Sounding Like a Broken Record: Principled Copyright Recommendations from the Music Industry

October 2017

Presented to Minister Mélanie Joly and the Department of Canadian Heritage by the members of the Canadian Music Policy Coalition (CMPC):

ACTRA Recording Artists' Collecting Society

Association Québécoise de L'industrie du Disque, du Spectacle et de la Vidéo Inc. (ADISQ)

Association des professionnels de l'édition musicale (APEM)

Artisti

Canadian Federation of Musicians (CFM)

Canadian Council of Music Industry Associations (CCMIA)

Canadian Independent Music Association (CIMA)

Canadian Music Publishers Association (CMPA)

Canadian Musical Reproduction Rights Agency (CMRRA)La Guilde des Musiciens and Musciennes du Quebec (GMMQ)

Music Managers Forum (MMF)

Re:Sound

Songwriters Association of Canada (SAC)

Screen Composers Guild of Canada (SCGC)

Society of Composers, Authors and Music Publishers of Canada (SOCAN)

Société du Droit de Reproduction des Auteurs, Compositeurs et Éditeurs au Canada (SODRAC)

Société de Gestion Collective des Droits des Producteurs de Phonogrammes et de Vidéogrammes du Québec (SOPROQ)

Société Professionnelle des Auteurs et des Compositeurs du Québec (SPACQ)

TABLE OF CONTENTS

EXECUTIVE SUMMARY

The Canadian Music Policy Coalition (CMPC) is a coalition of Canadian music professional organizations and music rights organizations representing a cross-section of the entire Canadian music industry. Our groups represent over 150,000 English and French-Canadian songwriters, composers and publishers, over 621,000 performers and record labels domestically and internationally, 280 Canadian professional and trade organizations, and an estimated $750 million of revenue in 2016.

The CMPC is pleased to submit this document to share our trends, facts, data and experiences with the government to assist with its upcoming consultation and review of the *Copyright Act* under section 92, and request the government to follow this parliamentary review with a full legislative review of the *Act*.

The CMPC encourages the government to consider three guiding principles during this review:

- The principle of **real-world applicability** suggests that the digital nature of today's musical industries and worldwide business models requires a copyright framework that can seamlessly adjust in real time with global realities.
- The principle of **forward-thinking rights** suggests that strong copyright laws are vital to providing jobs, economic opportunities, and encourage creative output in our cultural and creative sectors, including the music industry. A vibrant cultural economy is only possible when Canadian creators, performers, producers and music entrepreneurs are properly rewarded and incentivized to produce unique, valuable musical content.
- The principle of **consistent rules** suggests that the Canadian music industry – and the national economy at large – can best thrive when clearly defined and stable rules are in place to promote consistency, confidence and trade.

The CMPC makes the following recommendations according to each principle:

REAL-WORLD APPLICABILITY

1. The CMPC recommends that Canada extend the copyright term for authors to life plus 70 years to harmonize with de facto international standards.

2. The CMPC recommends the provision of the necessary resources to the Copyright Board of Canada and a legislative framework to ensure timely decisions, including: (a) a 12-month certification deadline after the end of a hearing and an expedited process for settled and unopposed tariffs; (b) mandated guidance for setting tariff rates; and (c) a reliance on the best practices of copyright tribunals internationally.

3. The CMPC recommends making the private copying regime technologically neutral to cover audio recording devices such as digital audio recorders, tablets and smartphones.

FORWARD-THINKING RIGHTS

4. The CMPC recommends a review of the fair dealing provisions, focusing on how these provisions are exploited to subsidize commercial industries at creators' expense.

5. The CMPC recommends that exceptions for temporary reproductions or backup copies be revised to indicate that these refer to technological processes without human intervention.

6. The CMPC recommends the revision of the exception at section 32.2(3) to include the term “without motive of gain” to avoid abuse by organizations performing music for ordinary business endeavors.

7. The CMPC recommends that the radio receiver set exemption (section 69(2)) be repealed.

CONSISTENT RULES

8. The CMPC recommends the repeal of the $1.25 million exemption in section 68.1(1)(a) of the *Copyright Act*, which currently provides an outdated and unnecessary subsidy to broadcasters on the royalties they pay at the expense of creators.

9. The CMPC recommends that Internet intermediaries be treated as more than “dumb pipes” and should be liable for infringing activities in certain circumstances.

10. The CMPC recommends that language in the *Copyright Act* be clarified to confirm that a licence fixed by the Copyright Board has a mandatory binding effect on users.

1.0 INTRODUCTION

"There is nothing in this bill that will help create a middle class for artists in this country."

- Andrew Cash, NDP, Davenport, ON, commenting on Bill C-11: *Copyright Modernization Act* on May 14, 2012, which became law on November 12, 2012.[1]

"The Government will develop a new intellectual property strategy over the coming year. The strategy will help ensure that Canada's intellectual property regime is modern and robust and supports Canadian innovations in the 21st century."

- Federal Government Budget 2017, "Building a Strong Middle Class", March 22, 2017.

It took 15 years for the *Copyright Act* to be amended for the digital age. During that time there have been tremendous changes in the ways that music is consumed. Between 1997 and 2012, smartphones became ubiquitous, music streaming and downloading dethroned physical sales, and new services allowed consumers to have the world's repertoire of music at their fingertips. The amendments made in 2012 were a recognition of the changing digital landscape, however more work needs to be done to bring the *Copyright Act* into the modern era and ensure an appropriate balance between user and creator rights.

We cannot wait another 15 years for further amendments.

This document sets out key recommendations by the CMPC for amendments to the *Copyright Act*, aimed at striking a better balance between recognizing consumer rights while ensuring that the various stakeholders involved in the creation of music are fairly compensated for the use of their works. Some of the recommendations put forth by the CMPC acknowledge the changing marketplace and circumstances of copyright in the 21st century. Other recommendations are not new, and have been identified by countless sub-committees, standing committees, policy reviews, and investigations of the *Copyright Act* with reform of these issues remaining urgently needed. The CMPC encourages the government to address both the new and long-standing issues in this review.

The Canadian musical ecosystem is tremendously important to the Canadian population and the broader Canadian economy. The House of Commons' Standing Committee on Canadian Heritage noted in 2014 that the Canadian music sector alone contributes nearly $3 billion annually to the Canadian economy, including over 10,000 people employed in the sound recording and concert sectors and over 30,000 professional songwriters.[2]

Canadian musicians continue to receive international awards and recognition. Despite the vast popularity of Canadian music – both inside and outside of Canada – the musical works created and performed by our songwriters, composers, artists and music entrepreneurs are not protected to the same extent as other jurisdictions, are unjustifiably used to subsidize successful industries, and do not generate the appropriate remuneration that musicians deserve.Of key concern are amendments brought in under the *Copyright Modernization Act* which have created internationally unprecedented exceptions to copyright protections afforded in the *Act*. The CMPC echoes the hope of the Association littéraire et artistique internationale (ALAI) that this review will be an opportunity to improve the economic situation of authors and other rights owners protected by the law by reducing the number of exceptions in the *Act*. These exceptions strike an inappropriate balance between consumer and creator rights and have led to an unwarranted erosion of protections for artists and creators for the use of their works, leading in turn to an erosion of the livelihood

[1] https://openparliament.ca/debates/2012/5/14/andrew-cash-6/
[2] *Review of the Canadian Music Industry: Report of the Standing Committee on Canadian Heritage*, June 2014, at page 3.

of the tens of thousands of working-class Canadians employed in the industry. On Canada's 150th anniversary as a nation, now is the time to celebrate and protect Canadian expression, adapt to the technological realities of the marketplace, and position Canada as a copyright leader on a global stage.

2.0 REAL-WORLD APPLICABILITY

The *Copyright Act* needs to reflect how individuals, organizations, and companies use musical works, sound recordings and performers' performances, and how copyright needs to reflect global – rather than national – realities. In the modern world, treating copyright as if it is confined to a specific territory does not make sense with how content is shared and used. Likewise, rapidly changing business models require a flexible and efficient regulatory body to address these changes. Bringing the *Copyright Act* into the "real world" requires harmonizing protection with international norms, providing the necessary resources to address rapid change, and realizing the intent of certain regimes.

2.1 TERM EXTENSION

The term of copyright protection in Canada for the authors of musical works is out of line with modern copyright law. Under Canada's *Copyright Act*,[3] protection for musical works subsists for the duration of the author's life plus a further period of 50 years. By contrast, the majority of Canada's largest trading partners recognize longer copyright terms for musical works, and a general standard of the life of the author plus 70 years has emerged, *for example*, from the following nations:

Australia	Finland	Israel	Norway	Switzerland
Belgium	France	Italy	Peru	U.K.
Brazil	Iceland	Mexico	Russia	U.S.
The EU	Ireland	The Netherlands	Spain	

Canada's law is consistent with only the minimum protection set out over a century ago in *The Berne Convention for the Protection of Literary and Artistic Works*,[4] but with longer life expectancies, a term of life plus 50 years does not reflect the underlying intention of that treaty. Canada's shorter term is also out of step with the emphasis and value that Canada has otherwise placed on artistic works, both domestically as part of our heritage, and internationally as cultural exports.

