

The logo for SOCAN, with the 'C' in red and the rest in black. In the top right corner of the page, there are three small red squares of varying sizes arranged in a diagonal pattern.

SOCAN

Written Submission for the Pre-Budget Consultations in Advance of the Upcoming 2022 Federal Budget

By: Society of Composers, Authors and Music Publishers of Canada (SOCAN)

August 6, 2021

Recommendation 1: Continued COVID-19 financial support

That the Government continues to provide COVID-19 financial supports to those who have been adversely affected by the pandemic, particularly music creators who will continue experiencing financial difficulties despite the reopening of the economy.

Recommendation 2: Regulate digital media

That the Government implement regulations on digital media so that they have obligations towards discoverability and promotion of Canadian music and so that they participate, as do their traditional equivalents, in the financial support programs and funds that help foster the creation of Canadian music.

Recommendation 3: Clarify the exemption at section 32.2(3) in the *Copyright Act*

That the Government amend the language of the exemption at section 32.2(3) of the *Copyright Act* to clarify that the exemption only applies where an organization acts “without motive of gain.”

Recommendation 4: Modernize private copying

That the Government, through the budget implementation process, clarify section 82 of the *Copyright Act* to make the private copying regime technologically-neutral and confirm the ability of the Copyright Board to set levies for private copies made on audio recording media and audio recording devices.

Recommendation 5: Clarify enforceability of copyright tariffs

That the Government amend the *Copyright Act* to clarify that tariffs approved by the Copyright Board of Canada are enforceable against users of copyright-protected works for uses that fall within the ambit of an approved tariff unless the user has already obtained a valid licence for the use.

Background

1. Society of Composers, Authors and Music Publishers of Canada (SOCAN) is Canada's largest rights management organization. SOCAN has over 170,000 songwriter, composer, music publisher, and visual artist members and clients, and licenses tens of thousands of businesses and organizations across Canada. SOCAN issues licences for the performing rights and reproduction rights of musical works, as well as exploitation rights for artistic works, and collects and distributes royalties to its members and the international rights management organizations with which it has reciprocal agreements.
2. In 2020, SOCAN collected \$391.2 million in licence fees and distributed more than \$348 million to music creators, publishers and visual artists. Collections from digital services increased to \$104 million, an average increase of 32.4% year-over-year since 2016.

Recommendation 1: Continued COVID-19 financial supports

3. We thank the Government for the financial supports during the COVID-19 pandemic, including the cultural funding made available through the Canadian Heritage Emergency Support Fund, and the general funding through the CEWS, CERB, and CRB. These benefits helped Canadians to make ends meet during this unprecedented time.
4. The Canadian music sector was one of the first affected by government lockdowns and will be one of the last sectors to return to normal after the economic reopening.
5. For SOCAN's members, the effects of COVID-19 will be felt for an extended period after the economy has reopened. SOCAN collects licence fees for the use of music and distributes them to our members. There is a delay between when licence fees are collected and when they are then processed and paid to the applicable members. For example, licence fees collected for performances that take place in 3Q2021 will not be distributed to members until 2Q2022. We do not expect distribution levels to resume their pre-COVID levels upon economic reopening.
6. This means that for songwriters, composers and music publishers, the impact of COVID-19 is felt in two waves: the immediate loss of income during the pandemic lockdown in 2020-2021 (for example, from cancelled live events and shuttered TV and film productions), and the lower royalties received throughout the economic recovery.
7. It is important that financial supports exist for songwriters, composers and music publishers to survive while their incomes remain at lower-than-expected levels.
8. In a recent survey of Canadians, 53% of those surveyed agreed that without government support, an entire generation of Canadian musicians and arts could be lost.¹
9. As a result, we recommend that COVID-19 financial supports continue in 2022 to help Canada's music creators.

