CANADIAN FEDERATION OF MUSICIANS
An Organization of the American Federation of Musicians of the United States and Canada

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Canadian Content in a Digital World

Consultation of the Department of Canadian Heritage

The Honourable Mélanie Joly

Minister of Canadian Heritage

Submission of the Canadian Federation of Musicians

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Contents

INTRODUCTION

The Canadian Federation of Musicians (CFM) welcomes this opportunity to participate in the consultation "Canadian Content in a Digital World." We thank the Honourable Mélanie Joly, Minister of Canadian Heritage, for initiating this project to examine the federal government's current cultural policy toolkit in a digital age. The CFM shares "the belief that the time is ripe to review the role of the federal government in helping Canada's creative sector navigate the transformation and chart a course to ensure that we are poised to position ourselves as global leaders."[1]

In this consultation the CFM will focus on the regulatory and policy tools and financial support we believe is needed to ensure that Canadian musicians thrive in the digital environment now and for the years ahead. We will focus on the issues and concerns that have the most impact on our members and provide our recommendations to help "create a system" in which Canadian content creators can succeed in a "digital, globalized world."[2]

We support finding the means to empower our own creative communities to make their contributions available to new markets and to promote Canadian cultural content to the world.

WHO WE ARE

CFM members are Canadian professional musicians who perform in duos, trios, quartets, quintets and orchestras, in bars, churches, recording studios, schools, concert halls and stadiums. Performing musicians are the front line and the voice of the music industry in Canada. We hear them perform live, recorded on disc and tape, broadcast on radio and television, and transmitted over the Internet. Without performing musicians, all the great music that has been written would remain unheard.

[1] On 13 September 2016, Minister Mélanie Joly launched consultations on "Canadian Content in a Digital World" (https://www.canada.ca/en/services/culture/consultations.html). During this exercise, all Canadians are invited to join the conversation and have their say on how to strengthen the creation, discovery and export of Canadian content in a digital world.

[2] Message from Minister Joly, "Consultations on Canadian Content in a Digital World," https://www.canada.ca/en/services/culture/consultations/message-minister.html.

The CFM represents professional musicians in a broad range of collective bargaining and legislative actions. We provide vital resources for Canadian musicians at any stage in their career and on any platform, from live concert to recorded performance, broadcasts and film scores. We help thousands of musicians who need assistance with any number of issues related to the performing and recording of their craft. With specialized services that range from information and assistance with immigration, media recording, symphonic and theatrical matters, touring and freelance work to membership services, contract negotiations and administration, royalty streams and more, the CFM helps its membership take advantage of every career opportunity and optimize their professional working environment.

The CFM is the Canadian national headquarters of the American Federation of Musicians of the United States and Canada (AFM) and has been representing the interests of professional musicians for 120 years. Together with the AFM, the CFM comprises 200 local offices across the United States and Canada, representing a membership of approximately 85,000 professional musicians, 17,000 of whom are members in Canada.

As the distinctively Canadian division of the AFM, the CFM negotiates fair agreements for Canadian members, works diligently to protect ownership of recorded music, secures benefits such as health care and pensions for its membership, and actively lobbies legislators on copyright reform and other matters of interest to professional musicians who live and work in Canada. The CFM is committed to raising industry standards and placing the professional musician in the foreground of the Canadian cultural landscape. It is "here for its members to minimize potential threats and maximize opportunities."[3]

THE PURPOSE OF OUR SUBMISSION

In this consultation, the CFM will focus on the regulatory and policy tools and financial support needed to ensure that Canadian professional musicians thrive in the digital environment now and for the years ahead. We are pleased to work with Canadian

[3] "About Canadian Federation of Musicians," http://www.cfmusicians.org/about-us.

Heritage to build a new model that reflects a broad consensus – a social contract for how we support the creation, discovery and export of Canadian content in the digital world.

The CFM agrees with the government that "It's time to rethink how we support and promote Canadian content." We acknowledge the "need to create a system that better aligns with how we consume content and that helps Canadian professional musicians and other content creators succeed in a digital, globalized world." Rewarding diversity and creativity should be at the heart of cultural innovation. We believe that it is possible for recording artists' and professional musicians' lives to improve if Canada moves forward as a hub for creativity and innovation. Valuing culture through up-to-date legislation, funding innovation and creativity, and education is "key to having a strong society, a vibrant democracy, and to promoting Canadian cultural content to the world."[4]

Like other cultural-content industries, the Canadian music industry has been profoundly affected by the digital revolution. While music is more accessible than ever before, sales of compact discs (CDs) have dropped sharply. The revenues generated by digital downloads and online streaming services have not made up for the decline in revenues from CD sales. The many players in the music industry – composers, performers, producers, distributors, publishers, record companies, live music venues and festival and concert promoters – face diverse challenges in adapting to the new digital environment.[5]

Despite the challenges facing the Canadian music sector and Canadian musicians, Canada continues to produce world-class musical performers. To illustrate our successes, one example – often a quiz question on British game shows – is which musician holds the record for longest at number one on the British charts. The answer is Bryan Adams, who was at the top of the UK charts for 16 weeks with his 1991 hit "Everything I Do, I Do It for You" – an unbroken record for 25 years. Drake, the runner-

[4] "Summary of the Consultation Paper," http://www.canadiancontentconsultations.ca/summary-of-the-paper.

[5] "Review of the Canadian Music Industry: Report of the Standing Committee on Canadian Heritage," June 2014, 1, http://www.parl.gc.ca/content/hoc/Committee/412/CHPC/Reports/RP6661036/chpcrp05/chpcrp05-e.pdf. The Committee held 14 meetings during the study, during which it heard from 82 witnesses and received 15 written submissions.

up, was number one on the British charts with his single “One Dance” and poised to equal Adams’s record earlier this summer, but then Justin Bieber, in collaboration with Major Lazer and MØ, took first place with a song called “Cold Water.”[6] Canadian musicians have had more than their share of success internationally; witness Celine Dion, Sarah McLaughlin, Shania Twain, Leonard Cohen, Joni Mitchell, k.d. lang and Neil Young, to mention only a few. And the successes continue: Justin Bieber and Drake came out on top as the overall winners at the 2016 American Music Awards.[7]

According to the department of Canadian Heritage, between 2001 and 2012 the share of total domestic album sales increased from 16 to 26 percent. In a brief submitted to the Standing Committee, the department also noted that royalties paid by the Society of Composers, Authors and Music Publishers of Canada (SOCAN) for public performance of Canadian music abroad had increased by 43 percent between 2001 and 2012, from $33.1 million to $47.3 million.[8] The Canadian music sector contributes nearly $3 billion annually to the Canadian economy. More than 10,000 people are employed in the sound-recording and concert sectors, and there are 30,000 professional songwriters. In addition, music contributes to other economic sectors such as tourism and advertising.[9]

In a news release from the CRTC, Jean-Pierre Blais, CRTC Chairman and CEO, noted that new technology is driving consumption of content by Canadians:

> Our report illustrates how online and wireless services are becoming critical to Canadians’ day-to-day lives. This trend will only continue to increase in the years to come. The explosive growth in data consumption clearly demonstrates that Canadians are relying more and more on

[6] Esther Addley and Harriet Gibsone, “Bryan Adams Retains Record for Longest Time at UK No 1,” *The Guardian*, 29 July 2016, https://www.theguardian.com/music/2016/jul/29/bryan-adams-retains-record-for-longest-time-at-uk-no-1-charts-drake.
[7] CBC News, “Canadian Content Cleans Up at American Music Awards,” 20 November 2016, http://www.cbc.ca/news/entertainment/canadians-amas-2016-1.3859498. Bieber beat out Drake in four categories but the Toronto rapper received four AMAs of his own.
[8] Department of Canadian Heritage, “Government of Canada Policy Framework for Canadian Music,” brief submitted to the Standing Committee on Canadian Heritage, March 2014.
[9] Jean-François Bernier, Director General, Cultural Industries, Department of Canadian Heritage, evidence submitted to House of Commons Standing Committee on Canadian Heritage, 2nd Session, 41st Parliament, 4 March 2014, 1145.

> streaming and real-time communication applications to consume content and communicate with the world.[10]

With all the successes and opportunities being offered by new technology, why are Canadian recording artists and musicians struggling to maintain a middle-class lifestyle? The technology companies and telecommunications intermediaries that profit from both lawful and unlawful uses of recorded music, films, games and other intellectual property goods and services should be contributing to the growth and stability of Canadian cultural industries, and the music sector in particular. We believe that this consultation must explore ways to add value to the lives of Canadian professional musicians through support of proper funding, by revising legislation to fill the gaps in intellectual property rights, to repair past mistakes that have deprived recording artists and professional musicians of compensation for the use of their creations, and to address piracy and the "culture of free" through better enforcement and public education.