Canada's copyright term is outdated and is not reflective of current life expectancy. The *Berne Convention* explicitly provides for signatory nations to allow for longer terms of copyright,[5] as Canada's top trading partners have done. An extension of Canada's term of copyright protection for musical works is actually consistent with the underlying spirit and intention of the *Berne Convention.*

In 1993, the European Union adopted a Directive recommending that copyright protection be extended to the life of the author plus 70 years throughout all EU nations.[6] The Directive observed that the minimum term of protection under the *Berne Convention* was "intended to provide protection for the author and the

[3] RSC 1985, c. C-42 (*Copyright Act*).
[4] The *Berne Convention*, as amended.
[5] Article 7(6).
[6] Council Directive 93/98/EEC of October 29, 1993. (Directive). The Directive was adopted following an extensive review process undertaken in the 1990s.

first two generations of his descendants" and that "the average lifespan in the [EU] has grown longer, to the point where this term is no longer sufficient to cover two generations." (Emphasis Added)[7]

Thus, as the EU observed, the underlying basis for the minimum standard of copyright protection under the *Berne Convention* was out of line with contemporary advancements in medicine and life expectancy as early as 1993. Following the recommendations set out in the Directive, various EU member states extended their respective terms of copyright protection to the life of the author plus 70 years.[8] In 2006, the EU formally adopted and codified the Directive, which all EU member states are required to effect in their respective domestic legislation. The US extended its term to 70 years earlier in 1998 with the Sonny Bono Copyright Term Extension Act, upheld by the U.S. Supreme Court as constitutional.[9]

The same considerations apply in Canada. Around the time that Canada joined the *Berne Convention* in 1928,[10] the average life expectancy was about 60 years.[11] It rose to about 81 years between 2007 and 2009.[12] As a result, the current term of protection afforded under the Canadian *Copyright Act* is insufficient to cover two generations of descendants of a songwriter, and is therefore out of line with the goals of the *Berne Convention*.

Canada should follow the examples of its major trading partners and update the *Copyright Act* to reflect the underlying intention behind the *Berne Convention*.

Canadian creators are at a disadvantage with a shorter copyright term. Canada's shorter copyright term disproportionately impacts Canadian authors and music publishers seeking to export their works as a result of the "rule of the shorter term" prescribed by article 7(7) of the *Berne Convention*. Under that rule, the term of copyright for a literary or artistic work "shall not exceed the term fixed in the country of origin of the work." As a result of Canada's term being shorter than that of its major trading partners, artistic works by Canadian authors may only be protected by copyright for the life of the author plus 50 years in countries that have ratified the *Berne Convention*;[13] conversely, the domestic works of authors from those other countries, as well as works by authors from other trading partners with longer terms of copyright, are protected by copyright for longer periods than Canadian works available in those territories. Canadian authors and music publishers are at a disadvantage as cultural exporters because their works are subject to lesser protections internationally as a result of our *Copyright Act*. Canada's laws should not place limits on the ability of Canadian authors to exploit their works around the world.

Less revenue and less investment in the Canadian music industry with a shorter copyright term. In 2015, SOCAN flagged 11,322 songs that entered the public domain in Canada. This included musical works by songwriters such as Cole Porter, Sam Cooke, and Jim Reeves, and in 2016 this list expanded to include works by Clarence Williams and Nat King Cole. In 2018, works by Woody Guthrie, Otis Redding, and John Coltrane will join Canada's public domain as well. While those works will remain protected by copyright in the territories of Canada's main trading partners, the Canadian rights holders will no longer benefit from those copyrights. The significant royalties, including those flowing to original creators and publishers via

---

[7] *Ibid.*, preamble, para 5.
[8] 1994: Belgium; 1995: UK, Germany, Netherlands, Spain, Ireland; 1996: Italy; 1997: France.
[9] *Eldred v. Ashcroft*, 537 US 186, 2003.
[10] Summary of contracting parties to the Berne Convention, available online: <http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15>.
[11] In the years 1920-1922, the average life expectancy in Canada was about 60 years. See: http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/health26-eng.htm
[12] *Ibid.,* 2007 to 2009.
[13] Section 9(2) of the *Copyright Act* provides an exception to this rule for signatories of the North American Free Trade Agreement (i.e. the USA and Mexico)

Canadian sub publishers, that are generated by those extensive catalogues each year will be lost to the Canadian music economy and consequently cease to be reinvested in Canada's cultural industries.

The Canadian music industry is an important economic driver both domestically and internationally, and it relies upon the strength of Canada's copyright protections for musical works to support the creation of new musical works by ensuring a just reward for creators and rights holders. Canada's laws are out of line with those of its major trading partners as well as the underlying rationale for the structure of our own copyright regime. This is an unreasonable cost to existing Canadian talent in royalties from abroad, as well as to emerging creators who rely on support from rights holders through reinvestment.

Recommendation:

The CMPC recommends that Canada amend the *Copyright Act* to extend the term of copyright protection for musical works to the life of the author plus 70 years, in recognition of international copyright norms as well as the underlying intention of the *Berne Convention* and other such benchmarks for valuing intellectual property.

Impact of the Recommendation:

Term extension will benefit Canada in international trade. The majority of Canada's major trading partners protect copyright for longer than the life of the author plus 50 years, including the vast majority of the members of the Organisation for Economic Co-operation and Development (OECD).[14] Most nations have embraced an international standard of the life of the author plus 70 years, with a few exceptions that recognize either slightly shorter or even longer terms.[15] In particular, Canada's top two trading partners, the United States of America and the entire European Union, both offer copyright terms of life plus 70 years. Royalties distributed by SOCAN to Canadian songwriters and publishers from foreign territories with life plus 70 year copyright terms exceeded $61 million in 2015 and $65 million in 2016.[16]

The inconsistency in copyright protection between Canada and its major trading partners is counterproductive to international rights administration and trade. These differing copyright regimes give rise to uncertainty and additional costs for rights holders because it forces them to investigate the particular scope and applicability of their rights in each country where their works are exploited. This creates unnecessary barriers to rights administration that multiply for each territory beyond an author's country of origin, hindering the achievement of optimal efficiency in rights management and enforcement. As observed by the EU, differences in nations' legal regimes "are liable to impede the free movement of goods and freedom to provide services, and to distort competition in the common market."[17] Legal harmonization is a key element in the creation of a productive international trade environment. This is particularly true for intellectual property rights in the digital age, since copyright protected works are so easily distributed across borders via the Internet. Harmonization has become a key aspect of contemporary trade agreements, such as the Australia-United States Free Trade Agreement, which included provisions extending copyright protection in Australia to the life of the author plus 70 years to match U.S. law.[18] In order for Canada to

[14] All OECD member nations offer copyright terms of life plus 70 except Canada, Japan, and New Zealand.

[15] India and Venezuela recognize copyright terms of the life of the author plus 60 years, while Mexico has adopted a term of the life of the author plus 100 years.

[16] $61,362,000 in 2015 and $65,390,000 in 2016; SOCAN Annual Report – 2016, excluding countries with life + 50 terms (Hong Kong, Japan, Malaysia, Phillipines, Thailand, Uruguay, Vietnam), accessed at: http://socanannualreport.ca/wp-content/uploads/2017/06/8773_SOCAN_Annual_Report_Print_V2_ENG.pdf

[17] The Directive, *supra* note 6, preamble, para 2.

[18] Australia-United States Free Trade Agreement, Chapter Seventeen: Intellectual Property Rights, Article 4(a), accessed at: https://ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file469_5141.pdf

ensure a productive international trade environment, both for its domestic authors as well as those of other countries seeking to exploit their works here, the term of copyright protection should be harmonized with our major trade partners by amending it to the life of the author plus 70 years.

Criticisms that term extension negatively impacts users has been consistently found baseless. Canada's major trading partners have explicitly rejected the theory that an extension of the term of copyright will negatively impact users. That theory posits that a term extension is detrimental to the public because it delays works from entering the public domain, without generating any additional incentive for new creativity. The EU Commission rejected that theory (in relation to term extension for copyright in sound recordings), following a thorough consultation process, as follows: "[I]n analysing the impact of copyright or related rights on prices ... it is fair to say that there is no clear evidence that prices will increase due to term extension."[19] More pointedly, on the topic of incentive for creativity, the EU Commission found that term extension had a direct long-term impact on cultural reinvestment by rights holders, and stated that

> "... overall, the extended term should have a positive impact on consumer choice and cultural diversity. In the long run, this is because a term extension will benefit cultural diversity by ensuring the availability of resources to fund and develop new talent."[20]

This is precisely the role that music publishers play, by reinvesting the revenues derived from the exploitation of copyright protected works in the discovery, support, and development of songwriters. The additional income generated by a longer term of copyright protection would help finance music publishers' ongoing efforts to discover and develop new and emerging talent. Additionally, from a multinational perspective, longer terms of protection in a market provide incentives for foreign companies to invest in repertoire in that market. In both cases, providing for a longer term of copyright protection in Canada will strengthen domestic reinvestment in cultural development and diversity, as well as foreign investment in Canada's substantial local talent.