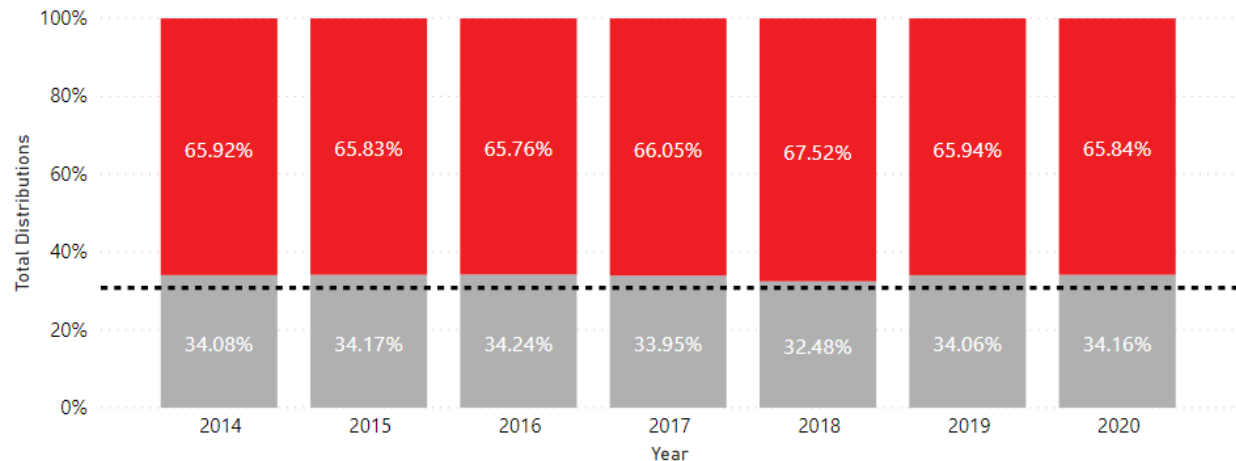
¹ Abacus Data, "The Live Music Community is In Crisis" (February 8, 2021), accessed online: <https://abacusdata.ca/live-music-government-support-music-canada/>.

Recommendation 2: Regulate digital media

10. Traditional media for music consumption (radio, broadcast television, cable) are subject to regulations in Canada with respect to, among other things, Canadian content rules and contributions to cultural funds.
11. In contrast, digital media for music consumption (online music and audiovisual services) are not currently subject to similar regulations.
12. In analyzing our royalty distributions, SOCAN has identified a stark difference between distributions to domestic and foreign songwriters and composers for performances in Canada on traditional versus digital media. As can be observed in the charts below, 34% of royalties collected from traditional media “stay in Canada” (i.e., are paid to SOCAN writer members), while only 10.5% of royalties collected from digital media do:

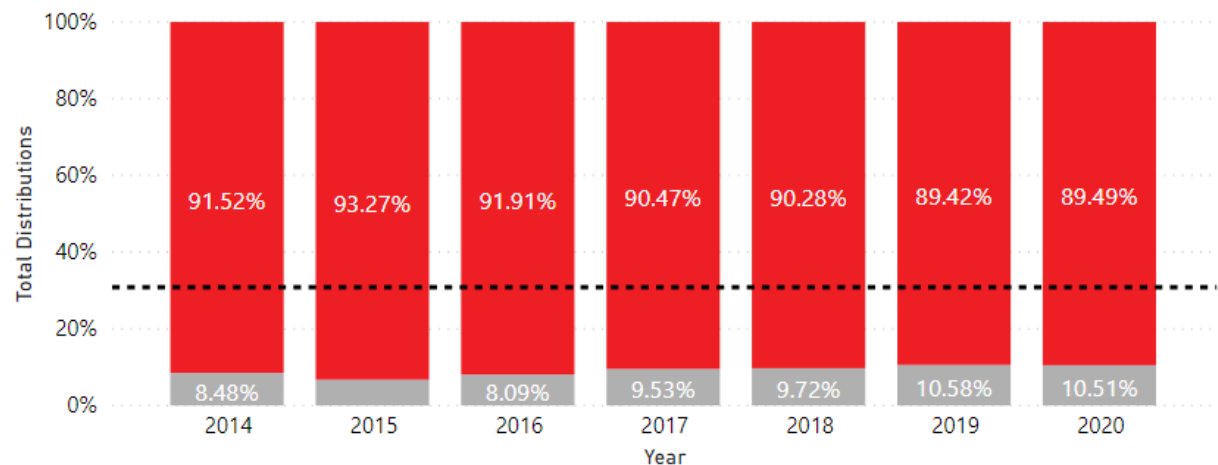
Traditional Media: Distributions to SOCAN Writers vs Foreign Society Writers

Distribution Recipient ● 1) SOCAN ● 2) Foreign Society



Online Media: Distributions to SOCAN Writers vs Foreign Society Writers

Distribution Recipient ● 1) SOCAN ● 2) Foreign Society



13. SOCAN estimates that if digital media had the same distribution percentage as traditional media, SOCAN writer members would have received \$34.5 million more in digital royalties since 2015.
14. With digital media for music consumption becoming the top choices for Canadians, we recommend that the Government ensure that comparable regulations that apply to traditional media, such as obligations to promote Canadian content and participate in financial support programs and funds that help foster the creation of Canadian music, are in place for digital media to increase royalty distributions to Canadian creators and their publishers.

