Summary of Recommendations for Reform of the *Copyright Act*

Submitted by: Music Canada

To: The Standing Committee on Industry, Science and Technology

December 10, 2018

Music Canada has the following recommendations for the Government's five-year Review of the *Copyright Act* (the "*Act*"). We are a non-profit trade organization that promotes the interests of our recording industry members and their partners, the artists. We thank the Government on its initiative to engage with stakeholders in this Review and we welcome the opportunity to participate in this important consultation.

Numerous stakeholders appearing before the Committee have stressed the urgency of closing the Value Gap for artists and creators. The Value Gap is the significant disparity between the value of creative content accessed and enjoyed by consumers and the revenues returned to creators.[1] A broad consensus of Canadian music industry stakeholders have proposed the following four immediately implementable measures to start to close the Value Gap (as discussed at **Part A**):

1. Eliminate the $1.25M radio royalty exemption;
2. Amend the definition of sound recordings;
3. Create a private copying fund; and
4. Extend the term of protection for musical works to life +70 years.

A. Immediate measures to reduce the Value Gap

1. Eliminate the $1.25 million radio royalty exemption

When the *Act* was amended in 1997 to extend to performers and record labels the rights that songwriters and music publishers had been entitled to for half a century, commercial radio stations were exempted from royalty payments on their first $1.25 million in advertising revenue.[2] Since then, each of the nearly 700 commercial radio stations, regardless of the size of their parent company, are required to pay only a nominal $100 on their first $1.25 million in revenue. This is the only such exemption in the world.

This exemption creates an outdated and unjustified cross-subsidy paid by performers and record labels to large, vertically-integrated and highly profitable media corporations. Since 1997, many radio stations have

[1] Music Canada, *The Value Gap: Its Origins, Impacts and a Made-in-Canada Approach ("Value Gap Report")*, at 6. https://musiccanada.com/wp-content/uploads/2017/10/The-Value-Gap-Its-Origins-Impacts-and-a-Made-in-Canada-Approach.pdf.

[2] Section 68.1(1)(a). With Bill C-86, it will be renumbered as s. 72(2).

been consolidated into large conglomerates, entitled to the exemption for each and every station they own. And since that time, the radio industry has experienced steady growth in net profits before income tax from approximately $3.6 million in 1995 to over $272 million in 2017.[3] Annually, the exemption costs rights holders $8 million, and between 1997 and 2017 it cost performers and labels nearly $150 million. This exemption has no basis in evidence, as the Copyright Board has found that the commercial radio industry is fully capable of paying royalties on all revenues,[4] and as the Board already tiers radio royalties based on revenue and music usage.[5]

We recommend repeal of this exemption. Commercial radio stations should pay pursuant to evidence-based Copyright Board tariffs (community radio stations would remain exempt from payment).

2. Amend the definition of "sound recording"

Unlike composers, songwriters and publishers, performers and record labels are excluded from public performance royalties when their recorded music is played in television shows or films. This is because the definition of "sound recording" in the *Act* excludes recorded music used in soundtracks. This exemption is unique to Canada. As a result, performers and record labels are denied royalties when their music is played on film or TV worldwide, while composers, lyricists and publishers collect full royalties. This costs performers and record labels approximately $45 million a year in lost royalties.

The definition should be amended to remove this unjustifiable inequity.[6]

3. Create Private Copying Fund

Part VIII of the *Act* allows consumers to copy recorded music for their own personal use. Because such copying is very difficult to license or control, the private copying levy was created to compensate rights holders for such private copies. Manufacturers and importers of blank audio recording media pay a small levy (set by the Copyright Board) for each unit imported and sold in Canada. Similar levies are collected in over 40 countries around the world. This regime has been an important source of earned income, generating over $300 million in revenue since 1997 for over 100,000 music creators and artists, enabling them to continue to create.

Over time, however, courts and regulations have limited the levy to blank CDs, which are increasingly rarely used by consumers to copy music. This has resulted in a significant decline in revenue for music creators (a decline by nearly 90% since 2004, to less than $3 million in 2016).[7]

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[3] Statistics Canada. Table 22-10-0005-01 Radio broadcasting industry by operating and financial detail https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=2210000501&pickMembers%5B0%5D=1.1&pickMembers%5B1%5D=3.2

[4] *Statement of royalties to be collected by SOCAN and NRCC in respect of Commercial Radio, 2003-2007,* Copyright Board of Canada (2005) at 32, 37-38; http://cb-cda.gc.ca/decisions/2005/20051014-m-b.pdf .