2.2 COPYRIGHT BOARD REFORM

"The most common suggestion made by witnesses was to provide the Copyright Board of Canada with the resources it needs to speed up its decision-making process."

- Review of the Canadian Music Industry, Report of the Standing Committee on Canadian Heritage, June 2014, 41st Parliament, Second Session, at page 7.

Both copyright owners and users have long agreed that the regulatory regime for setting tariff rates through the Copyright Board of Canada takes far too long in an era where business models are changing rapidly. These concerned were reflected in a key recommendation by the Standing Committee reviewing the Canadian Music Industry in 2014, which strongly recommended a need to implement changes to Copyright Board decision-making ahead of the *Copyright Act* review in 2017.[21] On August 9, 2017, the Government of Canada announced that the Honourable Navdeep Bains, Minister of Innovation, Science and Economic Development and the Honourable Mélanie Joly, Minister of Canadian Heritage, jointly with the Copyright

[19] "Summary of the Impact Assessment on the Legal and Economic Situation of Performers and Record Producers in the European Union," COM (2008) 464 final, SEC(20080) 2287

[20] *Ibid*.

[21] Review of the Canadian Music Industry, Report of the Standing Committee on Canadian Heritage, June 2014, 41st Parliament, Second Session, at page 25 [*Review of the Canadian Music Industry*].

Board, have launched a consultation process on proposed legislative and regulatory changes to the Board's decision-making processes.[22]

The Copyright Board of Canada could play a crucial role in Canada's musical ecosystem. The Copyright Board itself estimates that $434 million in royalties are generated each year by the tariffs the Board certifies.[23]

The CMPC has determined three key issues to be addressed with respect to ensuring the Copyright Board fulfills the principle of real-world applicability. The issues that must be addressed are:

1. Create new deadlines or shorten existing deadlines in respect of Board proceedings;
2. Codify and clarify specific Board procedures through regulation; and
3. Specify decision-making criteria that the Board is to consider.

Each of these issues is detailed below, with explanations of the proposed solutions and the impact of the solutions.

1. **Create new deadlines or shorten existing deadlines in respect of Board proceedings.**

With the advent of the digital age, tariff certification processes that worked before the digital revolution no longer keep pace today as consumers enjoy content in new, creative and rapidly changing ways.

The entire process from filing a tariff to Board certification routinely takes up to six years and sometimes longer, including two to three years for a decision to be released after a hearing ends. Even settled tariffs, which are jointly submitted to the Board by the parties for certification, can take the Board over three years to certify. By the time decisions are rendered, they apply to past periods, which creates significant uncertainty for businesses planning and budgeting for the cost of music and for creators seeking financial certainty and stability. We believe that this uncertainty has also influenced businesses' decisions to refrain from offering services in Canada to the detriment of music rights holders and users alike.

A delay of two or more years from the end of a hearing until a decision can mean that the decision is based on business models and evidence that are outdated or no longer exist by the time the tariff is determined. Music streaming is a good and highly topical example. In 2012, the Board held a hearing for Re:Sound's simulcasting and webcasting tariff (for the years 2009-2012)[24] and semi-interactive webcasting (for the years 2011-2012).[25] By the time of the Board's decision in 2014, music consumption had changed dramatically. Specifically, consumption by CDs dropped by one-third, from 54% from 36%; permanent downloads (buying songs on iTunes) increased from 21% to 24%; and streaming jumped 500%, from 3% to 15%.[26] These figures are of course also drastically different today: CDs have dropped to 34% of the market, permanent downloads are down to 15%, and streaming now constitutes 29% of the music market, almost double its share in 2014.[27]

These music streaming tariffs are only a sample of the tariff certifications that have been subject to significant Board delays. For example, on August 25, 2017, the Board rendered a decision certifying the SOCAN/CMRRA-SODRAC Inc. (CSI) online music services tariff for the years 2011-2013, almost three

[22] https://www.canada.ca/en/innovation-science-economic-development/news/2017/08/consultations_launchedonreformingcopyrightboardofcanada.html
[23] Copyright Board of Canada, Annual Report 2014 – 2015, at page 12.
[24] Re:Sound Tariff 8.A (2009-2012) – Simulcasting and Webcasting.
[25] Re:Sound Tariff 8.B (2011-2012) – Semi-Interactive Webcasting.
[26] International Federation of the Phonographic Industry, Recording Industry in Numbers, April 2015, at page 28.
[27] International Federation of the Phonographic Industry, Global Music Report 2017, April 2017, at page 48.

and a half years after the hearing ended in May 2014.[28] Additionally, the Board took close to five years to certify the SOCAN-CBC settled tariff, for which certification was sought on November 28, 2012 and granted by the Board on May 19, 2017.[29]

It is clear from these figures that decisions can be drastically out of date by the time they are rendered. This was also acknowledged by the Standing Committee on Canadian Heritage in its 2014 review of the Canadian music industry, in which its top recommendation was for the Government of Canada to examine the time that it takes for decisions to be rendered by the Copyright Board ahead of the 2017 review of the *Copyright Act*.[30]

Recommendation:

The CMPC submits that (a) deadlines must be imposed on Copyright Board decisions, requiring, for example, that tariffs be certified no more than 12 months after the end of a hearing; and (b) an expedited approval process must be imposed for settled and unopposed tariffs, requiring that they be approved six months following their joint or unopposed submission to the Board.

Many copyright tribunals around the world have fixed deadlines for decisions, and some tribunals that are not subject to a prescribed timeframe are used only as a last resort where creators and music users are unable to settle as much as possible between themselves. The chart below highlights a number of tribunals that (i) have prescribed timelines for issuing decisions following tariff hearings, (ii) are used only as a last resort, and/or (iii) must follow expedited approval processes for settled tariffs.

Country	**Timeline for Decision following Tribunal Proceeding**	**Tribunal as Last Resort**	**Expedited Approval Process for Settled Tariffs**
Canada	Not specified by legislation. In practice, two years or more for a decision after a proceeding.	Involvement of Copyright Board is mandatory in most cases; majority of rates must be fixed by the Board before taking effect.	No expedited approval process; settled tariffs still have to be approved.
United States	Decisions must be issued no more than (i) 11 months after the post-discovery settlement conference (if agreement is not reached at that time), or (ii) in the case of a renewal tariff, 15 days	Rates can be established either by agreement or by the tribunal.	No approval required for rates established by agreement pursuant to the *Webcaster Settlement Act*.

[28] SOCAN Tariff 22.A (2011-2013) – Online Music Services; SODRAC Tariff 6 (2010-2013) – Online Music Services, Music Videos; CSI Online Music Services Tariff (2011-2013).
[29] SOCAN Tariff 1.C (2012-2014) – Radio – Canadian Broadcasting Corporation; SOCAN Tariff 22.E (2007-2013) – Internet – Canadian Broadcasting Corporation.
[30] Review of the Canadian Music Industry, *supra* note 22, at page 25.

Country	Timeline for Decision following Tribunal Proceeding	Tribunal as Last Resort	Expedited Approval Process for Settled Tariffs
	before the expiration of the tariff's current term.		
Germany	Tribunal Proposal for an agreement must be issued within one year of initiation of the proceeding.	Tribunal is last resort: Tribunal settles disputes only where agreements cannot be reached.	No approval required for settled tariffs.
United Kingdom	N/A	Tribunal is last resort: Tribunal settles disputes only where agreements cannot be reached.	No approval required for settled tariffs.
Australia	N/A	Tribunal is last resort: Tribunal settles disputes only where agreements cannot be reached.	No approval required for settled tariffs.
New Zealand	N/A	Tribunal is last resort: Tribunal settles disputes only where agreements cannot be reached.	No approval required for settled tariffs.
The Netherlands	N/A	There is no tribunal: rates are determined only by agreement. If agreement cannot be reached, matter must go to the Dutch Court of First Instance in the Hague.	No approval required for settled tariffs.
France	N/A	There is no tribunal: rates are determined only by agreement.	No approval required for settled tariffs.
Italy	N/A	IP Courts are last resort: IP Courts settle disputes only where agreements cannot be reached.	No approval required for settled tariffs.

Country	Timeline for Decision following Tribunal Proceeding	Tribunal as Last Resort	Expedited Approval Process for Settled Tariffs
Denmark, Finland, Iceland, Sweden & Norway	N/A	N/A	No approval required for settled tariffs.

Impact of the Recommendation:

Imposing deadlines on Board decisions will have a tremendous positive impact on creative industries and broader business in general. Reducing the time for decisions will reduce uncertainty by providing music creators with income certainty and stability and allowing music users to budget for the cost to use music so that they can properly run their businesses. The proposed solutions will also incentivize creators and users to negotiate terms and avoid lengthy and expensive hearings before the Copyright Board, which would also allow for better use of Board resources.

2. Codify and clarify specific Board procedures through regulations

Not only are business models evolving to meet changes in the form of music consumption, but so too are business models reaching across boundaries as users access music online from other jurisdictions. Canada's copyright regime must respond to changing realities in a timely and fair manner, and in order to do so the Board must have a clear and consistent set of practices. It is clear that detailed rules of procedure would be preferable to the current approach of a general and unclear directive, however the CMPC is not yet in a position to identify what those rules should contain. In determining the best approach, it is important that Canada looks to examples of working domestic tribunals and that the best practices on copyright from other jurisdictions be studied and considered by all stakeholders in developing a system that is appropriate for Canada.

