of wireless frequencies to fund the creation, discovery and export of Canadian music. This presents the government with a unique opportunity to invest in the music industry with little or no disadvantage to the Treasury or taxpayer. The government has stated that it expects these auctions to stimulate greater competition in the wireless market and facilitate more choices for consumers, while infusing much-needed capital into domestic creative industries to enable the creation of new local content.

The Canadian government can provide a greatly needed infusion of investment capital for the music industry by directing a fixed percentage of proceeds from the sale of wireless spectrum frequencies, in the manner and spirit of current CCD regulations for radio. We believe that the best course of action would be for these funds to be invested in the commercial music ecosystem where they can then be administered over a period of years.

e) Expand Canada Media Fund to Include Music Video Production

At a time when a video streaming service such as YouTube has over one billion estimated users, the production of music videos and other visual content continues to be an essential business and artistic tool for Canadian artists and music companies.[15] Indeed, music videos remain a powerful promotional tool for songwriters, performers, record labels and music creators at large.

RECOMMENDATION:

As one means of providing needed capital for the creation of promotional tools like music videos, CIMA recommends expanding the Canada Media Fund to include support for music video production – similar to how contributions from MuchMusic and MuchMoreMusic have been used to facilitate music video production for the last number of decades.

The Canada Media Fund is well positioned to manage the ongoing funding of Canadian music videos, given the expertise and organizational structure already associated with the Fund.

[15] YouTube, *Statistics,* 2016. Available at: https://www.youtube.com/yt/press/statistics.html.

Together with the artists and music companies who develop Canadian cultural products, domestic broadcasting services have also been key participants in the tradition of making local content accessible to citizens. In the future, market forces alone will not guarantee the accessibility of such locally-relevant programming to Canadian audiences.

Between 2005 and 2015, private television stations in Canada spent approximately $7.9 billion on foreign programming, compared to $6.8 billion on locally produced content.[16] As specialty services including MuchMusic and MuchMoreMusic change formats to prioritize foreign TV series, movies and reality TV show content, Canadian stations dedicated to broadcasting music are becoming more rare. The impact on Canada's music industry will be a deprivation of support for the production of music videos by companies who benefit in numerous other ways from transmitting music content over their networks (or more generally promoting their ability to carry such content). Consequently, CIMA urges the government to explore and adopt alternative strategies for promoting local musical works, such as greater reliance on the Canada Media Fund to support the creation of music videos and related music content.

3. Existing Cultural Policies Must be *Adapted* to the Internet – *Not* Abandoned

In a digital landscape, there is a mounting need to update Canada's cultural policies and establish a more consistent, reliable media governance framework in which Canadians can express themselves (nationally and globally) despite the technological, social and economic obstacles that increasingly complicate the transaction of products like music.

Assessing the impact of digital music sharing on the royalties earned by Canadian music creators, research from the Centre for Law and Economics at Australian National University found that such rights holders suffered a $12.5 billion loss in compensation between 1997 and 2015.[17] This was a 20% shortfall compared to what creators would have earned if effective copyright laws were in place to uphold their rights to profit from the risks, investment and labour that they contributed to producing Canadian music content.

[16] Canadian Radio-television and Telecommunications Commission (CRTC), *Communications Monitoring Report,* 2016.
[17] Barker and Maloney, "The impact of internet file-sharing on the purchase of music CDs in Canada," (2015) *Journal of Evolutionary Economics,* Vol. 25, No. 4; George Barker, "Sharing sounds: Does file-sharing harm the music industry," in Greenberg and Elliott (eds.), *Communication in Question: Competing Perspectives on Controversial Issues in Communication Studies,* (2013) Nelson Education Ltd., Toronto.