COPYRIGHT FOR RECORDING ARTISTS AND MUSICIANS

In 2017 the statutory review of the *Copyright Act* will provide an opportunity to make needed amendments that will better position Canadian content creators to succeed in a digital, globalized world. In this consultation, copyright should play a prominent role as the economic driver of creativity and cultural innovation. From the standpoint of the CFM, by strengthening copyright laws we will make great strides in ensuring that Canadian recording artists and professional musicians continue to be fairly paid for the use of their recorded performances of music and will be able to ensure a decent standard of living for themselves and their families.

In the digital age, copyright and culture are intertwined with enterprise and technology. Francis Gurry, Director General of the World Intellectual Property Organization (WIPO), expressed this relationship in his opening remarks at a conference on the global digital content market:

> Copyright is the central mechanism in the creation of the market for creative works – if you like, the dominant interface between the world of

[10] Canadian Radio-television and Telecommunications Commission (CRTC), "Downloaded Data Skyrockets in 2015," news release, 26 October 2016, http://news.gc.ca/web/article-en.do?nid=1143179.

> creativity and the economy. It is the means by which the market exchange of creative works occurs. As such, it is also the principal means for the financing of the production of creative works, enabling the creator to control the commercial exploitation of her works, thereby returning economic value to the creator and ensuring livelihood for the individual creator, and economic sustainability for the creative industries.[11]

Recording artists and professional musicians, like other creators, increasingly rely on copyright law as a necessary means of protecting, controlling and receiving compensation for the exploitation of their musical performances. Copyright has perhaps never been more important than now, in the digital world. There are still gaps in the *Copyright Act* that leave creators vulnerable. This is particularly true for recording artists and professional musicians. Further changes to the *Copyright Act* must begin with this consultation if recording artists, professional musicians and other content creators are to succeed in a digital, globalized world.

The policy rationale for intellectual property rights in a recording artist's performance stems from the creative contribution or expression in the performance.

> A performance is a live act, and accordingly no *property* right can subsist in the performance itself – only in a fixation of that performance – yet the performer enjoys certain rights in the ether of his work, whether it is recorded or not (for example, the right to authorise the broadcasting of the live performance). The essential nature of copyright, on the other hand, is inherently proprietary, since it must be recorded to subsist at all. However, when a piece of music is recorded, the rights in the performance become inextricably linked with any literary or musical copyrights in that music – to exploit the sound recording is to exploit both the performance and the respective copyrights simultaneously. Therefore, unless one takes the view that a performance is undeserving of protection, it would seem

[11] Francis Gurry, Opening Remarks, "The Global Digital Content Market," 20–22 April 2016, http://www.wipo.int/about-wipo/en/dgo/speeches/dg_gdcm_2016.html.

> unreasonable if the copyright owner and the performer were not granted at least very similar rights.[12]

The structure of the audio recording industry dictates that, as a rule, performers shift from one employment to the next. They may often endure long periods without work, during which they often receive no compensation. Recording artists and musicians have little individual bargaining power, and they argue therefore that they must have the economic right to authorize or prohibit each and every use of their work.[13] Musical performers need to be able to negotiate both collectively and individually with producers regarding the terms under which their creative work may be exploited, now and in the future, in the worldwide digital marketplace. A recent proposal was made to the WIPO Standing Committee on Copyrights and Related Rights (SCCR) calling for reassessment of the international treaties – the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) – in light of the profound changes in technology and business that have taken place in the past 20 years.[14]

Copyright law has protected authors' work since at least the 19th century; however, performers have not enjoyed that same legacy of legal protection. As media, brands and technology lawyer Jamie Barnard notes,

> In society, rights exist on two levels: philosophically and legally. Whilst we may feel socially and intellectually entitled to certain rights, the actual rights we possess are those recognized by the state, and conferred on us accordingly. Injustice (or at least perceived injustice) arises when the latter does not reflect the former. In the context of this essay, therefore, a performer has only those rights that he has been given by the state.[15]

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[12] Jamie Barnard, "Performers' Rights," Music Law Updates, October 2005, 1, http://www.musiclawupdates.com/wp-content/uploads/pdf-articles/Article-Performers_Rights.pdf.
[13] R. Towse, "Assessing the Economic Impacts of Copyright Reform on Performers and Producers of Sound Recordings in Canada," Industry Canada, 10, http://www.ic.gc.ca/eic/site/ippd-dppi.nsf/vwapj/towes_final_e.pdf/$FILE/towes_final_e.pdf.
[14] Group of Latin American and Caribbean Countries (GRULAC), "Proposal for Analysis of Copyright Related to the Digital Environment," Standing Committee on Copyright and Related Rights, 31st Session, Geneva, 7–11 December 2015.
[15] Barnard, "Performers' Rights," 1.

In Canada, performers have exclusive rights to control their performances, but once they have made a sound recording, they have limited subsequent control over the recorded performance. Performers also have a related right of equitable remuneration for the public performance of sound recordings in many countries, including Canada.[16]

In the 1980s and '90s the sound-recording industry developed into a multinational, multibillion-dollar industry, attracting performers who would typically rely on record companies – record labels – to record and distribute their performances.[17] The business relationship featured performers or artists who usually signed royalty contracts that committed them to record and promote a number of albums.[18] Technology and the Internet have changed this relationship. Not only are recording artists and professional musicians now recording their own performances, they are also promoting their recordings via their websites and social media platforms.

Performers were among the last participants in the creative arts to be legally protected by copyright or recognized in multinational intellectual property treaties.[19] In the domestic context, "performers' rights over their live performances ... are categorically different from copyrights historically, and so some might argue do not qualify constitutionally as 'Copyrights.'" Noel and Davis, however, suggest that "'Copyright,' both in conceptual and legal terms, is an umbrella under which creative activities of varying degrees are collected and connected."[20]

In 1997, amendments to the *Copyright Act* made it possible to ratify the Rome Convention, an international treaty for the protection of rights in sound recordings and recorded performances of music. The 1997 amendments added new copyrights for recording artists and musicians, known as "neighbouring rights."[21] The neighbouring

[16] Exclusive Rights in Copyrighted Works, 17 U.S. Code §106(6). The remuneration right is only for digital recording in the USA.
[17] "IFPI Publishes Digital Music Report," news release, International Federation of the Phonographic Industry (IFPI), 21 January 2010. In 2009, global digital music trade revenues reached US$4.2 billion, up 12 percent.
[18] R. Caves, *Creative Industries* (Cambridge, MA: Harvard University Press, 2000).
[19] *WIPO Intellectual Property Handbook: Policy, Law and Use*, ch. 5, "International Treaties and Conventions on Intellectual Property," 314, http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch5.pdf#rome.
[20] Wanda Noel and Louis B. Z. Davis, "Some Constitutional Considerations in Canadian Copyright Law Revision," (1981) 54 C.P.R. (2d), 17 at 22.
[21] *An Act to Amend the Copyright Act*, S.C. 1997, c.24.

rights amendments gave performers limited ability to control their live performances. Neighbouring rights also provided a source of revenue, through statutory or compulsory licenses shared equally with record labels. Additionally, Canadian professional performers were given a share in the proceeds of levies collected for private copying of musical recordings.[22]

The *Copyright Act* mandates that musical performers' right to receive revenue ("remuneration"), for example, income from radio broadcasts, music-streaming services and private copying, are accessible only by submitting to the hearing and tariff certification process administered by the Copyright Board.[23] The performers are required by the *Copyright Act* to join with record companies under a single agency mandated to collect fees for the use of their musical performances.

Re:Sound is the collective that administers recording artists' and professional musicians' right to receive revenues shared jointly with record companies.[24] Re:Sound represents the rights of the thousands of featured artists and professional session musicians who are CFM members. It collects neighbouring rights revenues when recorded musical performances are played on commercial radio, satellite radio, pay audio and music-streaming services, and by other businesses that use music, such as nightclubs, stores and fitness centres. CFM musicians also receive remuneration from proceeds collected by the Canadian Private Copying Collective (CPCC), which collects a levy on audio-recording media such as discs and tapes.