Recommendation:

The CMPC recommends that attention should be paid to tribunals in Canada and copyright tribunals around the world. In particular, notable practices of other countries' copyright tribunals include:

- The U.S. Copyright Royalty Board consists of three full-time judges: one is the chief judge, one has copyright expertise, and one has economics expertise. The judges serve staggered six-year terms and are supported by three full-time staff members. The U.S. Board has an annual budget of $5.3 million, $1.8 million of which is just for personnel expenses such as salaries, awards and benefits.[31]

- In many countries, the copyright tribunal is seen as a last resort. The aim is to have creators and music users settle as much as they can between themselves.

[31] Library of Congress, U.S. Copyright Office Licensing Division Operating Costs as of 06/30/2016, at page 1, accessed at: https://www.copyright.gov/licensing/financial-statements/operating/jun2016.pdf.

Impact of the Recommendation:

By considering and implementing the best practices of copyright tribunals around the world, the Canadian regime will reflect the borderless reality of the digital music industry and place our creators on equal footing with their international counterparts.

3. Specify decision-making criteria that the Board is to consider

The only guiding criterion of general application for the Copyright Board in setting tariffs is set out in Section 66.91 of the *Copyright Act*, which requires that royalties be "fair and equitable". Canada is unique in its lack of guidance for its copyright tribunal. In the U.S., U.K., Australia and New Zealand, the tribunals have mandated criteria to consider in setting tariff rates.

As a result of this limited guidance, the Board's decisions are not always based on objective criteria, such as market agreement, rates for substantially the same rights in other jurisdictions, or even the best evidence proffered at the hearing. The Board often ignores and dismisses evidence put forward by the parties in favour of its own economic methodologies and the advice of its in-house economists and legal counsel. These efforts are duplicative of the cost and efforts undertaken by all parties to a proceeding in proferring evidence, including that of highly regarded experts who frequently provide evidence that is considered credible by tribunals in other jurisdictions. Moreover, because the Board is not even bound by its own precedent, its decisions have become increasingly unpredictable, making it more and more difficult for stakeholders to plan their affairs – especially since tariffs are routinely certified years after their expiration dates.

Recommendation:

The CMPC recommends well-defined mandated guidance for the Copyright Board in setting tariff rates.

Impact of the Recommendation:

If the Board had clear, enumerated guidance for its rate-setting, parties would focus on collecting the best and most persuasive evidence with a view to satisfying these criteria. This would in turn ensure proceedings are focused and efficient, assist the Board in rendering decisions more promptly, and avoid uncertainties that may lead to judicial review of Board decisions.

2.3 PRIVATE COPYING

The Canadian Private Copying Collective (CPCC) makes this submission in conjunction with the CMPC.

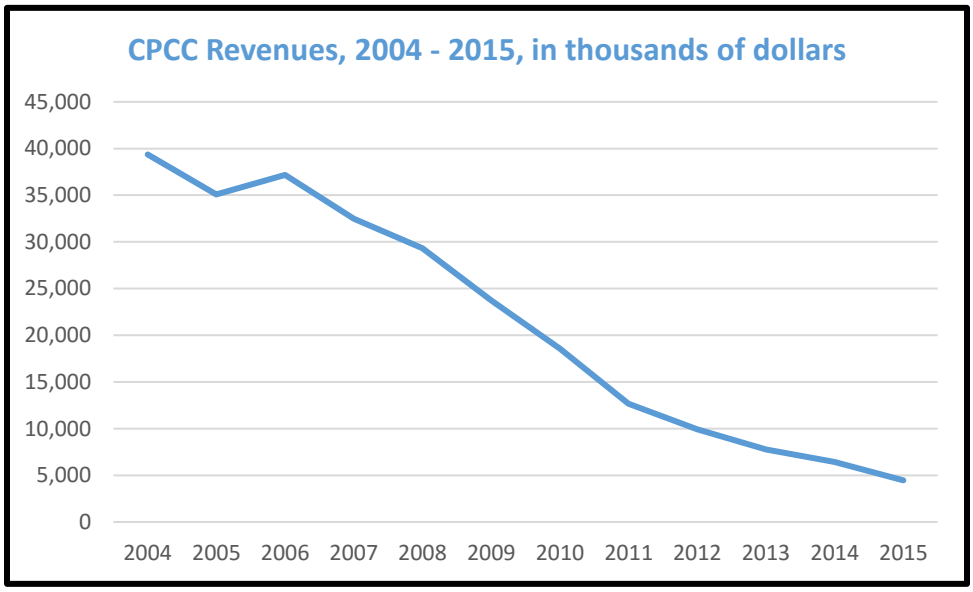
In 1997, Canada's *Copyright Act* was changed to allow Canadians to copy music onto blank audio recording media for their private use. In return, the private copying levy was created to provide remuneration to music creators for that use of their music. Under the *Act*, manufacturers and importers of blank audio recording media pay a small levy for each unit imported and sold in Canada. Those levies are collected by the Canadian Private Copying Collective (CPCC) on behalf of its member collectives, representing recording artists, songwriters, music publishers and record companies.

For many years since its creation, the private copying regime was an important source of earned income, generating a total of over $300 million in revenue for over 100,000 music creators, enabling them to continue to create and commercialize important cultural content. Unfortunately, the regime has been limited since 2010 to a single blank audio recording medium, which is quickly becoming obsolete: CDs.

The majority of consumers are now making copies of music onto devices such as smartphones, and the use of blank CDs to copy music is rapidly declining. As a result, the revenue collected for music creators for private copying is also rapidly declining despite the fact that private copying of music is increasing.

Annual revenues from the private copying levy to music creators have plunged from a high of $38 million in 2004 to less than $3 million in 2016. [32]

Private copying activity doubled over that same period. Canadians copied over 2 billion tracks of music in 2015-16.[33]



The original intention in the wording of the *Copyright Act* was to make the private copying regime technologically neutral; however, decisions of the Federal Court of Appeal and the Federal Government have since limited the regime to media that are quickly becoming obsolete. As a result, rights holders are not receiving compensation for the billions of private copies that are being made each year.

The loss of remuneration from this use of their work is tantamount to asking Canadian music creators to work for free. In fact, to the extent our private copying exception is not accompanied by remuneration, Canada is in violation of its international copyright treaty obligations. [34] By contrast, many European countries (including Austria, Belgium, Croatia, France, Germany, Hungary, Italy, Netherlands, Portugal and Switzerland) have healthy private copying regimes that extend levies to a wide variety of media and devices, like smartphones and tablets. [35]

Recommendation:
The CMPC recommends that the Government amend the *Copyright Act* a) to allow the private copying regime to apply to both audio recording media <u>and devices;</u> and b) to ensure that private copying levies are payable on both media <u>and devices</u>.

[32] http://www.cpcc.ca/en/wp-content/uploads/2016/11/Financial-Highlights-2015-EN.pdf
[33] According to CPCC's national Music Monitor Survey.
[34] The so-called "Berne Convention three-step test" specifies that exceptions to copyright protection, like private copying regimes, are only valid if the exceptions a) are limited to special cases, b) do not conflict with a normal exploitation of the work; and c) do not unreasonably prejudice the legitimate interests of the rights holder.
[35] http://www.wipo.int/edocs/pubdocs/en/wipo_pub_1037_2017.pdf

Impact of the Recommendation:
With minimal revisions to the *Copyright Act*, the private copying regime would be restored to what it was originally intended to be – a flexible, technologically neutral system that monetizes private copying that cannot be controlled by rights holders. Rights holders would be compensated for the hundreds of millions of unlicensed copies of their music being made now onto devices like smartphones, and the levy regime would be able to keep up with how Canadians consume music in the future.

The process for setting levies would remain the same - the CPCC would be required to file a proposed tariff with the Copyright Board and to prove, through empirical evidence, which devices and media are ordinarily used to copy music. The Copyright Board ultimately determines the value of the levy. However, CPCC's proposed levies will certainly be a small fraction of the cost of a smartphone and will be comparable to the levy rates in many European countries where, for example, the average levy payable on a smartphone is approximately CDN$3.50. As always, the levy would be payable by manufacturers and importers of the media and devices. In fact, the cost of many smartphones and tablets is already subsidized for consumers by intermediary companies that provide these devices in a bundle with mobile network services.

Wherever possible, rights holders will continue to license the streaming and downloading of music from online sources, including the right to make copies from these licensed sources. Levies certified by the Copyright Board have always been discounted to exclude the value of authorized copies, so that the regime is focused on private copies that cannot be controlled. CPCC will therefore also propose minor revisions to the *Act* to ensure there is no doubt that this exception to copyright infringement only applies to the copying of music that is already in a person's possession, and that offering or obtaining music illegally, whether through an unlicensed online service, stream-ripping, or by stealing an album from a store, remains illegal.

3.0 FORWARD-THINKING RIGHTS

"I put forward the simple proposition that if music users use music that belongs to somebody else and make money out of it, then they should pay for the property they use for the purpose of making profit."

