Movie Theatre Association of Canada
Submission to the Standing Committee on Industry, Science and Technology
September 20, 2018

INTRODUCTION

This submission is made on behalf of the **Movie Theatre Association of Canada** (MTAC) in respect of the section 92 review of the *Copyright Act ("The Act")*. MTAC wishes to address a single issue that has been raised in this proceeding by the music industry and this relates to their proposal to amend the definition of "sound recording".

MTAC believes the current definition of "sound recording" in the *Act* strikes the appropriate balance between creators, rightsholders, and exhibitors. The amendment proposed by the music industry will aggravate the forces of disruption affecting exhibitors and risks further destabilizing the role of cinema as the primary showcase for Canadian creators within the domestic and global film industry.

ABOUT MTAC

Founded in 1980, MTAC is the trade organization representing the interests of exhibitors behind more than 3,000 movie screens across Canada. MTAC is the voice of Canada's exhibitor network, communicating their unique needs and challenges to industry stakeholders worldwide.

Among other mandates, MTAC is tasked with representing Canadian exhibitors in negotiations with Canadian collective societies and intervening in proceedings such as the statutory review that is before this Committee. In 2012, MTAC successfully responded to an appeal before the Supreme Court of Canada on matters relating to the legislative intent of the 1997 changes to the *Act* and the appropriate interpretation of the definition of "sound recording" that the music industry has again raised in these proceedings.[1]

RECORD LABELS TAKE AIM AT CANADIAN CINEMA

In this review, a group of stakeholders led by multi-national record labels and their Canadian affiliates have expended considerable resources to promote the idea of a so-called "gap" in the business of copyright. This group claims significant, direct impacts are being suffered by Canadian artists as a result of alleged "subsidies" embedded in the *Act*. The arguments put forward by this group suggest bleak prospects for those stakeholders and depict a diminishing future where technology causes creators to fall further behind if their demands are not met with legislative amendments.

This package from the music industry contains no discussion or accounting of its historical reluctance to adapt to changing business models and scarcely any reference to its current success in harnessing streaming technology as a significant new source of revenue. The

[1] *Re:Sound v. Motion Picture Theatre Associations of Canada*, 2012 SCC 38, affirming 2011 FCA 70 and the Federal Court of Appeal's dismissal of an application for judicial review from the decision of the Copyright Board dated September 16, 2009 ("Reasons for the decision dealing with NRCC Tariffs 7 and 9", the "Copyright Board Decision").

arguments are short on legislative context and take no accounting of the multiple levels of consideration the consequences of their proposed amendment has already received by the Copyright Board, the Federal Court of Appeal, and the Supreme Court of Canada. In all of those proceedings, the definition of "sound recording" has been defended and upheld as the intentional result of a careful examination of the *Act* and its purpose as enacted by thoughtful legislators. Contrary to the repeated refrain from some in the music industry, the definition is not arbitrary, inequitable, or unjustified.

We share the view expressed by others that changes to Copyright legislation should only be considered after careful due diligence, a detailed examination of the current system, and a frank discussion of who ultimately stands to benefit. Despite multiple references to the plight of Canadian artists, the proposal from the music industry contains no details or assurances as to how the proceeds from the requested amendments will land in the pockets of Canadian artists. And without specific details as to how any alleged gap will be effectively closed, this Committee should receive the music industry's proposal with serious skepticism – particularly as it arrives from the desks of foreign-owned corporations who seek change at the expense of Canadian exhibitors who are more than 80% domestically owned and controlled.

DISRUPTION IS ALSO A REALITY FOR EXHIBITORS

Exhibitors are no stranger to the forces of technological disruption and can certainly appreciate the concerns expressed by those seeking to expand their Copyright footprint in a dawning digital marketplace. While the rapid advances in technology and patterns of content consumption affect all sectors of the creative economy, it bears repeating that exhibitors are being particularly affected.

As recently noted in an independent study by Telefilm, TV is the primary and preferred medium for Canadians to watch movies. While theatres still attract two-thirds of Canadians from time to time, consumers are increasingly turning to streaming options like Netflix who aren't burdened with brick and mortar expenses (and are not taxed in Canada by any level of government).[2] Another study from Telefilm notes that roughly two thirds of Canadians go to the movies at least once a year, but Canadians report going to the movies less often than before with "cost" is cited as the "leading reason" for declining attendance.[3] As a result of this phenomenon, exhibitors have had to adapt their offering to better compete against in-home and out-of-home sources of entertainment while keeping their costs low. As these studies make clear, any upward pressure on operating costs will have a direct and negative impact on exhibitors.

The reality is that exhibitors compete for the leisure time and disposable income of all potential customers against all other forms of entertainment, including home and online consumption of content, sporting events, streaming services, gaming, live music concerts, live theatre, other entertainment venues and restaurants. Exhibitors are acting to differentiate the movie-going experience by providing premium alternatives such as UltraAVX, VIP, 4DX and D-

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[2] Telefilm Canada, "Understanding and Engaging with Audiences" (November 2016) at pg. 11, 36, online: https://telefilm.ca/wp-content/uploads/Understanding-and-engaging-with-audiences-Summary-report.pdf; See also: "We don't have employees, office, or assets in Canada and therefore are not required to register for and charge GST to our Canadian customers," said Netflix spokesperson Anne Marie Squeo in an email to the Star." Toronto Star, "Netflix subscribers may be unwitting tax evaders" (August 10, 2015), online: https://www.thestar.com/news/canada/2015/08/10/netflix-subscribers-might-be-committing-tax-evasion.html

[3] Telefilm Canada, "Audiences in Canada: Trend Report" at pg. 10 (October 2015), online: https://telefilm.ca/wp-content/uploads/audiences-in-canada-trend-report.pdf

BOX seating. Exhibitors are also increasingly turning to amusement gaming as an additional source of revenue and are leveraging technology to deliver alternative and niche programming that appeals to specific demographic groups.

