Canadian Independent Music Association

Backgrounder Presented to the Standing Committee on Industry, Science and Technology for its review on the Copyright Act

On behalf of the

Canadian Independent Music Association (CIMA)

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INTRODUCTION

CIMA is the national, not-for-profit trade association representing the English language, Canadian-owned and controlled companies of the domestic music industry, including independent record labels, managers, publishers, distributors, artist-entrepreneurs, recording studios and the like - all small businesses.

It is important to note that "creators" must be defined as everyone in the music ecosystem of creating, recording, performing and commercializing music. Creators are the artists, songwriters, composers AND the companies that support them - such as labels, managers and publishers.

There is broad consensus within the Canadian music industry on what crucial steps need to be taken in order improve the livelihood of our music creators. CIMA is one of the signatories of the policy document authored by the Canadian Music Policy Coalition and we support all of the recommendations contained in that submission.

This document sets out 4 recommendations that echo CIMA's remarks made on June 5, 2018 to the see the Heritage Committee studying remuneration models for artists and creative industries.

1. $1.25 MILLION BROADCASTER EXEMPTION

In 1997, the Canadian government amended the Act to bring Canada into compliance with its treaty obligations under the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. These amendments introduced a right that ensured performers and makers of recorded music would be fairly compensated for the public performance and communication of their sound recordings. These amendments rectified a systemic inequity within the Act whereby, prior to 1997, only songwriters and publishers were compensated for these uses.

As a political compromise to provide temporary relief to a struggling commercial radio industry, the government implemented special and transitionary measures, which included the $1.25 million broadcaster exemption in Section 68.1(1)(a)(i) of the Act (the "$1.25 Million Exemption"). The $1.25 Million Exemption is a subsidy that allows commercial radio stations to pay only $100 in public performance royalties to performers and makers of sound recordings on the station's first $1.25 million dollars of advertising revenues.

In the 20 years since this "special and transitional" $1.25 Million Exemption was enacted, the commercial radio industry has changed dramatically, and is now dominated by a few large and extremely profitable corporations posting a total profit that is 8,300% higher than in 1995.[1] The $1.25 Million Exemption, enacted as a temporary measure to relieve the then-floundering commercial radio industry, has been rendered out of date, discriminatory and the only subsidy of its kind in the world.

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[1] Statistics Canada, Private Radio Broadcasting, 2014, *The Daily* (June 16, 2015) at p. 1.
[2] Statistics Canada, Private Radio Broadcasting, 2014, *The Daily* (June 16, 2015) at p. 1.

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It is important to note that CIMA believes that community radio stations should continue to receive a preferential and discounted rate as stated in (current) subsection 68.1(b) of the *Copyright Act.* Furthermore, the removal of the extension is not meant to target the "mom and pop" radio stations. CIMA supports the same approach as community radio stations for truly small, independently-owned stations which earn only modest annual revenues.

As an economic body mandated to set fair and equitable rates, the Copyright Board is in the best position to assess the ability to pay a tariff, as it does for all other users under the tariffs it certifies. It is more appropriate for the Copyright Board to make the determination of an appropriate rate based on economic evidence over having a legislative subsidy exist in perpetuity, which is not based on any economic evidence of ability to pay.

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

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

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

A. <u>The $1.25 Million Exemption is an Unnecessary Subsidy</u>

Since 1997, the commercial radio industry has increased its profits from $3.6 million, when the $1.25 Million Exemption was implemented, to $304.6 million in 2015.[2] This is an increase in profits of over 8,300%.

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

The $1.25 Million Exemption applies to every commercial radio station in Canada, regardless of size of revenue. This means that Canada's commercial radio stations pay the same amount of royalties as Canada's community not-for-profit radio stations on their first $1.25 million of advertisement revenue: $100.[3]

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

[2] Statistics Canada, Private Radio Broadcasting, 2014, *The Daily* (June 16, 2015) at p. 1.
[3] Under a separate section of the Copyright Act (Subsection 68.1(1)(b)) community radio stations only pay $100.

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

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

Since 1997, this exemption has cost a struggling music industry and performers and makers substantial lost revenue, while providing an unwarranted subsidy to large and highly profitable commercial radio corporations.

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

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

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

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

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

2. AMEND THE DEFINITION OF 'SOUND RECORDING' IN THE COPYRIGHT ACT

The current definition of "sound recording" set out in s.2 of the *Copyright Act* is worded in such a way that recorded music is actually not considered a sound recording when it is included as in a soundtrack of a TV or film and is therefore not entitled to royalties under section 19. This means that, when the film Titanic is played in public or broadcast to the public, that the composer, James Horner receives public performance royalties for the use of the song My Heart Will Go On, but not Celine Dion.

The current definition is costing performers and makers approximately $45 million a year in lost revenue in a time when the music industry is struggling to adjust to a new digital landscape and methods of monetization.

Section 2 of the *Copyright Act* therefore; in inequitable towards performers and makers of sound recordings. There is no logical reason why performers and makers should be denied fair compensation, when their counterparts, songwriters and publishers, receive full protection under the Copyright Act.

Recommendation: CIMA asks the Canadian government to amend s.2 of the Copyright Act to allow recorded music in the TV and form to be eligible for s. 19 public performance remuneration.

3. TERM EXTENSION

The new United States-Mexico-Canada Agreement (USMCA) now states that the term of copyright protection shall be "not less than the life of the author and 70 years from the author's death". Under Canada's existing *Copyright Act*, the general term of copyright protection for works extends for 50 years from the end of the year that the last living author dies. As part of the transition period, Canada has up to 2.5 years from the date that USMCA enters into force to amend the *Copyright Act* extend the general copyright term.

Canada's law is consistent with only the minimum protection set out over a century ago in *The Berne Convention for the Protection of Literary and Artistic Works.* The intention at the time was to establish a term of protection that was sufficient to benefit two generations of descendants of the creator of the work. With longer life expectancies, a term of life plus 50 years is insufficient to cover two generations of descendants of a songwriter and therefore no longer reflects the underlying intention of that treaty. By contrast, the majority of Canada's largest trading partners recognize longer copyright terms for musical works, and a general standard of the life of the author plus 70 years.

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

Recommendation: CIMA recommends that Canada amend the *Copyright Act* to extend the term of copyright protection for musical works to the life of the author plus 70 years.

4. PRIVATE COPYING

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

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

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

CONCLUSION

There continues to be mixed messages about copyright in Canada from institutions that one would expect to champion and support creative endeavors. The *Copyright Act* review in 2017 offers the chance for Canada to change this narrative.

CIMA appreciates your consideration and looks forward to discussing, contributing and learning more about what the government hopes to accomplish in this review.

Warm regards,

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Canadian Independent Music Association