- Mr. Justice J.T. Thorson, former chairman of the Copyright Appeal Board, 1943-1964

There are three insidious myths underlying criticism of a strong copyright policy.

One is that every creator is an ethereal creature, interested only in creating great music and having no need to earn a living from his or her hard work and creativity. This myth fails to recognize the economic worth of the creative industry, an industry which is vital to the livelihood of tens of thousands of Canadians and whose survival is key to Canada's national identity.

The second myth is that creators are multi-millionaires and that any attempts to limit copyright exemptions are simply acts of greed. This myth myopically focuses only on the successes of superstars – and neglects to consider the effect of these exemptions on middle-class and low-income artists and creators. Our policies have lost sight of this. Otherwise, how do we explain a Juno-award winning musician who can barely eke

out a living creating art, while Canada creates exceptions for multinational companies and other successful organizations to use the works of that very same Juno-award winning musician for free?[36]

The third myth is that strong economic protection impedes creativity and only works that are in the public domain can be easily adapted, reused, sampled, or reimagined. This myth leads to requests for numerous exceptions and limitations and regrettably, Canada has had the dubious privilege of being recognized for the number and scope of exceptions – many without precedent in any other country in the world. This undermines or utterly ignores the ease of clearing rights services that Music Rights Collectives (MROs) regularly provide to users.

The current review provides this government with an opportunity to revisit copyright policy with a view to developing fair and workable rules that will protect Canada's creative industry and the thousands of jobs of working-class Canadians within it.

3.1 FAIR DEALING

Three new fair dealing purposes were introduced in the *Copyright Act* in 2012: parody, satire, and education. Despite the fair dealing purposes of "private study", "research", and the specific exemptions for educational institutions and libraries, the Government inexplicably broadened the scope by introducing education – an undefined term in the *Copyright Act* – to further undermine the compensation paid to creators. As a result of the introduction of "education" as a fair dealing purpose, more than 20 universities have refused to continue their licences with Access Copyright (Access), a copyright collective designed to distribute royalties to Canadian writers.[37] This development is troubling for the CMPC and the music industry.

Recently, a decision was issued by the Federal Court regarding litigation between Access and York University (York) over the interpretation of fair dealing for the purpose of education. York interpreted this provision to mean that no compensation was payable to Access for York's copying activities and "opted out" of paying royalties to Access. The estimated loss to Access was between $800,000 to $1.2 million dollars per year, and these royalties made up about 20% of creators' revenues.[38] The Federal Court rebuked York for their interpretation of fair dealing for the purpose of education, calling it a "transfer of wealth from content producers to content users" and that York "effectively [read out] 'fair dealing'" and relied "solely on the fact that the materials were used for education."[39] The Federal Court has ordered York to pay royalties to Access.[40]

It was estimated that if all universities in Canada interpreted fair dealing in the same way as York, the annual loss of licensing royalties for Access would be between $10-$14 million.[41] In Quebec, Copibec has also experienced a 16% decrease in the fees collected since the expansion of the fair dealing provisions, from $11 million collected per year to $9.2 million.[42]

---

[36] Kate Taylor, "What happens when we starve our artists", *The Globe and Mail*, May 26, 2017. Accessed at: https://www.theglobeandmail.com/arts/music/what-happens-when-we-starve-our-artists/article35126623/.
[37] Patrick Warner. "How Universities Manage to Avoid Paying Writers for Their Work", July 6, 2017, accessed at: https://thewalrus.ca/how-universities-manage-to-avoid-paying-writers-for-their-work/.
[38] *Access Copyright v. York University*, 2017 FC 669, at paragraph 351.
[39] *Ibid.*, at paras 186 and 347.
[40] *Ibid*., at para 246.
[41] *Ibid.*, at para 108.
[42] Le Devoir, "Les auteurs perdent des dizaines de millions en redevances", September 15, 2017, accessed at: http://www.ledevoir.com/culture/actualites-culturelles/508014/droit-d-auteur-la-reforme-a-coute-des-dizaines-de-millions-aux-auteurs

The York case is a clear example of when the implementation of broad wording in an exemption disproportionately impairs the ability of creators and artists (in any creative industry) to make a living while having to initiate prohibitively expensive litigation to simply enforce the rights they have – and as the Federal Court decision points out – were still entitled to.

Recommendation:

The CMPC recommends the government undertake a review of the new fair dealing purposes and their effect on creators and artists immediately. The CMPC suggests that the government should investigate: the revenue trend for creative industries after 2012 to the present and the average earnings of individual creators from their copyright-protected works before and after the implementation of the new fair dealing purposes.

Impact of the Recommendation:

The focus of the Canadian government is to strike a balance between the interests of users and creators of copyrighted works. The inclusion of "education" as a fair dealing purpose, and the broad interpretation used and implemented by organizations, has upset that balance in favour of users' rights at the expense of creators' rights. An in-depth review of the fair dealing purposes, five years after their implementation, will provide the government, users, and creators with much-needed data on the effect of these provisions and their benefits or drawbacks and what the next steps should be.

This will be an opportunity to start using evidence-based decision making when examining exceptions to copyright infringement rather than relying on anecdotal evidence and expensive and time-consuming litigation.

3.2 TEMPORARY REPRODUCTIONS AND BACKUP COPIES

In 2012, the Harper government introduced more new exceptions to the *Copyright Act*: (i) Temporary Reproductions for Technological Processes, for which the Backgrounder stated that, "*the making of temporary, technical and incidental reproductions of copyright material as part of a technological process is allowed*"[43], and (ii) Back-up Copies, which conferred to users the right of making duplicate copies of licensed source material.

The Issue:

Prior to the Supreme Court's decision, there was consensus that exceptions would only apply in certain special cases and could not unreasonably prejudice the interest of the creator. Moreover, we were then dealing with "real" exceptions: cases where rules do not apply. However, it now appears that all exceptions can no longer *"be interpreted restrictively."*[44]

With this new view on interpretation, we feel that language that is too vague can give rise to a wide range of interpretations, which, in itself, constitute a risk all parties involved would prefer not to be exposed to; more so considering that the aforementioned exceptions relate to a set of digital reproductions whose respective values have already been fixed.

[43] Industry Canada*, "The Copyright Modernization Act" (29 September 2011) Backgrounder.*
[44] *Ibid.*

The Canadian Association of Broadcasters' (CAB) narrow reading of these new exception is a good case in point. Indeed the organization argued that any business who uses tiered duplicative processes as part of its "technological process" should not be held liable to account for the entirety of its operation as it relates to the reproduction of copyrighted contents.[45] Though CAB's rhetoric proved unsuccessful in this particular case, who can say CAB, or another trade organization for that matter, will not try and make a more productive use of it in a future case?

In the past, what Parliament has done to deal with situations such as these was to 1) translate principles set by jurisprudence into the *Act*, and 2) provide additional precisions. Our recommendation to government is that we return to these two prescriptions.

For example, the automatic nature of the temporary reproduction is captured in the temporal limitation mentioned in paragraph 30.71(c), which states that such reproduction: "*exists only for the duration of the technological process*." We opine that linking the duration of the existence of the reproduction to the technological process could be better conveyed by adding the word "*concomitantly."*

Another example is the fact that such exception is very similar to another exception introduced in a directive of the European Parliament in 2001[46], which uses the same language as in 30.71, but with the notable omissions that we have underlined below:

> "*Temporary acts of reproduction referred to in Article 2, <u>which are transient or incidental</u> [and] an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, <u>and which have no independent economic significance</u>, shall be exempted from the reproduction right provided for in Article 2.***"**

This article was interpreted by the Court of Justice in 2014[47] in the following way:

> "*the technical process involved require the copies in question to be made (…) <u>automatic</u> (…) <u>require no human intervention</u> (…) normally replaced by other content after a certain time, which depends on the capacity of the cache (…) (Our emphasis)*

Adding these precisions would have the clear (and instantaneous) benefit of avoiding any future legal void. More, it would ensure that any and all reproductions made by a user that results in a material benefit to his operation and business would still generate the payment of royalties to content creators.

In the case of Back-up copies, it seems that such exception would apply both to physical and legal persons. In a commercial set-up, not only these backup copies have a useful and specific function, but the Court found that they create economic value. We would be remiss not to mention that this value has already been fixed in existing licence agreements. While we fail to grasp why such exception was introduced in the first place, it should be made clear that such exception do not apply to commercial purposes.

---

[45] *Statement of royalties to be collected by SOCAN, Re:Sound, CSI, Connect/Soproq and Artisti in respect of Commercial Radio Stations,* Decision of the Board, April 21, 2016, Section 177.

[46] *DIRECTIVE 2001/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL* of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Article 5.

[47] *PRC ("Meltwater") v NLA,* Case C 360/13.