It is also important to understand that exhibitors do not control the film content available to them and keep less than half of the box office proceeds they collect. Exhibitors are still recouping the costs of converting to digital projection, have less time to generate operating revenue from first-run films than ever before, and – as the music industry will appreciate - must also continually contend with losses created by the ever-changing reality of online piracy.

In light of the above, any adjustment to the Copyright landscape governed by the *Act* will have a serious and lasting impact on an industry already experiencing the effects of technological disruption. According to the figures claimed by the music industry (without citation), amending the definition of "sound recording" in the *Act* would add an additional $45 million in costs to those exhibiting film on television and in cinemas. However those alleged losses would be allocated to exhibitors, they will further constrain the ability of MTAC members to employ Canadians, to invest in their communities, and exhibit the work of Canadian writers, filmmakers, and musicians on the big screen where they rightfully belong.

DEFINITION OF SOUND RECORDING SHOULD BE MAINTAINED

The sole purpose of amending the definition of "sound recording" in the *Act* is to extract additional royalties from the film and television sector by expanding the scope of neighbouring rights for contributors found in Section 19 of the *Act*. For years, the music industry tried to force this exact outcome by litigating a plainly illogical interpretation of "sound recording" that was dismissed at every level of court that examined the issue. They are now asking this Committee to pick up the pen where their litigation left off. However, the same inconsistencies and absurdities identified by the courts continue to apply.

1. The proposed amendment of "sound recording" would create a system of double dipping that undermines the worldwide distribution of film.

With its proposed amendment, the music industry seeks to extract double compensation from film soundtracks. Neighbouring rights compensate for unintended or uncontrolled usage of sound recordings (such as by radio stations) that can arise without the record label's involvement. However, the right to exploit music in a cinematographic work is a right for which a licence is required and for which compensation has already been provided by the filmmakers as expressly agreed upon in a contract. These inclusion rights are negotiated directly with the copyright owner and acquired on a worldwide basis to facilitate the global distribution and exhibition rights for the cinematographic work. This distribution model is critical to the global box office returns which, in turn, pay the costs of the filmmaker, including payment to music industry stakeholders.

The result of the proposed amendment is that those with copyright interests in a sound recording would be paid on the front end with a licensing fee (a rental fee) and on the back end with the benefit of a royalty (a remuneration right). In that context, the proposed amendment can

be perceived as a simple double dip that is plainly not what Parliament intended when it introduced the 1997 amendments to the Act.[4]

2. Soundtracks are excluded from the definition of "sound recording" only where they accompany a cinematographic work. Revising that definition to remove this limited exclusion will create absurd results.

Among other things, the exclusion targeted by the music industry enables the owner of the copyright in a film to exploit the work without risking a veto from anyone else who may have contributed to the audio components of the work – provided that the owner has entered into appropriate contractual relationships with those contributors. As the Copyright Board determined, if the definition of "sound recording" were to be interpreted or amended in the manner proposed by the music industry, "then each performer, maker and author of each recording incorporated into a soundtrack could effectively veto the renting of the movie through one of the three exclusive rights over the rental of the sound recordings incorporated into the soundtrack".[5] This interpretation would lead to the absurd result where some contributors, who are certainly not the copyright owners, would have such a veto.

3. Changing the definition of "sound recording" will require the *Act* to be rewritten.

The right to collect royalties from the public performance or communication of a "sound recording" was introduced in 1997 as part of a package of neighbouring rights. Although the music industry proposes an amendment affecting a single definition, the effect of that amendment will create a ripple effect that deserves careful scrutiny. In addition to the absurdities summarized above, the proposed amendment also begs the question of similar treatment for other creative contributors to a film. Sections 15 + 17 of the *Act* operate to prohibit a performer from enforcing their copyright in a cinematographic work where they have authorized its inclusion. If the rules applicable to a "sound recording" are changed to allow simultaneous rental and remuneration rights, an inequality will result that will beg a significant further correction and re-balancing among copyright stakeholders.

CONCLUSION

The current definition of "sound recording" in the *Act* strikes the appropriate balance between creators, rightsholders, and exhibitors. The exclusion of soundtracks "where they accompany a cinematographic work" from the definition of "sound recording" was intentional and reflects the realities of the creative economy and crucially facilitates the worldwide distribution of film. It does not operate as a subsidy – creators involved in film soundtracks negotiate their terms and are paid in full. The proposed amendment will aggravate disruptive forces affecting all creators and negatively affect the business of Canadian cinema.

[4] See: Copyright Board Decision, paras. 31-33.

[5] See: Copyright Board Decision, paras. 23, 29-30.