Memorandum of the Society of Composers, Authors and Music Publishers of Canada

(SOCAN)

Memorandum presented to the Standing Committee on Industry, Science and Technology on the Statutory Review of the Copyright Act

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INTRODUCTION

SOCAN is Canada's music performing rights society. We administer the public performance and communication rights of authors, composers and music publishers. We currently have more than 150,000 Canadian members, and we also represent the repertoire of all foreign performing right societies in the Canadian territory.

SOCAN 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. In this document, more specifically, SOCAN wishes to focus on particular aspects of the current *Copyright Act* that we believe require modifications.

TERM OF COPYRIGHT PROTECTION

The term of copyright protection in Canada for the authors of musical and other works is out of line with modern copyright law. Under Canada's *Copyright Act*, protection for musical works subsists for the duration of the author's life plus a period of 50 years. By contrast, the majority of Canada's largest trading partners recognize a general standard of the life of the author plus at least 70 years. Those countries include all of the European Union members, the United States, Australia, Israel, Norway, Switzerland, Peru, the U.K., Brazil, Iceland, Mexico and even Russia.

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 no longer reflects the underlying intention of that treaty. The European Union recognized this twenty-five years ago, i.e., that the underlying basis for the minimum standard was out of line with contemporary advancements in medicine and life expectancy. Following the recommendations set out in a directive, various EU member states extended their respective terms of copyright protection to the life of the author plus 70 years. In 2006, the EU formally adopted and codified the directive, which all EU member states are required to implement in their respective domestic legislation. The US extended its term to 70 years even earlier, in 1998.

The same considerations apply in Canada. Around the time that Canada joined the Berne Convention in 1928, the average life expectancy was about 60 years. It rose to about 81 years between 2007 and 2009. As a result, the current term of protection afforded under the Canadian *Copyright Act* is insufficient to cover two generations of descendants of a songwriter, and the current term is therefore out of line with the goals of the Berne Convention. Canada's shorter term is also out of step with the emphasis and value that Canada has otherwise placed on the creation of works, both domestically as part of our heritage, and internationally as leaders of cultural exports.

Canadian authors and their music publishers are at a disadvantage as cultural exporters because their works are subject to lesser protections internationally because of Canada's outdated term of protection. This is unfair and most unfortunate, as Canada's laws should not place limits on the ability of Canadian creators to exploit their works around the world.

Criticisms that term extension negatively impacts users have been consistently found baseless. Canada's major trading partners have explicitly rejected the theory that an extension of the term of copyright will

negatively impact users and consumers, and their long experience under the life plus 70 term constitutes overwhelming evidence that the critics' claims of deleterious effects are unsupported.

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:

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

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. SOCAN is a member of the CPCC.

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

The majority of consumers are now making copies of music onto devices such as smartphones, and the use of blank CDs to copy music has rapidly declined. As a result, the revenue collected for music creators for private copying is also rapidly declining, despite the fact that private copying of music is significantly increasing. Annual revenues from the private copying levy to music creators have plunged from a high of $38 million in 2004 to less than $3 million in 2016. Yet, private copying activity doubled over that same period. Canadians copied over 2 billion tracks of music in 2015-16.

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

Italy, Netherlands, Portugal and Switzerland) have healthy private copying regimes that extend levies to a wide variety of media and devices, like smartphones and tablets.

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:

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

CLARIFY THE EXEMPTION FOR CHARITABLE ORGANIZATIONS

Section 32.2(3) of the current *Copyright Act* provides an exception for the payment of royalties for the public performance of music when the performance is "in furtherance of a religious, educational or charitable object." This exception prevents compensation to music creators and artists where the use is for a charitable purpose.

However, the charitable exemption is currently being exploited and abused by local, regional and national music festivals and venues operated by, ostensibly, "charitable" organizations having millions of dollars in revenue. Despite receiving government funding and paying market rates for costs associated with putting on such events (e.g., paying venues, promoters, food providers, advertisers, staff and so forth), many of these organizations refuse to pay royalties to the underlying rights holders, citing the exemption under section 32.2(3). Typically, they do so by taking the position that they have obtained charitable status from the Canadian Revenue Agency pursuant to the *Income Tax Act*. SOCAN estimates that, in its case, the annual royalties lost to this dubious application of the charitable exemption are between $850,000 to $1.7 million.

A similar exemption, section 32.2(2) of the *Act*, exists for agricultural exhibitions and fairs. However, that provision makes it clear that the activities of the organizations in question must be without a "motive of gain". This legal term has been judicially considered by the Supreme Court of Canada and interpreted to mean that a performance without motive of gain means that the performers cannot be paid and the exhibitors cannot receive private profit in order for the exemption to apply.

Organizations operating under the guise of charitable objects, but in reality operating mainstream commercial music festivals, should no longer be able to hide behind the broad wording of the section 32.2(3) exemption. Legitimate activities by charitable organizations will continue to operate without being required to seek proper authorization.

Recommendation:

Add the words "without motive of gain" to the exemption in section 32.2(3) as follows:

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

And, add a new subsection 32.2(4) as follows:

(4) An organization referred to in subsection (3) that is registered or otherwise designated as charity pursuant to the Income Tax or any other Act is not, for that reason alone, deemed to qualify for the exception in subsection (3).

RADIO 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.

As a political compromise to help radio stations adjust to this new royalty, 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"). Essentially, the $1.25 Million Exemption is a subsidy that allows commercial radio stations to pay only $100 in public performance royalties to performers and makers of sound recordings on the station's first $1.25 million dollars of advertising revenues.

In the 20 years since the allegedly "special and transitional" $1.25 Million Exemption was enacted, the commercial radio industry has changed dramatically, and it is now dominated by a few large and extremely profitable corporations. 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. SOCAN strongly recommends that the $1.25 Million Exemption be repealed.

Recommendation:

SOCAN recommends the $1.25 Million Exemption be repealed.

THE DEFINITION OF "SOUND RECORDING" IN THE *COPYRIGHT ACT*

The current definition of a "sound recording" in the *Copyright Act* prevents performers and the makers of sound recordings from receiving communication royalties for the use of their work in television and film soundtracks. This is inequitable and unjustified, particularly in light of the profound role music plays in television programs and soundtracks. The definition in the *Act* should be amended to remove what is, in effect, an unwarranted subsidy.