Recommendation:

To clearly convey the government's vision *and* avoid any legal voids, the CMPC proposes that the *Act* be amended as follows:

> *Temporary Reproduction*
>
> *30.71 It is not an infringement of copyright to make a temporary reproduction of a work or other subject-matter if*
>
> *(a) The reproduction forms an essential part of an automatic technological process*
> *(b) the reproduction's only purpose is to facilitate a use that is not an infringement of copyright and the resulting copy has no significant value (or alternatively: "which is useless or non-usable outside said technological process") and*
> *(c) the reproduction exists only concomitantly and for the duration of the technological process.*
>
> *Backup Copies*
> *29.24 (1) (e) the reproduction is for a non-commercial purpose*

Impact of the Recommendation:

Because our recommendation merely confirms the purposes set forth by Parliament in 2011, we find no negative impact to its adoption. What's more, these minor changes would prevent unduly legal expenses in irreconcilable interpretations by using a clear and technologically-neutral language.

3.3 CHARITABLE EXEMPTION

"By definition charity is voluntary. Legislation should not force charitable actions on the part of any member of society even though the objects themselves are commendable ones."

- *A Charter of Rights for Creators*, Report of the Sub-Committee on the Revision of Copyright, October 1985.[48]

The present *Copyright Act* provides an exception for the payment of royalties for the public performance of music when the performance is "in furtherance of a religious, educational or charitable object."[49] This exception prevents compensation to music creators and artists where the use is of a charitable purpose.

No other creative profession (including filmmakers, literary authors, or visual artists) legislatively requires creators to subsidize the use of their works by charitable, religious or educational organizations. These organizations, regardless of the purpose for which they are using literary, dramatic, artistic or cinematographic works, are required to properly remunerate these creators and artists to do so.

The charitable exemption is currently being exploited and abused by national music festivals and venues operated by charitable organizations earning millions in revenue. Despite receiving government funding and paying market rates for costs associated with putting on such events (e.g: paying venues, promoters, food providers, advertisers, staff and so forth), these organizations refuse to pay the songwriters, record

[48] *Sub-Committee on the Revision of Copyright of the House of Commons Standing Committee on Communications and Culture, A Charter of Rights for Creators (1985).*
[49] Section 32.2(3)

makers and neighbouring rights holders their share for the public performance of their works, citing the exemption under section 32.2(3). Even though this section has been judicially interpreted by the Supreme Court of Canada to not apply to events where music is used in an ordinary business sense for entertainment, these organizations still refuse to pay.[50]

The CMPC estimates that the royalties lost to these erroneous charitable exemption claims are between $850,000 to $1.7 million.

Recommendation:

Amend the exemption in section 32.2(3) to state:

> "32.2(3) No religious organization or institution, educational institution and no charitable or fraternal organization shall be held liable to pay any compensation for doing any of the following acts <u>without motive of gain</u> in furtherance of a religious, educational or charitable object."

Impact of the Recommendation:

The term "motive of gain" exists in the exemption for agricultural exhibitions and fairs in section 32.2(2). This legal term has been judicially considered by the Supreme Court of Canada and interpreted to mean that a performance without motive of gain means that the performers cannot be paid and the exhibitors cannot receive private profit.[51]

Unscrupulous organizations operating under the guise of charitable, educational, and religious objects but operating ordinary commercial festivals will no longer be able to hide behind the broad wording of the exemption. Legitimate activities by charitable, educational and religious organizations will continue to operate without being required to seek proper authorization.

There are numerous benefits to this recommendation: there is judicial interpretation of the recommended language, the recommended language will ensure consistency with the agricultural exhibition or fair exemption, there will be a clear rule for organizations when fees will or will not be payable, and music creators and artists will be fairly remunerated for the use of their musical works.

3.4 RADIO RECEIVER SET EXEMPTION

The *Copyright Act* at section 69(2) contains the following exemption:

> "In respect of public performances by means of any **radio receiving set** in any place other than a theatre that is ordinarily and regularly used for entertainments to which an admission charge is made, no royalties shall be collectable from the owner or user of the **radio receiving set**, <u>but the Board shall, in so far as possible, provide for the collection in advance from radio broadcasting stations of royalties</u> appropriate to the conditions produced by the provisions of this subsection and shall fix the amount of the same." (<u>Emphasis Added</u>)

In general, the effect of this exemption is that businesses who use the radio – except for theatres fitting the prescribed requirements - are not required to pay royalties for the public performance of music. The rationale for this exemption is that these royalties are supposed to be collected from radio stations in advance.

---

[50] *Composers, Authors and Publishers Association of Canada v. Kiwanis Club of West Toronto*, [1953] 2 S.C.R. 111 at page 115.
[51] *Composers, Authors and Publishers Association, Limited v. Western Fair Association*, [1951] SCR 596, 1951 CanLII 5 (SCC)

However, beyond the standard performing rights royalties applicable to radio stations, no additional royalties are being collected from radio stations for this exemption.

Dr. Harold G. Fox explained the rationale for the enactment of the exemption as follows:

> "The [radio receiver set exemption] was added to the statute in 1938 in an endeavor to protect small restaurant keepers and business owners from constantly infringing in ignorance."[52]

In addition, Chief Justice Duff explained the scheme involved in protecting business owners when interpreting the provision at the Supreme Court:

> "The result is that in respect of such fees, charges and royalties which, apart from [the radio receiver set exemption] would be eligible from the owners of records and receiving sets, the dealer gets the benefit of [the radio receiver set exemption] which invests the Copyright Appeal Board with the authority and the duty to make provision, so far as may be possible, for substituted charges which are to be collected from the radio broadcasting stations or gramophone manufacturers and which are to be appropriate to the conditions created by the enactment of [the radio receiver set exemption]." (Emphasis Added)[53]

Chief Justice Duff's comments were in relation to a prior version of the radio receiving set exemption that included a reference to gramophones. The gramophone exemption was removed in 1994 but the exception for radio receiving sets remained.[54]

The intention was that the sophisticated players – like large commercial radio stations and manufacturers of radio receiving sets – would bear the cost of the licence fees attributable to the "small restaurant keepers and business owners" and presumably pass that cost down in the price of their goods and services.

From 1939-1956, royalties payable by radio broadcasters included an amount in respect of the radio receiver set exemption.[55] It is unclear why the radio receiver set royalties were removed after 1956. Since that time, no royalty payments pursuant to the radio receiver exemption have been approved.

The basis for the exemption's existence – that sophisticated players would bear the burden of paying licence fees on behalf of small businesses – no longer applies, and the result is the exemption is an anachronism in the modern era.

Recommendation:

The radio receiver set exemption in section 69(2) should be repealed.

Impact of the Recommendation:

The radio receiving set exemption is infrequently used as businesses have become more sophisticated in how they use music. An interpretation of the expression "radio receiving set" to exclude "multi-functional devices" was supported by both music collectives and the broadcasters – and such an interpretation would make the exemption rarely applicable.[56] The Copyright Board partially agreed, noting that "multi-functional

---

[52] H.G. Fox, *Canadian Law of Copyright*, 1st ed., (Toronto: The University of Toronto Press, 1944) at 410-411.
[53] *Vigneux v. Canadian Performing Right Society Ltd.,* [1943] SCR 348 at 354-55.
[54] http://www.cb-cda.gc.ca/decisions/2016/DEC-2016-04-21.pdf at 229
[55] Copyright Appeal Board: *Report to the Secretary of State of Canada* for the years 1938 to 1957.
[56] http://www.cb-cda.gc.ca/decisions/2016/DEC-2016-04-21.pdf at 234.

devices" could not be disqualified outright, but that the functions that are outside of the scope of a "radio receiving set" would not be exempt:

> "Thus, we conclude that subsection 69(2) of the *Act* applies whether or not a device is capable of performing other functions in addition to that of a "radio receiving set," but that the provision applies only to the extent a performance results from the reception and demodulation of radio frequencies, and not of signals received by other means, such as by cable or the internet." (Emphasis Added)[57]

As such, the modern interpretation of the radio receiving set exemption creates confusion for "small restaurant owners and business owners" who think the music they are playing is exempt, but due to the legal distinction between internet or cable radio, it is not because it comes from a different functionality of the radio receiving set.

The provision was enacted to protect restaurant owners and business owners from infringing copyright in ignorance. However, most restaurant owners and business owners will not be able to differentiate the legal difference between playing Internet radio and terrestrial radio – to the lay person, this is just "radio." However, the decision of the Copyright Board makes it clear that publicly performing music by means of internet radio is a licensable activity, whereas terrestrial radio is exempt under s.69(2).

The radio receiving set exemption belongs to a past era, and the simplest way to ensure business owners do not infringe in ignorance is to establish simple rules: if they want to publicly perform music in their establishment then they require a music licence.

4.0 CONSISTENT RULES

In 2006, the five largest companies on the S&P Dow Jones Index were comprised of two banks, an oil and gas company, a software manufacturer, and General Electric. In 2017, the five largest companies are all tech companies, each of which that make substantial use of music in turning enormous profits.[58] Despite being hugely successful companies with valuations closing in on a *trillion* dollars, these businesses are subsidized by hard-working middle class creators through copyright exceptions, loopholes, and distinctions.

These copyright rules provide such companies – and smaller organizations – with unfair advantages that are based on outdated justifications and prioritize the dissemination of works over the encouragement of their creation.