1. Amend the Definition of Sound Recording

Canadian songwriters and composers are entitled to royalties when their music used in films and TV programs is broadcast, streamed on the Internet, or shown in theatres. However, recording artists and professional musicians are denied this right and source of income.[25] The current definition of "sound recording" in the *Copyright Act* prevents performers from collecting royalties when their recorded performances of music on the

[22] Standing Senate Committee on Transport and Communications, Ninth Report, 21 April 1997, http://www.parl.gc.ca/35/2/parlbus/commbus/senate/Com-e/tran-e/17rp-e.htm?Language=E&Parl=35&Ses=2&comm_id=19.
[23] R.S.C. c. C-42, ss. 67 and 67.1.
[24] Formerly the Neighbouring Rights Collective of Canada; http://www.resound.ca/.
[25] SOCAN, "SOCAN's Internet Distribution," http://www.socan.ca/content/tariff-22-faqs.

sound tracks of audiovisual works, such as TV programs and movies, are broadcast or streamed on the Internet and when they are presented in movie theatres.[26]

This issue has been thoroughly reviewed in Canadian courts. In 2008 the Neighbouring Rights Collective of Canada (now Re:Sound) filed two tariffs with the Copyright Board for the collection of remuneration under section 19 of the *Copyright Act* when recordings of musical performances on the soundtracks of television programs and movies are broadcast or shown in theatres.[27] The Copyright Board denied the tariffs; it reasoned that a soundtrack of a television program or movie that includes pre-existing sound recordings is excluded from the definition of "sound recording." The Board decision was taken to the Federal Court of Appeal, which upheld the decision. The matter was then sent to the Supreme Court of Canada (SCC).

The SCC ruled that "a pre-existing sound recording that is part of a soundtrack cannot be the subject of a tariff when the soundtrack accompanies the cinematographic work."[28] This interpretation of "soundtrack," the Court reasoned, is consistent with the scheme of the Act and Parliament's intention, and the word "soundtrack" used in the definition of sound recording is not defined. "Therefore, a 'soundtrack' is a 'sound recording' except where it accompanies the motion picture. Otherwise, the exclusion would be superfluous."[29]

The Supreme Court made it clear, however, that this was a legislative matter requiring changes to the *Copyright Act*. The SCC even offered guidance to Parliament, whose job it was to amend the definition of "sound recording":

> For a pre-existing sound recording to be excluded from the interpretation of "soundtrack", Parliament would have had to make that intention explicit

[26] "'Sound recording' means a recording, fixed in any material form, consisting of sounds, whether or not of a performance of a work, *but excludes any soundtrack of a cinematographic work where it accompanies the cinematographic work*" [emphasis added]; *Copyright Act*, para 26.
[27] Re:Sound Tariff No. 7: "Motion Picture Theatres and Drive-Ins," 2009–11, and Tariff No. 9: "Commercial Television," 2009–13.
[28] *Re:Sound v. Motion Picture Theatre Associations of Canada* [2012] 2 SCR 376. Re:Sound argues that the word "soundtrack" as used in s. 2 refers only to the aggregate of sounds accompanying a cinematographic work and not to the soundtrack's constituent parts. In its view, since pre-existing sound recordings incorporated into a soundtrack are constituent parts of the soundtrack and not the aggregate of sounds accompanying the work, they do not fall within the scope of the word "soundtrack" as used in s. 2.
[29] Ibid., para 35.

> in the Act. This could have been achieved by excluding, for example, only "the aggregate of sounds in a soundtrack".[30]
>
> In my view, a pre-existing sound recording cannot be excluded from the meaning of "soundtrack" unless Parliament expressed an intention to do so in the *Act.* It could have done this by, for example, excluding only "the aggregate of sounds in a soundtrack".[31]

Such an amendment is consistent with Canada's current international copyright obligations, as well as with the copyright laws of both Australia and the United Kingdom.

Furthermore, the amendment suggested in the Supreme Court decision would be consistent with the *Copyright Modernization Act* and Canada's obligations under the WIPO Performances and Phonograms Treaty (WPPT), which Canada ratified on 13 May 2014 and which entered into force on 13 August 2014.[32] The Supreme Court decision may well have been different had the Re:Sound tariffs been filed with the Copyright Board after Canada ratified the WPPT.

The WPPT protects recorded musical performances incorporated into movies and television programs that were recorded separately from the images.[33] The agreed-upon statement for interpretation of the definition of "phonogram" (i.e., sound recording) in the WPPT is as follows:

> It is understood that the definition of phonogram provided in article 2(b) does not suggest that rights in the phonogram are in any way affected through their incorporation into a cinematographic or other audiovisual work.[34]

The Agreed Statement addresses pre-recorded music and voice dubbing added to the sound track of a film, TV program or other audiovisual work during the post-production stage. The WPPT therefore provides that a recorded musical performance already fixed

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[30] Ibid., preamble.
[31] Ibid., para 36.
[32] "Treaties and Contracting Parties," WIPO Performances and Phonograms Treaty (WPPT), http://www.wipo.int/ treaties/en/remarks.jsp?cnty_id=1540C. Canada has not made any declarations or reservations that would prevent it from amending the definition of sound recording.
[33] Benoît Machuel, "The Definition of the *Phonogram* in the WPPT," presentation to ALAI Congress, 15–17 September 2003.
[34] WPPT, http://www.wipo.int/wipolex/en/details.jsp?id=12743.

in a sound recording remains a sound recording, despite its incorporation in a film, television program or other audiovisual work.

Changing the definition of "sound recording" in the *Copyright Act* would not affect Canadian producers of TV programs, films or other audiovisual works, because the additional royalties would be paid by broadcasters and other digital distributors out of the income they earn from advertising and subscription revenues.

An amendment to the definition of "sound recording" to exclude a pre-existing sound recording from the definition would not, however, provide copyright protection to musicians whose performances are directly fixed (i.e., captured) in an audiovisual recording such as a movie or television program. Fixations of musical performances in audiovisual media have been specifically excluded from the protections provided by the WPPT, which stipulates: "The WIPO Performances and Phonograms Treaty does not cover performers' rights in the audiovisual fixations of their performances."[35]

The protection of musical performers for performances that are fixed in an audiovisual work at the same time that the images are fixed also needs to be addressed. We propose that such protection can be extended to performers through ratification of the Beijing Treaty for Audiovisual Performances, and therefore submit that it is essential for Canada to ratify this treaty without delay.

We support Canadian performers in television and film in their efforts to amend the *Copyright Act* to comply with the Beijing Treaty. In the Canadian music industry hearings, Mark Tetreault of the Canadian Federation of Musicians called on the government to sign and ratify the WIPO's Beijing treaty. He stated that this treaty recognizes the right of audiovisual performers including professional musicians to be fairly compensated for their work.[36]

[35] Beijing Treaty on Audiovisual Performances, adopted by the Diplomatic Conference on the Protection of Audiovisual Performances in Beijing, 24 June 2012, preamble.
[36] Mark Tetreault, Director of Symphonic Services, Canadian Federation of Musicians, evidence submitted to House of Commons Standing Committee on Canadian Heritage, 10 April 2014, 1110.

2. Remove the $1.25 Million Royalty Exemption for Commercial Broadcasters

Canadian recording artists and record companies don't start earning remuneration until broadcasters earn their first $1.25 million in advertising revenue. Songwriters and music publishers, however, collect royalties on commercial broadcasting income from the first cent earned from advertising by commercial radio broadcasters. Only musicians and record producers are deprived of royalties from the first $1.25 million of broadcasters' advertising income. This is an unnecessary subsidy for broadcasters at the expense of recording artists and professional musicians. It is a unique exemption in the *Copyright Act.*

The exemption was intended as a transitional provision when amendments to the *Copyright Act* introduced "neighbouring rights" 20 years ago. Canadian musicians have lost millions of dollars' worth of royalties over the past 20 years. The Re:Sound music-licensing company has called for elimination of this $1.25 million exemption for commercial radio that is contained in the Act.[37]

The Canadian Independent Music Association (CIMA) argued in a letter to the Honourable James Moore, then Minister of Canadian Heritage, that removing "this $1.25 million subsidy is a common-sense, cost-neutral solution that would provide an additional $7 million to $8 million in annual compensation to the Canadian music industry – without any cost to Canadian consumers or taxpayers."[38]

This legislated subsidy allows a highly profitable industry that requires no protection to avoid paying fair compensation for its use of recorded music. Media-Corps reported in May 2016 that commercial radio advertising income has not experienced a decline:

> According to Canada's Radio-television and Telecommunications Commission (CRTC), national radio advertising revenues in Canada rose by 2.3% to $508.8M, marking the sixth year of consecutive increases. Total ad revenues (which include national and local ad sales) from

[37] Ian MacKay, President, Re:Sound Music Licensing Company, evidence presented to Standing Committee on Canadian Heritage, 8 April 2014, 1205.
[38] Canadian Independent Music Association, "CIMA Requests Elimination of Royalty Payment Exemption," news release, 29 November 2011, http://cimamusic.ca/cima-requests-elimination-of-royalty-payment-exemption/.