[5] https://cb-cda.gc.ca/tariffs-tarifs/certified-homologues/2016/TAR-2016-04-23.pdf

[6] See *Re:Sound v. Motion Picture Theatre Associations of Canada*, 2012 SCC 38 (at para 36).

[7] http://www.cpcc.ca/en/wp-content/uploads/2018/10/Letter-of-Support-by-15-orgs-EN.pdf

Music creators and artists are asking for the creation of an interim four-year Private Copying Fund of $40 million per year to ensure that music creators and artists continue to receive fair compensation for private copies.

4. Confirm term extension of musical works

Under the *Act*, protection for *musical works* subsists for the duration of the author's life plus a further period of 50 years, considerably shorter than the term recognized by the majority of Canada's largest trading partners: the life of the author plus 70. The recently agreed to Canada-United States-Mexico Agreement confirmed that the term of protection shall be life of the author plus 70. We applaud this extension and look forward to its enactment.

B. Further reducing the Value Gap and modernizing the *Act*

In addition to the immediate measures above, we recommend the following measures to bring the *Act* up to date and reduce the Value Gap:

1. Clarify safe harbours

The *Act* creates "safe harbours" intended to shield Internet and network service providers from liability for infringement when they are acting solely as *passive* intermediaries with no control over content on their service. However, these provisions were drafted at a time when providers were envisioned as mere conduits for communications. Today, far from passive, certain providers like YouTube, actively track, manage, curate and control content such as music on their platforms – and earn significant revenue from it. They leverage the breadth and uncertainty of the safe harbours language to either refuse to pay any royalties or to negotiate artificially low royalty rates. This is an unintended consequence of the outdated language of these provisions.

Europe has recognized the urgent need to close the Value Gap. The European Parliament recently overwhelmingly approved the EU Digital Copyright Directive, which will clarify and narrow safe harbors while ensuring that non-passive intermediaries enter into license agreements with content owners and keep down infringing content.

We recommend that safe harbours:

- be limited to true "innocent intermediaries" that are truly technical, automated and passive, with no knowledge of alleged infringements and unaware of circumstances to put them on notice of infringement;
- not apply to online content sharing services, which optimize and profit from user-uploaded content (as was recently approved by the European Parliament);
- be limited to intermediaries that have a policy to address repeat infringers, and comply with all requirements on them; and

- not shield providers (including search engines) where they have actual or constructive knowledge of infringement (without requiring rights holders to sue end users) and require that where they do, they must take reasonable steps to prevent infringement.

We also recommend that:

- the Act confirm that non-passive intermediaries engaged in interactive communications perform an act of making available to the public (without a clear basis for liability, there is less incentive for a service provider to comply with safe harbour requirements).

2. Online content sharing services

The European Parliament recently overwhelmingly approved measures to address the key role that online content sharing services such as YouTube, play in causing the Value Gap. The Digital Copyright Directive provisions approved by the EU Parliament provide that online content sharing services must:

- negotiate "fair and appropriate licensing agreements with right holders", and
- "cooperate in good faith" with rights holders "to ensure that unauthorised protected works or other subject matter are not available on their services".

Canada should follow the lead of the EU Parliament and adopt similar requirements for online sharing services and other non-passive intermediaries that profit from online commercial exploitation of creative works.

3. Additional modernizing amendments

The following amendments would help to further close the Value Gap, modernize the *Act* and render it more consistent in its application:

- clarify the exceptions for backup copies, technological processes, ephemeral recordings for broadcasters and hosting services to ensure that only copies intended by Government to be exempt from royalties are exempted. This will restore royalties lost to rights holders, despite Copyright Board rulings that they are fair and entirely within broadcasters' ability to pay, as a result of overly broad or unclear language;
- modernize the criminal remedies provisions to capture online forms of piracy (e.g., add offenses of communicating and making works available); and
- modernize secondary infringement provisions to expressly include digital distribution, prohibit communications and making available of intangible digital copies of works and sound recordings, and prohibit distribution of computer programs which enable infringement.

C. Technical amendments

We recommend the following technical amendments:

- codify the Berne Three-Step Test as an express limitation to all exceptions under the *Act* (to reduce ambiguity and ensure Canada's compliance with international treaties);
- modernize copyright registration: allow applicants to fix errors, show assignees, and specify year (rather than exact day) of first fixation or publication of sound recordings.

We would be pleased to discuss any of these proposed measures in detail.