Recommendation 3: Clarify the exemption at section 32.2(3) in the *Copyright Act*

15. The *Copyright Act*, at section 32.2(3), 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” by a religious, educational or charitable organization. Some organizations rely on this provision as *carte blanche* for refusing to pay music creators when they perform their music, even when the performances are for an ordinary business purpose.
16. No other creative profession (including filmmakers, literary authors, or visual artists) is legislatively required to subsidize the use of their works by charitable, religious or educational organizations. These organizations, regardless of the purpose for which they are using literary, dramatic, artistic or cinematographic works, must properly remunerate the creators and artists for those uses.
17. We recommend that the Government amend section 32.2(3) to state:

“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: ...”
18. The language “motive of gain” exists in the exemption for agricultural exhibitions and fairs in section 32.2(2). This language has been judicially considered by the Supreme Court of Canada and interpreted such that a performance that is “without motive of gain” means that the performers cannot be paid and the exhibitors cannot receive private profit.²

Recommendation 4: Modernize Private Copying

19. The introduction of private copying in the *Copyright Act* in 1997 addressed the then-revolutionary technological advances in recording technology that provided ordinary Canadians the means to “burn” (really copy) sound recordings onto compact discs for their personal use and enjoyment. Sellers of blank cassette tapes and blank compact discs were receiving value from the sale of these products (with this value being connected to the ability of consumers to copy creative works onto them), without any value flowing to creators. Private copying covered this gap by levying blank audio recording mediums and distributing the collected funds to creators.
20. Unfortunately, the private copying levy only applies to blank compact discs when most of the current unlicensed private copying is done on smartphones, tablets, and laptops to which the levy does not

² See *Composers, Authors and Publishers Association, Limited v. Western Fair Association*, 1951 CanLII 5 (SCC), [1951] SCR 596.

apply. As a result, the funds collected under the private copying levy have plummeted – from \$38 million in 2004 to \$1.1 million in 2019.

21. We recommend that the Government, through the budget implementation process, clarify section 82 of the *Copyright Act* to make the private copying regime technologically-neutral and confirm the ability of the Copyright Board to set levies for private copies made on audio recording media and audio recording devices to capture the unlicensed personal copying done on these media and devices.

Recommendation 5: Clarify the enforceability of copyright tariffs

22. Collective management of copyright and the tariff regime exist to address the inefficiencies of licensing and enforcing rights on an individualized basis. Collective management benefits both rights holders, users, and the public at large. In the Copyright Board's 2019-2020 Annual Report, royalties generated by Copyright Board tariffs were \$503 million in 2018.
23. Recently, the Supreme Court of Canada in *York University v. The Canadian Copyright Licensing Agency (Access Copyright)*, 2021 SCC 32 held that tariffs approved by the Copyright Board of Canada are not enforceable against users who "opt out" of the tariffs. The only available remedy for rights holders against such users is an action for copyright infringement.
24. This decision introduces unpredictability and inefficiencies in the entire system of collective management, to the detriment of rights holders and users alike.
25. We recommend that the Government clarify that tariffs approved by the Copyright Board of Canada are enforceable against users of copyright protected works for uses that fall within the ambit of an approved tariff unless the user has otherwise obtained a valid licence for the use.

Conclusion

26. The COVID-19 pandemic shuttered the Canadian music industry overnight. Venues closed, concerts were cancelled, and radio station and conventional television advertising revenues significantly declined.³ Meanwhile, digital services saw significant growth in revenue from users. However, without being subject to the same regulations as traditional media, fewer royalties from digital media go to Canadian songwriters and composers.
27. Despite the reopening of the economy, many Canadians are still reluctant to return to crowded in-person events and are likely to continue consuming music on digital services, meaning the effects of the pandemic will be felt in the Canadian music industry long after many other sectors have returned to normal.
28. Providing continued COVID-19 financial supports, regulating digital media to redistribute funds from big tech to Canadian songwriters, composers and music publishers, clarifying the copyright exemption at section 32.2(3), modernizing the private copying regime to share value with Canadian

³ Radio station advertising revenues declined by 20.9% in 2020 and conventional television advertising revenues declined by 14.3%. See: CRTC 2020 Broadcasting Financial Summaries Highlights: <<https://crtc.gc.ca/eng/publications/reports/branalysis/fin2020.htm#radio>>.

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creators, and clarifying the enforceability of tariffs in the *Copyright Act* will not only help Canadian music creators and publishers survive – it will help them thrive.