> Canada's 704 commercial radio stations amounted to $1.6B, down 0.7% from 2014, marking the fifth year of relative stability in overall ad sales. This finding throws cold water on those who think that radio is a dying medium.[39]

Maintaining the exemption in s.68.1(1) that limits performers' royalties to a token $100 payment on the first $1.25 million of commercial broadcasters' annual advertising revenue perpetrates an unequal treatment of music users. Small, medium-sized and large businesses such as satellite radio, pay audio, restaurants, retail stores and background music suppliers pay royalties to music creators. Only commercial radio receives a legislated subsidy. Amending the *Copyright Act* to remove this unnecessary exemption for commercial radio would add millions of dollars' worth of royalties for recording artists at no cost to Canadian taxpayers.

3. Expand Private Copying to Include New Copying Technology

Recording artists rely on a number of different copyright royalty streams, some of which have decreased as a result of digital distribution. One of these is the private-copying levy, which applies to blank cassettes and CDs. In its hearings for the review of the Canadian music industry, the Standing Committee on Canadian Heritage heard evidence that because the levy does not apply to digital audio recorders, the amount available for distribution to rights holders has dropped from $35.6 million 10 years ago to less than $10 million per year.[40] Technology has changed the mechanics of private copying from recordable discs and tapes to memory cards and music storage and playback devices that are not deemed "recording mediums" by the Act.

Although the private-copying levy is relatively new in copyright terms, it has not been revised to address new private-copying technology. Despite efforts by performers and other creators to have the levy applied to newer forms of copying media, such as smart

[39] Media-Corps, "CRTC: Radio Advertising in Canada Growing Steadily," 6 May 2016, http://media-corps.com/radio-advertising-in-canada-growing-steadily/; Canadian Radio-television and Telecommunications Commission, "CRTC Releases 2015 Financial Results for Canadian Radio Stations," news release, 25 April 2016, http://news.gc.ca/web/article-en.do?nid=1056439.

[40] Brad Keenan, Director, Recording Artists' Collecting Society, Alliance of Canadian Cinema, Television and Radio Artists, evidence presented to Standing Committee on Canadian Heritage, 4 March 2014, 1115, http://www.parl.gc.ca/content/hoc/Committee/412/CHPC/Reports/RP6661036/chpcrp05/chpcrp05-e.pdf.

cards and memory sticks, these have been rejected by the Copyright Board, the Federal Court and previous governments.

In many of the export markets where Canadian performers and creators are competing, the laws protect local performers and creators and reward their contributions to the national cultural economy with an up-to-date, modern approach to private copying, including levies on audio-recording and playback devices.

On 7 November 2012, the Government of Canada enacted a new regulation of the *Copyright Act* that denies compensation to creators for music copied onto micro SD memory cards. The regulation excludes micro SD memory cards as a blank audio-recording medium to which the private-copying levy could be applied, despite their growing popularity among Canadians using new digital media and devices for making private copies of music.[41]

> By not following the well-established practice of providing stakeholders an opportunity to provide their input on proposed regulations, the government has denied creators an opportunity to participate in a decision that will have an impact on their livelihoods.[42]

This government should repair the mistakes that past governments have made in respect to the private-copying regime. The MicroSD Cards Exclusion Regulations need to be repealed. In the course of this consultation the government should undertake to prepare the necessary legislative changes needed to update the private-copying regime to reflect advances in digital copying technology. When updating the private-copying regime, the government should consider that both the Copyright Board and the Federal Court have signalled a need for change, and the prevalence of electronic storage gadgetry in the marketplace dictates that the private-copying provisions in the *Copyright*

[41] MicroSD Cards Exclusion Regulations (Copyright Act), SOR/2012-226. Memory cards in micro SD format, including micro SD, micro SDHC and micro SDXC cards, are excluded from the definition “audio recording medium” in s.79 of the *Copyright Act*.
[42] Canadian Private Copying Collective (CPCC), “CPCC Says Regulation Denying Compensation for Private Copying on MicroSD Memory Cards Harms Music Creators,” news release, 8 November 2012, http://www.cpcc.ca/en/november-82012-cpcc-says-regulation-denying-compensation-for-private-copying-on-microsd-memory-cards-harms-music-creators-2.

Act need to apply in the digital age.[43] Canadian recording artists who benefit from the private-copy levy have asked previous governments to make the necessary changes to keep up with the times so that a stream of income from private copies continues to flow back to performers and other creators.

4. Reform the Copyright Board

We believe that changes to the operation and practices of the Copyright Board need not be delayed by the larger copyright review under section 92 of the *Copyright Act*. Improvements to the operations and practices of the Copyright Board, which are procedural and regulatory in nature, need to be addressed and implemented as soon as possible.

Our submission to the Senate of Canada Committee of Banking, Trade and Commerce on the operation and practices of the Copyright Board of Canada, 7 November 2016, is attached as a Appendix "A" to this document.

5. Reducing Piracy in the Digital World

"Piracy" of intellectual property is not a happy topic. It carries with it a lot of negativity because it represents unrestricted loss of income and loss of markets. Music piracy has become the proverbial "elephant in the room," and it remains a problem that must be addressed continually as technology changes to accommodate new forms of piracy. In this consultation the government must seek to find a system that offers a practical response to piracy, that better aligns how Canadians consume content, and that helps Canadian professional musicians and other content creators succeed in a digital, globalized world where theft of intellectual property is a destructive by-product of innovation.

[43] CPCC, "CPCC Disappointed with Federal Court of Appeal Decision," news release, 11 January 2008, http://www.cpcc.ca/en/january-11-2008-cpcc-disappointed-with-federal-court-of-appeal-decision. "There is strong evidence to indicate that Canadians support compensating rights holders for private copies made onto digital audio recorders. A June 2006 survey conducted by Environics Research Group found that 75% of Canadians supported a levy on digital audio recorders. In a December 14, 2004 decision, even the Federal Court of Appeal stated that a levy on digital audio recorders is 'desirable' and that '[t]he evidence establishes that these recorders allow for extensive private copying by individuals. Their use can potentially inflict on rightsholders harm beyond any "blank audio recording medium" as this phrase has been understood to date.'"

Recording artists and professional musicians suffer losses from copyright infringement every time a sound recording of their performance is unlawfully traded on the Internet, through peer-to-peer file-trading or unlawfully streamed from pirate websites. Some of the witnesses who gave evidence before the Heritage Committee during its review of the Canadian music industry in 2014 highlighted the negative impact that unlawful peer-to-peer file-sharing has on music creators and artists. Many of the witnesses asserted that most young people do not realize the damage caused by file-sharing bit-torrent services.[44]

Digital technology revolutionized the piracy of recorded music, and then films and video games, by making it possible for individuals in their basements and bedrooms to perpetrate mass infringement of copyright simply, quickly and seemingly anonymously, using only a personal computer.

The notice provisions added to the *Copyright Act* in 2012 and recently brought into force cannot alone achieve a reduction in the levels of digital piracy in Canada. We believe that "notice and takedown" (NTD) should have been included among the amendments of the *Copyright Modernization Act*, because NTD is an appropriate way to address the responsibility of ISPs for websites that are accessible on their networks and are sources of copyright infringement.[45]

The latest report from the CRTC indicates that downloads have reached a new peak in Canada. The notice provisions in the *Copyright Act* have been a useful regulatory tool to respond to peer to peer file sharing. File-sharing in North America grew 44 percent from 2008 to 2014, and an increase of 9 percent (PB per month) is forecast for the period from 2015 to 2020.[46] The CRTC report may be a good barometer of peer-to-peer file-sharing activity in Canada: if downloading of pirate copies is up, then the uploading of pirate copies is also up. The correlation between the phenomena of increasing

[44] "Review of the Canadian Music Industry," 8–9.
[45] The European Union Directive on Electronic Commerce (Ecommerce Directive) mandates NTD in the laws of its 27 member states. The NTD provisions in the *Digital Millennium Copyright Act* (DMCA) are an effective procedure for holding online copyright infringement in check. However, many rights-holder organizations are asking governments to escalate this response to a "notice and stay down" approach.
[46] "White Paper: Cisco VNI Forecast and Methodology, 2015–2020," 1 June 2016, http://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/complete-white-paper-c11-481360.html.

downloading and peer-to-peer file- sharing seems evident. This is all the more significant because Popcorn Time and Cactus Player – similar file-sharing platforms that deliver music via peer-to-peer platforms without a website – are the future of file-sharing, and they are unaffected by takedown notices and domain-blocking.[47] Keeping the notice provision in the *Copyright Act* so that copyright owners may use this provision to enforce their rights against unlawful filesharing should remain a priority. The effectiveness of the notice provisions in sections 41.25 and 41.26 of the Copyright Act must not be diluted by new regulations.