Only by establishing a clearer, more predictable system of intellectual property rules (including copyright law), will users and creators of Canadian content all be empowered to fully participate in today's cultural economy.

a) Cultural Policy Must Reflect Creator-Centric Copyright Reform

The Canadian music industry is eagerly anticipating the 2017 review of the *Copyright Act*. Much of the *Act's* language and regulations must be amended (including its private copying and notice-and-notice provisions) in order to properly protect Canada's creators in the digital marketplace. In many areas, the *Copyright Act* falls short of the intellectual property protections that creators actively need. The *Act* must be updated to ensure that Canadian artists, songwriters, composers and music companies are appropriately compensated for their creative output, as well as protected with respect to the considerable risks they assume to bring such products to market, both domestically and around the world.

RECOMMENDATION:

Due, in part, to weaknesses in the *Copyright Act,* Canada's musical creators are not protected to the same extent as creators in other countries. While the 2017 *Copyright Act* review will hopefully result in a more effective intellectual property regime for the 21st century, CIMA recommends that Department of Canadian Heritage pay particular attention to the real need to reform national intellectual property laws, as part of its current policy consultation process.

Canadian rights holders have experienced many decisions that have resulted in lower copyright compensation, and uncompetitive rates relative to our competitor nations. For example, the Tariff 8 Copyright Board of Canada decision (setting a royalty rate for streamed music that was 90% lower than its American counterpart); the *Copyright Act's* Section 31 exemption for "network services" (i.e. Internet Service Providers); and the Section 68.1(1)(a)(i) subsidy that continues to exempt commercial radio stations from paying royalties on their first $1.25 million in advertising revenue, all increase the extent to which music can be shared in Canada without offering sufficient compensation to domestic creators.[18]

In Prime Minister Trudeau's mandate letter to the Department of Canadian Heritage, he emphasized the necessity of strengthening Canada's "cultural and creative industries" in light of the fact that "Canada's stories, shaped by our immense diversity, deserve to be

[18] *Copyright Act* (R.S.C., 1985, c. C-42).

celebrated and shared with the world."[19] Promoting domestic creative industries and diverse storytelling – in the context of Canadian intellectual property reform – will mean clarifying the fair dealing defences in the *Copyright Act* and better articulating the responsibilities of ISPs and other digital intermediaries.

Likewise, when the above principles are applied to Canada's cultural policy framework, they call for improving the efficiency of the Copyright Board and making domestic copyright protections more consistent with international standards, in order to keep pace with the economic and technological realities of the global media landscape. Furthermore, all digital CanCon policies that result from the Canadian Heritage policy consultation should anticipate and be consistent with achieving such federal intellectual property reforms in this country.

i. Technological Neutrality in Cultural Policymaking

Digital mediums have been helpful tools for the music industry, but have also lowered the value of recorded music and thus the remuneration available to creators. As part of any Canadian policy review that seeks to advance the interests of industries like music, this problem must be acknowledged and corrected.

In Europe and elsewhere, respect for the principle of *technological neutrality* has encouraged governments to ensure that cultural policies remain in place to promote the development of local cultural products (e.g. sound recordings) regardless of whether they are applied to digital or analog media contexts. Canada's own judiciary, meanwhile, has repeatedly underscored the need for technological neutrality to be a guiding concept in the implementation of laws and regulations that govern domestic intellectual property transactions.[20]

RECOMMENDATION:

The Department of Canadian Heritage must evaluate how updated, *technologically neutral* versions of our own policy instruments can be used to sustain Canada's 50-year commitment to facilitating productivity in the domestic cultural economy. Modernizing these policies so that government intervention remains possible in the digital arena will be critical for ensuring the ongoing production of cultural content, while providing the long-term social and political benefits that are also associated with maintaining a strong cultural identity.