4.1 $1.25 MILLION BROADCASTER EXEMPTION

The objective of the *Copyright Act* (the "Act") is to ensure that creators are fairly compensated when their work is used and to foster the creation of new work. In 1997, the Canadian government amended the Act to bring Canada into compliance with its treaty obligations under the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. These amendments introduced a right that ensured performers and makers of recorded music would be fairly compensated for the public performance and communication of their sound recordings. These amendments rectified a systemic

[57] http://www.cb-cda.gc.ca/decisions/2016/DEC-2016-04-21.pdf at 248.

[58] "Is it time to break up Google?" New York Times, April 22, 2017, accessed online: <https://www.nytimes.com/2017/04/22/opinion/sunday/is-it-time-to-break-up-google.html?smprod=nytcore-ipad&smid=nytcore-ipad-share&_r=1>

inequity within the Act whereby, prior to 1997, only songwriters and publishers were compensated for these uses.

At that time, the financial outlook for commercial radio was grim: In 1992-1993, the Canadian Association of Broadcasters reported industry losses of $50 million[59] and in 1995, the commercial radio industry reported profits of approximately $3.6 million.[60] As a political compromise to provide temporary relief to a struggling commercial radio industry, the government implemented special and transitionary measures which included the $1.25 million broadcaster exemption in Section 68.1(1)(a)(i) of the Act (the "$1.25 Million Exemption"). The $1.25 Million Exemption is a subsidy that allows commercial radio stations to pay only $100 in public performance royalties to performers and makers of sound recordings on the station's first $1.25 million dollars of advertising revenues.

In the 20 years since the allegedly "special and transitional" $1.25 Million Exemption was enacted, the commercial radio industry has changed dramatically, and it is now dominated by a few large and extremely profitable corporations posting a total profit that is 8,300% of that in 1995.[61] The $1.25 Million Exemption, enacted as a temporary measure to relieve the then-floundering commercial radio industry, has been rendered out of date, discriminatory and the only subsidy of its kind in the world. Accordingly, the CMPC strongly recommends that the $1.25 Million Exemption be repealed.

I. Issues

The CMPC recommends the $1.25 Million Exemption be repealed on the grounds that the exemption is:

i. an unnecessary subsidy provided to a handful of very large commercial radio corporations in a highly profitable industry;
ii. discriminatory against performers and makers of recorded music versus other creators of music, who are not subject to the exemption;
iii. discriminatory against thousands of other music users that do not receive the subsidy, while commercial radio corporations do receive the subsidy; and
iv. the only exemption of its kind in the world.

Each of the above issues with respect to the $1.25 Million Exemption is briefly discussed below.

A. The $1.25 Million Exemption is an Unnecessary Subsidy

Over the past 20 years, the commercial radio industry has increased its profits from $3.6 million, when the $1.25 Million Exemption was implemented, to $304.6 million in 2015.[62] This is an increase in profits of over 8,300%.

The commercial radio industry has also benefited from extensive consolidation since the enactment of the $1.25 Million Exemption, with significantly fewer commercial radio groups owning substantially more radio stations and market share.

The $1.25 Million Exemption applies to every commercial radio station in Canada, regardless of size of revenue. This means that Canada's commercial radio stations pay the same amount of royalties as

[59] Donner, A, & Lazar, F, Neighbouring Rights: A Financial and Economic Analysis (Prepared for the Department of Canadian Heritage), October 1994, at p. 5.
[60] Statistics Canada Service Bulletin Broadcasting and Telecommunications Private Radio Broadcasters, 1999, Vol. 30, no. 2, Catalogue no 56-001-XIB at p. 3.
[61] Statistics Canada, Private Radio Broadcasting, 2014, *The Daily* (June 16, 2015) at p. 1.
[62] Statistics Canada, Private Radio Broadcasting, 2014, *The Daily* (June 16, 2015) at p. 1.

Canada's community not-for-profit radio stations on their first $1.25 million of advertisement revenue: $100.[63]

As well, large commercial radio groups can claim the $1.25 Million Exemption for each radio station they own. A commercial radio group that owns 100 radio stations pays only $10,000 in public performance royalties to performers and makers on their first $125 million dollars of revenue.

B. The $1.25 Million Exemption Discriminates against Performers and Makers

Today, the $1.25 Million Exemption is benefiting a handful of very large commercial radio corporations and denying performers and makers their legal right to fair compensation when their music is used commercially. There is no $1.25 Million Exemption for song writer and publisher royalties. Performers and makers are the only rights holders whose royalties are used to subsidize the commercial radio industry.

Over the past 20 years that the $1.25 Million Exemption has been in effect, it has cost a struggling music industry and performers and makers substantial lost revenue, while providing an unwarranted subsidy to large and highly profitable commercial radio corporations.

C. The $1.25 Million Exemption Discriminates against Other Services that use Music but do not Receive the Subsidy

The $1.25 Million Exemption is only offered to commercial radio stations. It does not extend to the public broadcaster (CBC) or any other music users. While thousands of small, medium and large businesses (such as satellite radio providers, webcasters, restaurants, retailers and background music suppliers) pay full royalties to music creators, the highly profitable commercial radio industry is the only industry that does not.

D. The $1.25 Million Exemption does not Exist Anywhere Else in the World

Canada is the only country in the world to grant such a subsidy to commercial radio stations.

Recommendation:

The CMPC recommends the immediate removal of the $1.25 Million Exemption by repealing Section 68.1(1)(a)(i) of the *Act*.

Impact of the Recommendation:

To the extent that the $1.25 Million Exemption was ever justified, those justifications no longer exist. Indeed, the Copyright Board itself has said that the $1.25 Million Exemption is "seemingly based on no financial or economic rationale," and that even the smallest radio station could afford to pay the full royalty rate.[64]

Repealing the $1.25 Million Exemption would:

i. Bring our copyright legislation up to date;
ii. align Canada and its copyright legislation with the rest of the world;
iii. provide music creators with their legal right to fair compensation when their music is used commercially and put millions of dollars back into the Canadian music ecosystem;

[63] Under a separate section of the Copyright Act (Subsection 68.1(1)(b)) community radio stations only pay $100.
[64] Copyright Board of Canada, Statement of Royalties to be Collected by SOCAN and NRCC in Respect of Commercial Radio 2003 to 2007- Reasons for Decision (October 14, 2005) at p. 37-38.

iv. not impact any other parts of the Act, nor impact the profitability of commercial radio stations in any material way. Community stations would continue to receive a preferential and discounted rate as stated in Section 68.1(1)(b) of the Act; and
v. provide an equal landscape for all industries using the public performance of music.

4.2 NETWORK SERVICES

"A huge sector that is distributing the music of creators is paying a tiny share of revenue in return."

- Article adapted from a speech made by Jean-Michel Jarre, President of CISAC at UNESCO on June 12, 2017

ISPs and rights holders agree on two things: 1) uniformity and consistency should count amongst the legislative bodies' chief concerns as they sanction revisions to their domestic laws, and 2) supporting investments in innovation is crucial if we are to have a growing online market. Both these tenets are evidenced in the operational guidelines UNESCO has drafted in June 2017. The said guidelines serve one noticeable aim: promote cooperation between the two factions (i.e., the ISPs and the intellectual property community) to improve the distribution of cultural goods and services on the internet.[65]

The Issue:

To fully grasp the issue, one must go back to the report produced by the Sub-Committee on the Revision of Copyright of the House of Commons Standing Committee on Communications and Culture in 1985 and its notion of "innocent dissemination," as well as the landmark decision that was rendered in *SOCAN v. Canadian Association of Internet Providers* (2004 SCC 45).

A lot of time has passed since we first had to come to grips with the negative impacts of the said notion. We now have a better appreciation of the undesired consequence the so-called "innocent disseminator"[66] has had on the livelihood of creators. Indeed while ISPs saw their revenues increase exponentially, those of rights holders either stagnated or decreased (Note: In some cases, revenues are simply nonexistent). We are not the only ones to have made this sad observation. Policy makers of many other democratic states have come to the same conclusion, and that is that ISPs have morphed from their initial role as carriers to that of disseminators of culture.

The phenomenon is known as "*Transfer of Value*" or "*Value gap,*" two locutions commonly used to convey the passing of the value inherent to creative works to the platforms that host and monetize them, while paying little or no royalties to those who invested time and money into the creation of those works.

Safe Harbour provisions exemplify such Transfer of Value. An ISP that provides access to the public while performing a more active role than that of a carrier should not be able to claim the defense provided in section 31.1 of the Act. Parliament should send a strong signal that those who provide the means for telecommunication or reproduction of works through the internet are doing more than merely storing, hosting, and carrying content.

---

[65] *Conference of parties to the convention on the protection and promotion of the diversity of cultural expressions*, Sixth ordinary session, Paris, UNESCO headquarters, Room II, 12-15 June 2017, DCE/17/6.CP/11 section 16.7

[66] *Sub-Committee on the Revision of Copyright of the House of Commons Standing Committee on Communications and Culture, A Charter of Rights for Creators (1985): "the ISPs are "innocent disseminators" and "conduits," whose role is limited to "providing the means necessary to allow data initiated by other persons to be transmitted over the Internet"*

We need ISPs to play a bigger role, for example, by implementing content recognition technologies that would track usage, and, if need be, block unauthorized commercial uses.