Ad-supported piracy continues to plague creators.[48] The digital landscape is riddled with illegal services that do not pay recording artists. To unsuspecting consumers, many of these sites may appear to be legitimate; they are aided by intermediaries and search engines that, despite their claims to the contrary, continue to promote links to sources of pirated content. The Trustworthy Accountability Group (TAG) is a voluntary industry initiative of major advertisers that have taken TAG's Anti-piracy Pledge, requiring their advertising partners to take aggressive steps to help fight the $2.4 billion lost to pirate sites every year.[49] Voluntary industry initiatives can be effective but to apply equally they must be made law. The notice provisions recently added to the *Copyright Act* began as a voluntary initiative between copyright owners and Internet intermediaries nearly 15 years ago. We recommend that in the upcoming statutory review of the *Copyright Act*, the government add provisions to make the practice of supporting piracy with commercial advertising a violation of copyright and subject to statutory damages.

Finally, although it is not technically piracy, there needs to be a response to the value gap between recorded music being enjoyed by consumers and the revenues being returned to the music community. The International organization that represents the

[47] Robert Steele, "If You Think Piracy Is Decreasing, You Haven't Looked at the Data …" Digital Music News, 16 July 2015, http://www.digitalmusicnews.com/2015/07/16/if-you-think-piracy-is-decreasing-you-havent-looked-at-the-data-2/.
[48] "Apple + Google: Google Ad Supported Piracy in the Apple App Store," The Trichordist, 25 February 2016, https://thetrichordist.com/2016/02/25/apple-google-google-ad-supported-piracy-in-the-apple-app-store/.
[49] Farnaz Alemi, "Leading Advertising Agencies and Brands Join Voluntary Initiative to Reduce Ad-Supported Piracy," *MPAA Blog*, Motion Picture Association of America, 10 June 2016, http://www.mpaa.org/leading-advertising-agencies-and-brands-join-voluntary-initiative-to-reduce-ad-supported-piracy/#.WDOjwWB385o.

recording industry tells us that consumption of music driven by the digital technology that makes streaming services and user-upload platforms such as YouTube popular is contributing to the value gap. Increased exposure is not rewarded by rising revenues being returned to rights holders.[50] The value gap needs to be addressed through regulation and policies. This government should consider following the example already set by the European Union and the United States to restore fair markets for music and reform the "safe harbour" exemptions that encourage user-upload platforms.[51]

CANADIAN CONTENT

6. Runaway Post-production

Canadian-content requirements must extend to post-production activities in order to keep valuable cultural jobs in Canada. Musical sound tracks and other post-production components are often created offshore without using Canadian musicians. Billions of dollars' worth of public funds have been invested in the film and television industry in Canada to create and retain the high-quality jobs attached to the industry. The Canadian professional musicians who record the musical scores for movies and television shows are being left behind because this post-production work is going to foreign musicians.

The American Federation of Musicians has issued a report exposing the plight of musicians who record the musical scores of movies and television programs. It examines the trends and forces contributing to a dramatic decline in domestic employment for recording musicians in the United States who are working to industry standards.[52] The report concludes that, by increasingly offshoring recording work, Hollywood studios and production companies are saving relatively small amounts of money. Those savings, however, generate disproportionate costs for musicians, taxpayers and the broader economy. Hollywood can easily afford to meet the top

[50] Frances Moore, "Introduction," *Global Music Report 2016: State of the Industry* (London: International Federation of the Phonographic Industry, 2016), 5, http://www.ifpi.org/downloads/GMR2016.pdf.
[51] Billboard, "European Lawmakers Urge Tightening of Safe Harbor Exemptions," 21 June 2016, http://www.billboard.com/articles/business/7415489/european-lawmakers-urge-tightening-of-safe-harbor-exemptions.
[52] Joh Zeroinick, "Keeping the Score: The Impact of Recapturing North American Film and Television Sound Recording Work," report prepared for the American Federation of Musicians (Los Angeles: LAANE, December 2014), 3.

employment standards for musicians, thereby not only providing ample quality employment but also strengthening the domestic economy.[53]

Producers of Canadian films made with public money are actually encouraged by gaps in the Canadian Audio-Visual Certification Office (CAVCO) qualifications to take musical post-production work offshore so long as the composer of the music is Canadian. Loss of this post-production work hurts Canadian musicians. The gaps in the CAVCO qualifications deprive Canadian musicians of work and income that is instead going to foreign musicians at lower prices. Many of these foreign musicians work in countries that have weak or nonexistent labour regulations or under regimes where organized labour is discouraged by government policy and laws.

We urge the Minister of Canadian Heritage to review this matter and to make changes to the CAVCO qualifications in order to disincentive domestic media producers from using offshore musicians to record scores for Canadian movies and television programs created by Canadian musicians in Canada.

7. Funding Canadian Musicians

We are pleased that the 2016 Budget will invest $1.9 billion in the arts and culture over the next five years.[54] We encourage the federal government to continue to support the Canadian music industry through a series of direct and indirect measures. Canadian Heritage plays a key role through the Canada Music Fund (CMF), which is the support needed by Canadian music creators, artists and entrepreneurs to continue to provide a wide range of music choices for Canadians and for our export markets. The CMF should continue to address four separate components: New Musical Works, Music Entrepreneur, Collective Initiatives, and Canadian Music Memories. We recommend that the New Musical Works and Collective Initiatives components, which are administered by third-party agencies – Fondation Musicaction and the Foundation Assisting Canadian Talent on Recording (FACTOR) – be reviewed to ensure that they are indeed servicing the music community.

[53] Ibid.
[54] CBC News, "Budget Boosts Funding to Canada Council, CBC," 22 March 2016, www.cbc.ca/news/canada/ottawa/arts-federal-budget-canada-council-heritage-1.3501480.

8. Canadian Content Regulations

Radio plays an important role in introducing listeners to new music and artists. The Canadian Radio-television and Telecommunications Commission (CRTC) policies and regulations ensure that Canadian works are played on Canadian radio stations. Licensed stations must devote a percentage of their weekly music broadcasting to Canadian content. It is worth noting, however, that the CRTC does not regulate online music-streaming services.[55]

Canadians' use of streaming services is growing. In 2014 the CRTC reported that 52 percent of Canadians streamed music videos on YouTube, 22 percent streamed AM/FM radio online, 18 percent streamed personalized online music, and 21 percent listened to podcasts.[56] Polls by the Angus Reid Institute conducted during 10–13 May 2016 show that while Canadians support some form of content regulation for radio broadcasting, they do not exhibit the same support for content quotas for Internet music services.[57]

> In isolation, quotas are probably not as effective as when they are included in a more all-encompassing approach to supporting and developing local music. The challenge is to ensure that the strategic fit of each element in the toolkit is either contributing to the common goal or objective or that it is complimentary to realizing the expected outcome.[58]

The CRTC defines a Canadian musical selection in its Radio Regulations.[59] Within these regulations, four elements are used to qualify songs as being Canadian: music, artist, performance and lyrics (MAPL). The MAPL system is designed primarily to increase the exposure of Canadian musical performers, lyricists and composers to Canadian audiences and is a component of the Canadian-content quotas for radio

[55] CRTC, "Canadian Content Requirements for Music on Canadian Radio," http://www.crtc.gc.ca/eng/cancon/r_cdn.htm.
[56] CRTC, "Communications Monitoring Report 2016: Executive Summary," http://www.crtc.gc.ca/eng/publications/reports/policymonitoring/2016/cmrs.htm.
[57] Nicole Riva, "Canadian Content Rules for Online Media Have Weaker Support, Survey Suggests," CBC News, 3 June 2016, http://www.cbc.ca/news/canada/angus-reid-crtc-canadian-content-1.3613646.
[58] Shelley Stein-Sacks, "On Quotas as They Are Found in Broadcasting Music (2012)," CRTC, 9 February 2012, http://www.crtc.gc.ca/eng/publications/reports/rp120309c.htm.
[59] Canada, Radio Regulations, 986 (SOR/86-982), http://laws.justice.gc.ca/eng/regulations/SOR-86-982/.

broadcasters. It also strives to strengthen the Canadian music industry, including its creative and production elements.[60]

In the future review of the *Broadcasting Act*, the applicability of content quotas will need to be examined in relation to online services. Specifically it remains to be determined if the MAPL system can be adapted to a digital world. We urge the government to work with the music community to transition content quotas and the MAPL designation from an analog to a digital world.