[19] Canada. Office of the Prime Minister. 2015. Minister of Canadian Heritage Mandate Letter. Available at: http://pm.gc.ca/eng/minister-canadian-heritage-mandate-letter.
[20] *ESA v. SOCAN* (2012) at para. 5; *Robertson v. Thomson Corp* (2006) at para 49; *CBC v. SODRAC* (2003) at paras. 66, 71.

b) Remove Temporary $1.25 Million Commercial Radio Exemption

More than 20 years ago, Canada's private radio broadcasters were given a special 'temporary' relief in paying statutory public performance royalties, in an era of low profits and uncertainty for their industry.
In 1995, the federal government amended the *Copyright Act,* exempting commercial radio stations from paying market rate public performance royalties. This $1.25 Million Exemption is essentially a subsidy for commercial radio that permits commercial stations to pay only $100 in public performance royalties to performers and makers of sound recordings on a station's first $1.25 million dollars of advertising revenues. This relief was supposed to be transitory, and is currently the only one of its kind in the world.

In 2016, Statistics Canada published a *Profit Margin Before Interest and Taxes* report confirming that Canada's commercial radio industry took in $304.6 million in 2015, an *increase* of 0.4 percent over the preceding year.[21] Since the mid-1990s, industry data clearly shows that commercial radio has earned, and continues to earn, capacious profits. The $1.25 million exemption, however, is still enforced through s. 68.1(1)(a)(i) of the *Copyright Act, and* continues to apply to every commercial radio station in Canada, regardless of their overall size or wealth. Consequently, even Canada's largest commercial stations pay the same performance royalties as non-profit community broadcasters – that is, $100 a year.

<u>RECOMMENDATION:</u>

As the Department of Canadian Heritage reviews existing policies that impact the success and livelihoods of domestic cultural creators, CIMA recommends eliminating this needless exemption, as described in section 68.1(1)(a)(i) of the *Copyright Act*.

This recommendation is made on the grounds that such a provision – the only of its type in the world – is discriminatory against the makers, performers and users of Canadian music, as well as an unnecessary concession to Canada's highly profitable commercial radio industry.

Simply put, the exemption means that Canada's music creators are now, in effect, subsidizing the nation's commercial (i.e. for-profit) radio industry. The time for such an exemption has long since passed, and we urge the government to finally put an end to this unfair and unnecessary subsidy.

[21] Statistics Canada, *Private Radio Broadcasting, 2015* (2724 - Radio and Television Broadcasting Survey), 2016.

c) Extend Copyright Term to Life Plus 70 Years

Both the European Union and the United States provide copyright protection for a baseline term of life plus 70 years for authors of musical works, which includes publishers, songwriters and composers. Despite Canada's status as a culturally prolific country, we do not protect our artists to the same degree. Compared to jurisdictions in Europe, South America and Pacific Asia, our reliance on a life plus 50 years copyright term for domestic authors of musical works is a holdover from the 1886 Berne Convention that must be modernized to keep pace with the 21st century.[22]

Out of Canada's largest 20 trading partners, 14 have longer copyright terms. The United States, France, U.K., Brazil, Germany, Italy, Australia and the Netherlands all have terms of life plus 70 years.[23]

The intention behind the copyright term prescribed by the Berne Convention was to make a property claim available for authors and the first two generations of their descendants. Given increasing average lifespans, maintaining the term at life plus 50 years does not reflect the actual social or technological changes that have taken place in Canada since 1886.

Moreover, the availability of stronger and more lucrative copyright protections in other jurisdictions will exacerbate a 'brain drain' of talented artists away from Canada, toward countries that better respect the economic contributions of cultural creators.

For the purposes of international trade, the "rule of the shortest term" will also disadvantage Canadian creators. Otherwise known as "national treatment", this rule ensures that products with shorter protection spans in their native countries cannot receive longer copyright protection in foreign jurisdictions. Given Canada's existing life plus 50 years term, this aspect of international trade law will be harmful to Canadian authors. It increases the probability that Canadian cultural products exploited abroad will earn less revenue than works from countries that recognize a life plus 70 years copyright claim.

In 2015, the government extended Canada's copyright term for sound recordings and performances from 50 to 70 years. This was a welcome amendment, but unfortunately did not address the ownership term for all artistic works, including songs and musical compositions. Presently, such lawmaking continues to offer inconsistent protection for

[22] *Berne Convention for the Protection of Literary and Artistic Works,* Article 7. *Berne* has been in force in Canada since 1928.
[23] Jurisdictions with longer copyright terms include the European Union, United Kingdom, United States, Switzerland, Spain, Norway, Netherlands, Italy, France, Mexico, Belgium, India, Brazil and Peru.