"Fixing the value gap is the start of a longer journey to a significantly stronger and fairer global business"

Frances Moore, Chief Executive of the IFPI

Recommendation:

As early as 2004, the Supreme Court hinted at the fact that turning a blind eye to infringement, under the assumption that one is simply providing a mean of communication, should not be allowed.[67] We should follow suit.

Our recommendation is clear: ISPs should not be allowed to participate in the monetization of "infringing activities," and to profit at the creator's expense. Let us borrow on the wisdom of the courts in other jurisdictions, who have decided that the failure, by an ISP, to exercise some measure of control to prevent the infringing activities was unlawful.[68]

The European Commission is already on the case. It has filed a proposal that tackles the issue head on:

> "Evolution of digital technologies has led to the emergence of new business models and reinforced the role of the Internet as the main marketplace for the distribution and access to copyright-protected content. (…) It is therefore necessary to guarantee that authors and rightholders receive a fair share of the value that is generated by the use of their works and other subject-matter. Against this background, this proposal provides for measures aiming at improving the position of rightholders to negotiate and be remunerated for the exploitation of their content by online services giving access to user-uploaded content."[69] (Emphasis Added)

The measures are:

- Because ISPs store and provide access to copyrighted works and user-generated contents, their role goes far beyond the mere provision of physical facilities. They optimize the presentation of uploaded works and promote them. Consequently, we opine they should be obliged to secure licensing agreements with rights holders;

- ISPs should take concrete measures to ensure the protection of works, such as implementing effective technologies;

- ISPs should provide feedback to the intellectual property community, the extent of which should inform stakeholders of the use of the licensed assets;
- There should be a mechanism of adjustment for cases where the compensation that was agreed under a licence or a transfer of rights is found disproportionate when compared to the revenues and benefits ISPs derive from the exploitation of the works;

[67] *CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13, 236 D.L.R. (4th) 395, 317 N.R. 107, 30 C.P.R. (4th) 1, [2004] 1 S.C.R. 339, at [37] (Sup.Ct. Can.): authorization can be inferred from acts that are less than direct and positive, including a sufficient degree of indifference*

[68] *Universal Music Austl. Pty Ltd. v. Sharman License Holdings Ltd, [*2005] FCA 1242 (Fed. Ct. of Austl.)

[69] Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, SWD(2016) 301, page 3

- An alternative dispute resolution procedure should be introduced. It would address claims related to the obligation of transparency and the contract adjustment mechanism (for more on this subject, please see the section entitled *Binding Arbitration*)

Impact of the Recommendation:
There is an obvious efficiency in having ISPs secure licence agreements with rights holders. This efficiency is hardly attainable if the latter have to place claims with each physical person who upload copyrighted works onto the internet. That said, safeguarding the interests of consumers should run concurrent to our recommendations. In clear, government must safeguard consumers' rights and interests, which means that all expenditures going into the implementation of the solution we are advocating should not be passed on to the clients of the ISPs.

As intermediaries, ISPs should take a more active role in the prevention of infringing activities. Their unique position in the digital ecosystem makes them the ideal partner to stop infringement in its tracks.

Lastly, it is important to remember that failure to take remedial action amounts to being biased toward cultural content, which constitutes a considerable part of internet traffic.

4.3 BINDING ARBITRATION

"Arbitration was by its very nature developed as a binding process."

Dispute Resolution Reference Guide, Department of Justice, Canada

Most Canadian copyright collectives may, for the purpose of setting royalties and fixing conditions relating to classes of uses, enter into bargained *licensing agreements* with users in lieu of filing a proposed Tariff with the Copyright Board of Canada. In the event that a collective and an unlicensed user of copyrighted works are unable to agree on the royalties to be paid for the right to do such works or on their related terms and conditions, either party can ask the Board to intervene as an arbiter and fix both royalty and related terms. When it renders its decision, the latter is deemed having the same executive force and jurisprudential reach as that of a certified Tariff, inasmuch as it applies solely to the case that was heard.

The existing provision in the *Copyright Act* provides that once the decision rendered, the user thusly becomes fully authorized to do the act he sought to be licensed for, so long as he abides to the terms and conditions set out by the Board, and that he pays all royalties due.

The Issue:

However, this proceeding is stripped of its *raison d'être* if one of the parties is subsequently made unable to enforce the Board's decision, which is what transpires from the recent decision Justice Rothstein of the Supreme Court of Canada has made pursuant to the Board's licence-setting proceedings under s. 70.2.[70]

[70] *Canadian Broadcasting Corp. v. SODRAC 2003 Inc, 2015 SCC 57*, in particular, sections 104 to 113

Indeed, the Court found that licences fixed by the Board pursuant to s. 70.2 should not be viewed as having a *mandatory binding effect* on users. What's more, Justice Rothstein muses, in *obiter* about the Board's power to bind solely collectives to a licence based on the user's preferred model and on terms of the Board's choosing. We opine that this is wrong.

Ponder these two questions: Why would the results of an arbitration proceeding be binding on only one party? Why spend time, resources, and money on building cases and conducting full hearings if one can voluntarily detach oneself from the outcome of such proceedings?

If the intention of Parliament was to introduce a process of setting royalties in individual cases, its intent was certainly not to have parties retain the option of declining decisions that may not be to their liking.

Arbitration proceedings are such that there is always a mutual agreement that the award and determination of the Tribunal shall be final and binding on both parties. Obviously, such binding effect should be even clearer in the case of a statutory arbitration, as is the case for the *Commercial Arbitration Act* , for example.

In addition, the licensing scheme provided by sections 70.2 provides that (i) all parties be fully heard and be able to bring all arguments deemed pertinent to their case; and (ii) the outcome of such arbitration can be appealed if one of the parties (or both) finds the final decision unreasonable and tainted with errors of law.

Recommendation:

A clear and distinct legal authority able to show Parliament's intent is therefore needed. Our recommendation is simple: amend section 70.4 of the *Copyright Act* as shown hereunder:

> *Effect of Board decision*
>
> *70.4 Where any royalties are fixed for a period pursuant to subsection 70.2(2), the person concerned ~~may~~ **will**, during the period, subject to the related terms and conditions fixed by the Board and to the terms and conditions set out in the scheme and on paying or offering to pay the royalties, do the act with respect to which the royalties and their related terms and conditions are fixed and the collective society ~~may~~ **will**, without prejudice to any other remedies available to it, collect the royalties or, in default of their payment, recover them in a court of competent jurisdiction.*

Impact of the Recommendation:

We are of the opinion that if Parliament was to enact this amendment its impacts on stakeholders would be minimal. Before the SCC decision, it was the general understanding that any Board decision was binding and enforceable, including those resulting from arbitration proceedings. Even the appellant in the 2015 SCC Decision refrained from arguing this point (he instead objected to the Board's power to structure an Interim Licence).

Every enactment of a specific legislation is deemed remedial.[71] Consequently, introducing a statutory arbitration scheme in the *Copyright Act* and having one party at the end of such a proceeding pulling out is antithetical to a remedy.

[71] *Interpretation Act*, R.S.C., 1985, c. I-21, s 12

Worse yet, the aforementioned SCC decision was seen by one user[72] as an affirmation that, not only the arbitration regime was permissive, but any and all of the Board's decisions (i.e., Tariffs and Interim Tariffs) allowed him to pull out on a whim. We ask that you remedy this by considering our Recommendation.

In closing, confirming that both Tariff and arbitrary licensing terms set by the Board are compulsory and binding is not only legally sound, it would reinforce our trust in this quasi-judicial tribunal's proven ability to render fair decisions, thus ensuring that the time and the resources we spend on such proceedings shall never be in vain.

5.0 CONCLUSION

There continues to be mixed messages about copyright in Canada from institutions that one would expect to champion and support creative endeavors. Canada's public broadcaster challenges a Copyright Board decision all the way to the Supreme Court of Canada in an attempt to avoid paying royalties for broadcast-incidental copies, despite the *Copyright Act* having clear language since 1997 that royalties are payable for such copies.[73] One of Canada's top universities refuses to pay royalties that make up a substantial portion of creators' incomes to a copyright collective and forces lengthy and expensive litigation only for the court to confirm that royalties are indeed payable.[74] The general approach seems to be that copyright-protected works should be used to subsidize other industries without paying creators their fair remuneration.

Paid audio streaming in Canada is far below the average for developed markets,[75] our copyright term is falling behind international norms, and Canada is still identified as a "safe haven" country for copyright piracy.[76] The *Copyright Act* review in 2017 offers the chance for Canada to change this narrative.

The CMPC looks forward to discussing, contributing and learning more about what the government hopes to accomplish in this review.

---

[72] *The Canadian Copyright Licensing Agency (Access Copyright) c. York University*, 2017 FC 669 (*Access Copyright*)
[73] *CBC v. SODRAC 2003 Inc*., 2015 SCC 57 at para. 50.
[74] *Access Copyright, supra* note 74.
[75] IFPI, *Music Consumer Insight Report 2016*, at page 6. In a survey of 13 developed countries, an average of 18% of internet users used paid audio streaming services; in Canada this number was the second-lowest individual country rate at 11% of users using paid services.
[76] IIPA, *2017 Special 301 Report*, at pages 92-102.