9. Support for Live Music Venues in the Digital Age

Digital content consumption and "subscription-based" digital content services are changing the relationship between artists and their fans in a variety of ways.[61] Live music, as a traditional promotional and marketing tool to help sell recorded music, has shifted as a consequence of "peer discovery" on social media platforms and music sourced from paid music downloads and subscription music services.

According to findings in a study conducted by Nordicity in 2014, live music has become a more central part of the music consumption experience. Interviews consulted in the study suggested that "live music has become a complementary content consumption platform that is enjoyed alongside the consumption of recorded music and that provides a richer, more holistic musical experience."[62] From the recording artists' perspective, while live performances present opportunities for an additional income stream and allow them to connect with fans and build a larger base of support, it is becoming more difficult and expensive for musicians to fund touring themselves, without the traditional support of record companies. Another trend revealed by the study is that funding for live performances is directed towards large venues. Independent artists are the hardest hit by these trends, which are only compounded by a shortage of the smaller, more affordable venues that cater to them.

Although the federal government may not be directly responsible for assisting recording artists with live performance opportunities (other than for federally sponsored events), it

[60] CRTC, "The MAPL System: Defining a Canadian Song," http://www.crtc.gc.ca/eng/info_sht/r1.htm.
[61] Music Canada and Nordicity, *Live Music Measures Up: An Economic Impact Analysis of Live Music in Ontario*, 10. The interviews for the study were conducted in November 2014.
[62] Ibid.

nevertheless needs to work with provincial and local governments to ensure that there is adequate funding to support venues where recording artists can perform live. Support must extend to smaller venues that cater to new and independent performers. Support of this kind could be directed through one of the music funds or achieved through tax-incentive programs that encourage small music venues.

10. Music Education

In the review of the Canadian music industry hearings before the House Standing Committee on Canadian Heritage, Mark Tetreault, former Director of Symphonic Services for the Canadian Federation of Musicians, remarked that many orchestras across the country are active in the schools. He gave the example of El Sistema, an orchestral youth-training initiative that offers "coaching and rehearsing … leading to exciting performances."[63] Voluntary music education should be encouraged. The CFM supports proposals from other sectors of the music community that recommend more music education.

On a more sobering note, we call on governments at all levels to restore music education in public schools. In Ontario, for example, 43 percent of elementary schools have a specialist music teacher, either full-time or part-time – a decline from 49 percent in 2012.[64] The trend in the past decade has been to increase the number of elementary schools that have an itinerant music teacher rather than a full-time music instructor. Unfortunately, 29 percent of elementary schools still have neither a specialist nor an itinerant music teacher.

We recommend that governments at all levels work together to improve music learning in our public schools. This commitment should be matched with strong policy and funding support to ensure that music continues to be integral to our definition of successful schools.

[63] "Review of the Canadian Music Industry," 1115.
[64] People for Education, *Public Education: Our Best Investment* (Toronto: People for Education, 2014), 4, http://www.peopleforeducation.ca/wp-content/uploads/2014/06/annual-report-2014-WEB.pdf.

11. Exporting Canadian Musicians

We are pleased that the Minister of Canadian Heritage will restore the Trade Routes and PromArt international cultural promotion programs.[65] Many witnesses who gave evidence in the Canadian Heritage Committee hearings on the Canadian music industry in 2014 underscored the fact that, in the new context of digital broadcasting, it is more important than ever for Canadian musicians to tour within our country and abroad.

For many recording artists and musicians, touring provides the exposure necessary to build a career. Touring on a local scale can contribute to the cultural vitality of communities and add a boost to the economy at large. The demand for live performances by Canadian recording artists contributes to the economic vitality of concert halls, theatres, stadiums, bars and restaurants, as well as music festivals throughout the country.

At the music industry review hearings in 2014 the witness from Music Canada spoke about export as “critical” to the development of a recording artist's career.[66] The “Next Big Bang” program is an example of a public–private collaboration to invest in the growth of international markets and benefits individual Canadian recording artists and record companies. Such projects contribute to the reputation of Canadian recording artists and musicians, who also become cultural ambassadors to the world.[67]

Two earlier government cultural export programs were the Trade Routes program of the Department of Canadian Heritage and the PromArt program of the Department of Foreign Affairs and International Trade. The Trade Routes program contributed to initiatives by Canadian arts and cultural entrepreneurs to develop and pursue long-term export strategies. PromArt helped bring international buyers to Canada.

Several suggestions were made to the Standing Committee for improving the efficiency and efficacy of federal support programs, including increasing the budgets of touring

[65] Canada, Minister of International Trade Mandate Letter, Office of the Prime Minister, 2015, http://pm.gc.ca/eng/minister-international-trade-mandate-letter.
[66] Graham Henderson, Music Canada, evidence submitted to House of Commons Standing Committee on Canadian Heritage, 13 May 2014, http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=6596848&Language=E&Mode=1&Parl=41&Ses=2.
[67] Ibid.

support initiatives currently available through various funding organizations. It was also pointed out that, rather than acting in isolation, the federal government should collaborate with the other players. The complementary report by the Liberal Party of Canada added the following recommendation to the Committee's final report, under point 5, "Better support for touring within Canada and abroad":

> It is recommended that the Government of Canada consult members of the music sector and other levels of government to improve funding and efficiency of the support granted to Canadian musicians for domestic and international touring.[68]

We recommend that the government follow through with its commitment to improve funding and support for Canadian musicians touring domestically and internationally.

SUMMARY OF RECOMMENDATIONS

Many Canadian recording artists and professional musicians have captivated international markets and left their mark at the top of the charts. We have much to offer the world because we are a society that values creativity and innovation. Our government must ensure that its policies and regulations reflect the value we have for our creative community and the arts. This consultation should lay the foundation for the regulatory and policy tools and financial support needed to ensure that Canadian professional musicians thrive in the digital environment now and for the years ahead.

Copyright for Recording Artists and Musicians - Changes to the *Copyright Act* must begin with this consultation if recording artists, professional musicians and other content creators are to succeed in a digital, globalized world.

1. **Amend the Definition of Sound Recording**: The current definition of "sound recording" in the Copyright Act needs to be amended so that performers can collecting royalties when their recorded performances of music on the sound tracks of audiovisual

[68] Stéphane Dion, "Complementary Report by the Liberal Party of Canada," in "Review of the Canadian Music Industry," http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=6596848&Language=E&Mode=1&Parl=41&Ses=2.

works, such as TV programs and movies, are broadcast or streamed on the Internet and when they are presented in movie theatres.

2. **Remove the $1.25 Million Royalty Exemption for Commercial Broadcasters**: Amending the Copyright Act to remove this unnecessary exemption for commercial radio would add millions of dollars' worth of royalties for recording artists.

3. **Expand Private Copying to Include New Copying Technology**: In the course of this consultation the government should undertake to prepare the necessary legislative changes needed to update the private-copying regime to reflect advances in digital copying technology.

4. **Reform the Copyright Board**: Improvements to the operations and practices of the Copyright Board, which are procedural and regulatory in nature, need to be addressed and implemented as soon as possible.

5. **Reducing Piracy in the Digital World**: Our cultural policies and laws must offer a practical response to piracy, that better aligns how Canadians consume content, and that helps Canadian professional musicians and other content creators succeed in a digital, global market.

Canadian Content - Valuing culture through up-to-date legislation, funding innovation and creativity, and education is "key to having a strong society, a vibrant democracy, and to promoting Canadian cultural content to the world.

6. **Runaway Post-production**: We urge the Minister of Canadian Heritage to make changes to the CAVCO qualifications in order to disincentive domestic media producers from using offshore musicians to record scores for Canadian movies and television programs created by Canadian musicians in Canada.

7. **Funding for Musicians**: We encourage the federal government to continue to support the Canadian music industry through a series of direct and indirect measures.

8. **Canadian Content Regulations**: We urge the government to work with the music community to transition content quotas and the MAPL designation from an analog to a digital world.

9. **Supporting Venues for Live Performance**: The federal government needs to work with provincial and local governments to ensure that there is adequate funding to support venues where recording artists can perform live.

10. **Music Education**: We recommend that governments at all levels work together to improve music learning in our public schools.