Canadian cultural products, as well as the companies and artists who are responsible for creating them.

RECOMMENDATION:

CIMA recommends extending the copyright term in Canada to life plus 70 years, to establish better consistency with international intellectual property standards and trade agreements, as well as provide greater protection for all Canadian creators of musical works, including songwriters, publishers and composers.

d) Upgrade Resources and Efficiency of Copyright Board

A significant obstacle to prosperity and growth in Canada's cultural sector is the delays associated with Copyright Board of Canada decisions.

The Copyright Board of Canada is an economic regulatory body empowered to set the royalties to be paid for the use of copyrighted works, when the administration of such copyright is entrusted to a collective-administration society. The Board also has the right to ratify and supervise agreements between users and licensing bodies and issues licences when the copyright owner cannot be located. As such, it is a key player impacting all stakeholders – including the tens of thousands of creators and artists who make a living from the royalty streams on their works, to the businesses that need music licences for the works that are a central part of their customer experience.

The music industry relies on fair and timely decisions, in order to facilitate better business planning and maximize revenues for the commercial exploitation of its music. Both decisions on tariffs and ratification of negotiated tariff agreements need to be much faster, and creator-centric appropriate, to match the speed at which change continues to impact the industry.

Unfortunately, the Copyright Board of Canada quite often renders its decisions long after its hearings are held. By way of recent examples, the SOCAN online media tariff took between 10 and 18 years to be concluded (depending on whether the length of the original hearing is taken into account), while the CSI-SOCAN online music services and commercial radio station decisions took close to three years to be finalized. Likewise, the Re:Sound Tariff 8 decision for streaming services was rendered more than two years after Copyright Board hearings were first held.

Such a lengthy judicial process severely impacts investment, business planning and the livelihood of those working in the Canadian music industry, as well as those companies that commercialize music as part of their business model. Rendering decisions long after the fact is an unproductive and untenable process, particularly when one considers that the Canadian music industry is largely comprised of small businesses – businesses that can ill afford uncertainty and long delays.

The speed at which technological change continues to take place requires equally timely decisions by the Copyright Board in order to foster growth and jobs in the industry. Unfortunately, Copyright Board decisions continue to be protracted and overdue, an impediment to industrial growth and jobs.

Former Chairman, The Honourable William J. Vancise, Q.C., put it most succinctly in his final Chairman's Remarks in the Copyright Board's 2013-2014 Annual Report. He noted that, during his time of 10 years at the helm of the organization, "the workload of the Board has increased substantially, as evidenced by the value of all tariffs certified by the Board which is now well over $400 million, with **no commensurate increase in funding**. The processes leading to decisions have become more complex to manage as Board staff has been called upon to deal with an increasing number of requests to settle disputes over evidentiary matters…We as a Board strived to render decisions in a timely manner in a context of an ever-increasing number and complexity, both economic and legal, of the issues that come before it. This has become a challenge given the Board's lack of resources, recognized by many stakeholders, that has prevented us from hiring additional personnel to deal with the issues."[24]

It cannot be emphasized enough that the Copyright Board needs to become more nimble and anticipatory, rather than reactive, often rendering decisions years after the effective time period of the tariffs.

RECOMMENDATION:

CIMA recommends the Government ensures that the Copyright Board of Canada is optimally configured and has the resources it needs to render fair and equitable tariff decisions in a timely manner – a process that is more closely aligned with ever-evolving technology and the planning cycle of the Canadian music industry – and to ensure that it operates within a business development framework.

[24] Copyright Board of Canada, *Annual Report,* 2013-2014.

e) Music Compensation Fund

At a time when the careers and support systems available to Canadian creators are under significant threat, a sensible policy approach is to stand behind these creators – particularly the ones most affected by recent digital media changes, including musicians and independent music companies.

Canada's approach to governing the use and exchange of intellectual property should not be at odds with a 'digital world' where the consumption of cultural products increasingly takes place over platforms like online streaming or video-on-demand services. Instead, our communications laws and broader cultural policies must be adapted to the global, Internet-driven nature of contemporary media technology.

Rather than abandoning the policies that underpinned our private copying regime, for example, Canada should be willing to consider IP reforms comparable to those undertaken in Germany, Finland, Spain and other countries where updated remuneration programs have been used to compensate creators for insufficient monetization (or unfair exploitation) of their works in the digital marketplace.

According to recent statistics from the Canadian Private Copying Collective (CPCC), Canada's levy on blank media – a policy tool that helped stabilize the Canadian cultural economy by providing creators $36 million in 2004 – will have to offer 94% less compensation by 2017.[25]

Since being established in 1997, through amending Part VIII of the *Copyright Act,* Canada's private copying regime has allocated over $300 million in royalty-related profits back to the domestic music industry.

Unfortunately, due to the waning use of blank media like CDs to copy music – hastened by the popularity of music streaming services – revenue that rights holders receive from this levy will soon be depreciated to almost zero.

Today, the gap between skyrocketing consumption of music and shrinking compensation for its creators is more accurately the result of low statutory as well as private royalty rates set for streaming services in Canada (as well as other key jurisdictions such as the U.S. and EU).

Canadian creators, however, must continue to receive legal and economic support for use of their content, regardless of the particular medium on which it is consumed or distributed.

[25] Canadian Private Copying Collective (CPCC), *Financial Highlights,* 2016. Available at: http://www.cpcc.ca/en/wp-content/uploads/2016/11/Financial-Highlights-2015-EN.pdf.

They need to be empowered through cultural policy reform (and related amendments to Canadian copyright law) to receive a fairer share of income from the content they generate, so they can at least expect to profit from this work, and ideally earn a respectable living from doing so.

One potential instrument for offering better remuneration to creators is the $35 million Private Copying Compensation Fund proposed in the 2011 and 2015 Liberal policy platforms. This fund was intended to help reduce the adverse affects of unauthorized copying and consumption of musical works.[26] The Compensation Fund was conceived as a "technologically neutral and sustainable" tool for stimulating the productivity of creators in a more challenging, competitive and unpredictable music economy.

RECOMMENDATION:

CIMA recommends that the government consider developing a Music Compensation Fund to offset the low royalties currently paid to creative professionals in the industry, as an interim step toward establishing fuller and fairer market compensation for our domestic cultural creators.

The compensation fund prosed in 2011 and 2015 could be updated and expanded to address royalty compensation issues beyond the unauthorized duplication of music through personal electronic devices like computers or home stereos. By doing so, it could promote the more fundamental policy objectives that the Private Copying Compensation Fund was intended to serve – namely providing creators with the financial incentive and stability required to continue producing high-quality content, while being more appropriately remunerated for their artwork in the absence of suitable Canadian or international copyright royalty regimes.

4. Level the Playing Field for All 'Broadcasters'

At the heart of the current policy consultations on Canadian content in a digital world is the co-existence of terrestrial and online broadcasters, entities that equally leverage the content of our domestic music creators. As such, clearer guidelines need to be established to "level the playing field" in the broadcasting component of the Canadian communications sector – particularly with regard to the activities of digital 'broadcasters', whose business models largely depend on transferring cultural products (e.g. music) across their networks.

[26] 2011 Federal Election Questions From the Writers' Union of Canada and Party Responses. Available at: https://www.scribd.com/document/54244266/Party-Responses-to-TWUC-Election-Questions-1.

RECOMMENDATION:

Given the increasing degree to which cultural products are now exchanged on Internet platforms, digital transactions should be integrated into Canada's existing media regulation system. It should be a priority for the government to ensure that a fair share of revenues generated from the transaction of cultural products still contributes to the ongoing development and promotion of Canadian cultural industries.