11. **Exporting Canadian Musicians**: We ask that the government follow through with its commitment, made in the Music Industry Review, to improve funding and support for Canadian musicians touring domestically and internationally.

Thank you for the opportunity to share our views and provide our recommendations in this consultation. We would be pleased to reply to any questions or comments you might have and invite you to direct them to Liana White, Executive Director lwhite@afm.org.

Yours sincerely,

Alan Willaert

Vice President from Canada

APPENDIX "A"

The Operation and Practices of the Copyright Board of Canada
Senate of Canada
Committee of Banking, Trade and Commerce

Submission of the
Canadian Federation of Musicians
November 7, 2016

Introduction:

On behalf of Canadian professional musicians the Canadian Federation of Musicians (CFM) appreciates this opportunity to participate in the consultation of the Senate Committee on Banking, Trade and Commerce's, study of the operation and practices of the Copyright Board of Canada. An efficient and effective Copyright Board is vitally important to the lives and futures ofr professional Canadian musicians.

We believe that the changes needed to improve the operation and practices of the Copyright Board of Canada should be a separate process from the 2017 Copyright review under s.92 of the *Copyright Act*. We believe that changes to the operation and practices of the Copyright Board need not be delayed by the larger copyright review under section 92 of the *Copyright Act*. Improvements to the operations and practices of the Copyright Board, which are procedural and regulatory in nature, need to be addressed and implemented as soon as possible.

Who we are:

The CFM represents Canadian professional musicians that perform in duos, trios, quartets, quintets and orchestras, in bars, churches, recording studios, schools, concert halls, and stadiums. Performing musicians are the voice and the front line of the music industry in Canada. We hear them perform live, recorded on discs and tapes, broadcast on the radio and television and transmitted on the internet. Without performing musicians all the great music that is written would remain unheard.

The CFM has been representing the interests of Canadian musicians for 120 years, as the representative of professional musicians in a broad range of collective bargaining and legislative actions. We provide vital resources for Canadian musicians at any stage in their careers, on any platform, from live concert to recorded performance, broadcast and film scoring.

The CFM is the Canadian National office of the American Federation of Musicians of the United States and Canada (AFM). The CFM together with the AFM is comprised of 200 Local offices across the United States and Canada, representing a membership of approximately 85,000 professional musicians, 17,000 of which are members in Canada. In June 2016 AFM celebrated its 100th Convention.

Why the Copyright Board is important to Canada's Professional Musicians

In this consultation the CFM will focus on the regulatory, policy tools and financial support needed to ensure that Canadian professional musicians thrive in the digital environment now and for the years ahead. The efficient operation of the Copyright Board in the digital environment is integral to the future of Canadian professional musicians.

Despite their pivotal role in our cultural industries, Canadian professional musicians were the last to achieve legal recognition in the *Copyright Act*. In 1994 the *Copyright Act* was amended to give performers copyrights under Canada's admission to the World Trade Organization and Trade-Related Aspects of Intellectual Property Rights (WTO/TRIPs).

In 1997 further amendments to the *Copyright Act* made it possible to ratify the Rome Convention, an international treaty for the protection of the rights in sound recordings and recorded performances of music. The 1997 amendments added new rights for performers , known as "neighbouring rights".[69] The neighbouring rights amendments gave performers the ability to control their live performances. The neighbouring rights also provided a source of revenue, shared equally with record labels, to performers whose recorded performances were transmitted by any form of broadcasting and telecommunication. Additionally Canadian

[69] An Act to Amend the Copyright Act, S.C. 1997, c.24

professional performers were given a share in the levy proceeds collected for private copying of musical recordings.[70]

The *Copyright Act* mandates that musical performers' rights to receive remuneration, for example the income from radio broadcasts, music streaming services and private copying are only available by submitting to the hearing and tariff certification process administered by the Copyright Board.[71]

Re:Sound is the collective that administers professional musicians right to receive revenues shared jointly with record companies. ReSound represents the rights of thousands of featured and session musicians that are CFM members. It collects the neighbouring rights revenues when recorded musical performances are played on commercial radio, satellite radio, pay audio, music streaming services and in other businesses that use music, like nightclubs, stores and fitness centres. CFM musicians also receive remuneration from the proceeds collected by the Canadian Private Copying Collective (CPCC) that collects a levy on audio recording mediums, like discs and tapes.

The income professional musical performers receive is directly dependent on the operation of the Copyright Board, which has the sole mandate to certify tariffs proposed by Re:Sound and the CPCC. The Copyright Board is very important to the wellbeing of Canadian performers. When there are inefficiencies and delays in certification of Re:Sound and CPCC tariffs, performers suffer the consequences.

Certifying a tariff at the Copyright Board is slow and expensive. There are no viable expedited alternatives to the hearing and certification process. The Copyright Board is geared to litigation not alternative dispute resolutions.

[70] http://www.parl.gc.ca/35/2/parlbus/commbus/senate/Com-e/tran-e/17rp-e.htm?Language=E&Parl=35&Ses=2&comm_id=19 MONDAY, April 21, 1997 The Standing Senate Committee On Transport And Communications NINTH REPORT

[71] R.S.C. c. C-42 ss. 67 and .67.1

There is debate over the reasons for the length of time the Copyright Board requires to render a decision and certify a tariff.[72] There is no debate that there are delays. In all cases there is a significant "period of retroactive application" before a tariff is certified or in other words before all the interested parties including the general public are certain of the amount of the tariff to be paid. This means that the rates for many tariffs are not certified by the Copyright Board until after the period in which they were to apply.

Delays that causing retroactive application of tariffs negatively affect both copyright users and copyright owners. This is especially true of musical performers whose earnings are often cobbled together from many sources, such that a delay in tariff certification means that a portion of their income is held in abeyance. An obvious example is Re:Sound Tariff 8 for webcasting which took eighteen months post hearing for a decision and certification of the tariff by the Copyright Board. Tariff 8 was first proposed in 2008 and so in total took six years to be certified by the Copyright Board. The longest delay is SOCAN's proposed Tariff 22A for the period covering 2011-2013 which remains uncertified today.

Prolonged delays in certification of Tariffs create uncertainties in the market place for technical innovations and new services. If investors are unsure of the costs of new services and hold back their entry into the Canadian market the result is that Canadian musical performers do not receive income or the benefits from exposure that the new services would bring them. Two of the biggest webcasting services, Spotify and Pandora were hesitant to begin operations in Canada. Pandora, in fact, is still not available in Canada.[73]

Separate Process

[72] http://jeremydebeer.ca/canadas-copyright-tariff-setting-proces .
Professor De Beer's suggests in his study "On average, tariffs are certified 2.2 years after the beginning of the year in which they become applicable, which is in effect a period of retroactivity. Howard Knopf questions this analysis and instead finds based on the Board's own actual numbers from its website it takes four years or more for a contested tariff to get to a hearing and if often takes two years or more for a decision to be rendered after a hearing. http://excesscopyright.blogspot.ca/2016/06/the-canadian-copyright-board-to-be-or.htmls/

[73] The following message is received when access to the Pandora service is initiated from Canada: "Pandora isn't available where you are… yet. Pandora is only available in the U.S., Australia, and New Zealand right now – but we are working on bringing our music service to other parts of the world. Enter your email address below, and we'll notify you when Pandora is ready to launch in your country." http://www.pandora.com/restricted

The Standing Committee on Canadian Heritage, made the following recommendation in respect of the Copyright Board in its 2014 report *Review of the Canadian Music Industry*.

> "The Committee recommends that the Government of Canada examine the time that it takes for decisions to be rendered by the Copyright Board of Canada ahead of the upcoming review of the *Copyright Act* so that any changes could be considered by the Copyright Board of Canada as soon as possible."[74]

We agree with the Standing Committee on Canadian Heritage. This Committee's study must recommend that the operation and practices of the Copyright Board of Canada be addressed in a separate process from the 2017 Copyright review under s.92 of the *Copyright Act*. Improving the operations and practices of the Copyright Board should be accomplished through the regulations set out in sections 66.6 and 66.91 of the *Copyright Act*. This can be accomplished without debate in Parliament and without the need for amendments to the Copyright Act.

The Copyright Board should be tasked with setting out draft regulations for approval by the Governor in counsel under section 66.6(1) as follows:

> 66.6 (1) The Board may, with the approval of the Governor in Council, make regulations governing
>
> (a) the practice and procedure in respect of the Board's hearings, including the number of members of the Board that constitutes a quorum;
>
> (b) the time and manner in which applications and notices must be made or given;
>
> (c) the establishment of forms for the making or giving of applications and notices; and
>
> (d) the carrying out of the work of the Board, the management of its internal affairs and the duties of its officers and employees.

Additionally we recommend that regulations in respect to policy and general criteria be made under section 66.91 as follows:

[74] Review of the Canadian Music Industry, p. 25.

66.91 The Governor in Council may make regulations issuing policy directions to the Board and establishing general criteria to be applied by the Board or to which the Board must have regard

(a) in establishing fair and equitable royalties to be paid pursuant to this Act; and

(b) in rendering its decisions in any matter within its jurisdiction.

1997, c. 24, s. 44.

Recommendations

In the remainder of our submission we have raised four issues concerning the operation and practices of the Copyright Board to be addressed by regulations; Voluntary Agreements, Mandatory Mediation, Expedited Process and, Criteria for Rate-Setting.

1. Voluntary Agreements

In countries such as Finland, France, Greece, Israel and, Mexico there are no rate-setting procedures other than voluntary licenses.[75] One approach to relieve the Copyright Board of the back log of tariff certifications is to give consideration to the recognition of voluntary licenses. Voluntary licensing with recourse to a tribunal is an approach that is also taken in the United Kingdom. Under the UK scheme the collective licensing for remuneration is voluntarily agreed upon by contract between the parties. Only when an agreement between the parties cannot be reached, the copyright tribunal plays a part in the licensing process.[76]

In the Netherlands, the tariff for the performers rights are made by agreement with the users. The remuneration is distributed to phonogram producers and performers on a 50-50 basis. If parties do not agree on the amount that should be paid, the High Court in The Hague has exclusive jurisdiction to hear disputes over remuneration. [77]

[75] National Reports to ALAI 2015 International Congress http://www.alai2015.org/en/national-reports.html; Israel (not private copying set by law) and Finland (CMOs subject to general oversight by Ministry)
[76] National Reports to ALAI 2015 International Congress http://www.alai2015.org/en/national-reports.htmlRemuneration for the use of works Exclusivity v. other approaches Response Of BLACA (British Literary And Artistic Copyright Association) May 4, 2015
[77] National Reports to ALAI 2015 International Congress http://www.alai2015.org/en/national-reports. Questionnaire for the ALAI Study Days 2015 in Bonn Remuneration for the use of works, Exclusivity v. Other Approaches

2. Mandatory Mediation

All tariff matters before the Copyright Board should be subject to a prehearing mediation process to assist parties to reach settlement and avoid the cost and time of a hearing. In addition to the benefits to the parties, a regulatory requirement for mandatory mediation would free up the resources of the Copyright Board for matters that cannot be settled. The mandatory mediation program and case management under the Ontario Rules of Civil Procedure, that applies in Toronto, Ottawa and Windsor to certain civil actions, is a model for the Copyright Board to follow.[78] It is designed to help settle cases early in the litigation process to save time and money. In Ontario the mandatory mediation program in conjunction with case management has been effective in reducing the number of cases that proceed to a full hearing.[79]

3. Expedited Process

Considerations for an expedited process should be included among the recommendations in the Committee's study of the operation and practices of the Copyright Board. Expediting hearings that are conducted with a simplified process could alleviate the backlog of matters currently before the Copyright Board and provide an alternative to formal hearings and procedures in future matters.

A precedent of an expedited process can be found in the Australian copyright law which requires that …"proceedings shall be conducted with as little formality, and with as much expedition, as the requirements of this Act and a proper consideration of the matters before the Tribunal permit."[80] Both the United Kingdom and United States copyright tribunals provide for rules to expedite simplified matters. In the case of the United Kingdom, the Copyright Tribunal Rules provide for a default track for small applications where the monetary value is low and the facts are simple.[81] In the United States the law provides that matters before the Copyright Royalty

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[78] Ministry of the Attorney General Fact Sheet: Mandatory Mediation under rules 24.1 and 75.1 of the Rules of Civil Procedure http://www.attorneygeneral.jus.gov.on.ca/english/courts/civil/fact_sheet_mandatory_mediation.html

[79] Ontario's Auto Insurance Dispute Resolution System Review, The Ontario Bar Association October 1, 2013 Submitted to: Ministry of Finance, Industrial and Financial Policy Branch, Automobile Insurance Policy Unit. "As noted above, we do not believe that the previous backlog of cases was caused by the existence of mediation as a mandatory step in the dispute resolution process. In fact, mandatory mediation had a very high rate of resolution, removing approximately two thirds of cases from the system, so that they did not have to proceed through a pre-arb hearing and an arbitration, which are much more time consuming and resource intensive processes."

[80] Australia Copyright Act1968 – S.164

[81] The Copyright Tribunal Rules 2010, S.I. 2010 No. 791

Judges may proceed by a paper process without a hearing where all parties agree and there is no need for an evidentiary hearing.[82]

Another avenue to be considered is to set out specified time-lines in the regulations for any matter before the Copyright Board. The previous Chair of the Copyright Board vowed to shorten the time for the Copyright Board to render its decisions after a hearing.[83] The United States copyright law provides that proceedings before the Copyright Royalty Judges follow a schedule of periods in a timeline from filing a petition to appeal.[84] While differences in jurisdiction may not allow for a similar timeline in the Canadian context a less open ended hearing process is needed.

4. Criteria for Rate-Setting

The CFM was among the seventy (70) music organizations that publicly opposed the Tariff 8 decision. The decision set royalty rates for non-interactive webcasting services in Canada. This decision also drew into the open debate the need for rate setting criteria that includes consideration of existing market place agreements.

> "The Board's decision comes as the result of an inherently flawed system that lacks clear criteria for rate-setting and allows the Board to reject market rates. The Board had no statutory or regulatory obligation to take into account existing agreements on webcasting royalties that have been successfully negotiated between the music industry and its business partners for these services. The resulting rates ignore international standards that support the growth and development of the industry in the world marketplace. Canada, in fact, stands alone among its major trading partners – including the United States, Australia, the United Kingdom, France and the Netherlands – in its adherence to a

[82] US, 17 U.S.C. § 803(b)

[83] Speech by then Copyright Board Chair, the Honourable Justice William J. Vancise, Intellectual Property Institute of Canadian and McGill University, Toronto, August 23, 2006, p. 6 http://www.cb-cda.gc.ca/about-aprops/speeches-discours/20060823.pdf

[84] 17 U.S. Code § 803 - Proceedings of Copyright Royalty Judges; 30 day period for interested parties to file petitions to participate §803(b)(1)(A)(ii), 3 month mandatory negotiation period §803(b)(3), 60 day discovery period [§803(b)(6)(C)(iv), 21 day settlement conference §803(b)(6)(C)(x), Determination by the Copyright Royalty Judges must be rendered within 11 months after the settlement conference and in no event later than 15 days before the expiration of the current rates (if any) §803(c)(1), 30 day appeal window §803(d)(1)

mandatory tribunal process that determines royalties without regard for what currently works in the marketplace."[85]

A report written by Prof. Marcel Boyer, Professor Emeritus of Economics, Université de Montréal for the C.D. Howe Institute entitled, "The Value of Copyrights in Recorded Music: Terrestrial Radio and Beyond" concluded that the value of recorded music is about 2.5 times greater than the level of copyright royalties certified by the Copyright Board.[86] Professor Boyer found that the approach taken by Copyright Board had undervalued copyrights in the context of the commercial terrestrial radio industry and that this has been carried over into the determination of tariffs for non-interactive internet webcasting.

We submit that specific criteria for rate setting such as recourse to comparative market value analysis needs to be set out in the regulations under section 66.91 of the *Copyright Act*.

Conclusion

Again we wish to request that the Committee recommend that this study of the operation and practices of the Copyright Board of Canada and recommendations for improvements should be a separate process from the 2017 copyright review under s.92 of the *Copyright Act*.

We thank the Committee for providing the CFM, on behalf of its professional musicians, the opportunity to address our concerns with the operation and procedures of the Copyright Board. We would be pleased to address any questions you might have in regard to our submissions.

[85] Artists & Music Companies Support Re:Sound Application for Judicial Review of Copyright Board Tariff 8 Decision http://www.newswire.ca/news-releases/artists--music-companies-support-resound-application-for-judicial-review-of-copyright-board-tariff-8-decision-514461981.html

[86] Marcel Boyer, The Value of Copyrights in Recorded Music: C.D. HOWE Institute commentary NO. 419 https://www.cdhowe.org/public-policy-research/value-copyrights-recorded-music-terrestrial-radio-and-beyond