Existing CanCon rules and regulations must be adapted to digital technologies beyond TV and radio (such as online music streaming). In the spirit of technological neutrality, both digital and analog broadcasters should be treated equally under the law, and therefore required to contribute to the development of cultural content, such as in accordance with Canada's established CCD policies.

At the same time, digital companies that do not have a physical presence in Canada (e.g. iTunes, Netflix and Spotify) currently avoid paying HST, GST, PST and other consumption taxes when they engage in the sale of cultural products like music. Accordingly, they gain the benefit of a tax loophole that domestic broadcasters do not equally enjoy, and that deprives the Treasury of considerable national revenue.

The above issues have a disadvantageous impact on Canada's cultural policy infrastructure. As a result, they must not only be addressed in the 2017 *Copyright Act* review, but also anticipated by the Digital World policy consultation that Canadian Heritage is presently conducting. The goal is to develop a more consistent policy strategy that can govern the transaction of cultural products in an economy that is increasingly shaped by digital technology.

Affirmative legislative action is needed, therefore, that will enable a reasonable share of the revenues generated from the sale and consumption cultural content to be reinvested in the productivity and growth of domestic cultural industries like music.

Ultimately, this will mean enacting policy reforms that permit greater regulation of telecoms, ISPs, OTT services and other "online broadcasters" – apportioning a reasonable amount of their gross revenue to the promotion of Canadian content in the same spirit as terrestrial broadcasters already contribute to cultural development in Canada.

5. Conclusion

We live and compete in a global economy. Music has no borders, as technology and digital media services have made access to music instantaneous and global. This very fact – that Canada's music industry must compete with the rest of the world in terms of business, fans and royalties – means that the need for strong cultural policies, programs, legislation and regulations has never been more acute. In fact, given the pressures of a digital world, CanCon policies and regulations that the government enacted a generation ago are no less important today, and are arguably even more important than they were in the past.

As we prepare to celebrate the 150th anniversary of Canada's storytelling traditions, our national culture can only thrive if economic and legal conditions are re-established in this country that enable creators like musicians (and the Canadian-owned companies that support them) to have a reasonable chance of profiting from their artistic pursuits.

In particular, a legislative and regulatory environment must exist that properly compensates creators for the risks and investments that they undertake to bring Canadian content to audiences around the world. Both terrestrial broadcasters and their 'online broadcasting' counterparts, therefore, must be expected to contribute a similar proportion of revenues they generate in Canada to the development of music and other domestic cultural products.

In a 'digital world' where global competition is more rigorous than ever, the Department of Canadian Heritage policy consultation offers a unique chance to show leadership by empowering our communications laws, policies and regulation to address the realistic, Internet-driven ways that Canadians now share information with each other and with the world.

At present, there is no less need to ensure that all citizens can democratically express themselves in Canada, and be heard outside our borders, as well. To the contrary, digital technology makes it even easier for content from the U.S. and other culturally dominant parts of the world to overshadow Canadian voices in our domestic media forums.

At this decisive moment in both Canadian history and the development of our remarkable creative industries, it should be a high priority for the government to embrace policies that address the protection of Canada's cultural ecosystem – including local artists, songwriters, composers and Canadian-owned music companies.

The government must ultimately ensure that its policies support and encourage competitive choices in the marketplace, both at home and abroad. This approach will establish a more level playing field, as well as ensure that the costs of market access do not skyrocket, and that the value inherent in a 'creator-centric' policy approach is realized by all.

Given the longstanding importance of celebrating Canada's national heritage and identity – and the pressing economic and technological challenges that face our cultural industries today – we cannot afford to let this opportunity to achieve meaningful cultural policy reform pass us by.

Thank you for the chance to contribute the Canadian independent music industry's views and recommendations to this important consultation process. Should you have any questions or comments, please direct them to myself or to CIMA's Policy Analyst, Jonathan MacKenzie, at (416) 485-3152, ext. 223, or jonathan@cimamusic.ca.

Yours sincerely,

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