

Putting Users and Small-Scale Creators First in Canadian Copyright Law and Beyond

A Brief Submitted By:

The Cultural Capital Project: Digital Stewardship and Sustainable Monetization for Canadian Independent Musicians

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Statutory Review of The Copyright Act

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Introduction

In an industry characterized by market consolidation, an imbalance of power between creators and big businesses is one of the largest factors that prevents fair remuneration for creators. Proposals for legislation that do not address this imbalance may worsen the conditions for working musicians. While legislation that supports users rights may offer some mitigation of the effects of this industry concentration, copyright is generally an inefficient tool for protecting artists and encouraging innovation. Artists are not always the rights holders for their creative works, and thus legislation for rights holders does not *inherently* help artists. By encouraging creativity, user rights are more empowering for everyday creators and can help balance the concentration of power enjoyed by the large industry players.

Our submission comes from a research team that is working on a SSHRC Insight Grant funded project titled “The Cultural Capital Project: Digital Stewardship and Sustainable Monetization for Canadian Independent Musicians.” The project investigates issues of fair payment for creators, as well as ways to encourage new and creative artistic production.

The following recommendations aim to represent the interests of everyday users and smaller scale musical creators and hope to provide a diversity of position.

1. Recognize that increasing market consolidation is at odds with a vibrant and diverse music industry.

Increasingly, copyright as an exclusive right has been effective at building up assets for oligopolies, and the concentration of these assets provides a barrier to new and innovative players in the cultural industries. Canadian musicians and users are at the mercy of non-Canadian media and tech companies: Universal, Sony, and Warner control roughly 86% of the North American recording and publishing market.¹ The stunning inequality among musicians is getting worse: the top 1% of artists account for 77% of all recorded music income,² while the 10 top-selling tracks command 82% more of the market and are played almost twice as much on Top 40 radio than they were a decade ago.³

The Canadian Media Concentration Research Project notes that vertical integration *within* Canada “is very high by historical standards and almost four times current levels in the United States.” In Canada, Bell, Rogers, Telus, Shaw, and Quebecor accounted for 71.1% of the \$80 billion network media economy in 2016.⁴ As President of Re:Sound Music Licensing, Ian MacKay, noted: in 1997, 50% of the

¹ Ed Christman, “Q3 SoundScan Report: Taylor Swift and Bruno Mars Dominate, Streaming Surges,” *Billboard*, October 8, 2015. <https://www.billboard.com/articles/business/6722597/q3-soundscan-2015-taylor-swift-bruno-mars-streaming-surge>

² Mark Mulligan, “The Death of the Long Tail: The Superstar Music Economy,” *MIDiA Consulting*, March 2014. <https://www.midiaresearch.com/downloads/the-death-of-the-long-tail-the-superstar-music-economy/>

³ Derek Thompson, “The Shazam Effect,” *The Atlantic*, December 2014. <https://www.theatlantic.com/magazine/archive/2014/12/the-shazam-effect/382237/>

⁴ Dwayne Winseck, “Media and Internet Consolidation in Canada, 1984-2016,” *Canadian Media Concentration Research Project*, November 2017. <http://www.cmcrp.org/media-and-internet-concentration-in-canada-results/>

Canadian radio sector was in the hands of 10 radio groups; it is now 82%, leading to homogenized playlists and limited exposure for new musicians.⁵

Massive profits are being made in the media landscape, little of which makes its way to artists and performers. A recent Citigroup report found that the U.S. music industry generated \$43 billion last year, but artists received only 12%.⁶ This market consolidation, combined with vertical integration (where tour promoters are owned by radio stations are owned by record labels) makes it harder for both creators and users to be exposed to diverse and remunerated cultural goods.

Market Consolidation Recommendations:

1. Antitrust regulation should be pursued to protect a diverse marketplace, not just to ensure competitive pricing.
2. Increase public funding and support dedicated to smaller creators who are more likely to be squeezed out by market consolidation.
3. Increase collaboration with other governments recognizing the importance of protecting diversity, like the Joint Declaration on Cultural Diversity and the Digital Space with France,⁷ the “international grand committee” of Canadian and British parliamentarians that are investigating American tech companies,⁸ and the EU’s actions against Amazon, Facebook, and Google for anticompetitive practices.⁹

2. Recognize that user rights and the creative commons have value for Canadian creativity and culture and that these should be protected.

Cultural works in the public domain/ creative commons encourage access to information and culture, which inspires further creative work and lessens boundaries between users and creators. We encourage a consideration of the value of having musical works in the creative commons and advocate for legislation that is in line with contemporary cultural practices and technological realities (including online activities such as music sharing, fandom, and remix culture).

Protecting the rights of people to use and create culture in noncommercial ways is crucial to protecting the public domain.¹⁰ We caution against the technological optimism shown in the recent EU copyright

⁵ Canada. Parliament. House of Commons. Standing Committee On Canadian Heritage. *Minutes of Proceedings*. 1st sess., 42nd Parliament, Meeting No. 114, 2018. <https://www.ourcommons.ca/DocumentViewer/en/42-1/CHPC/meeting-114/evidence#Int-10193878>

⁶ Daniel Sanchez, “The Music Industry Generated \$43 Billion in Sales Last Year. Artists Only Received 12% of That,” *Digital Music News*, August 7, 2018. <https://www.digitalmusicnews.com/2018/08/07/citigroup-music-industry-sales/>

⁷ “[Joint Declaration on Cultural Diversity and the Digital Public Space](https://pm.gc.ca/eng/news/2018/04/16/joint-declaration-cultural-diversity-and-digital-space),” *Justin Trudeau, Prime Minister of Canada*, April 16, 2018. <https://pm.gc.ca/eng/news/2018/04/16/joint-declaration-cultural-diversity-and-digital-space>

⁸ “Facebook’s Zuckerberg summoned to appear before session of U.K., Canadian politicians,” *CBC News*, October 31, 2018. <https://www.cbc.ca/news/politics/canada-britain-zuckerberg-summons-1.4885397>

⁹ Adam Satariano and Jack Nicas, “E.U. Fines Google \$5.1 Billion in Android Antitrust Case,” *New York Times*, July 18, 2018. <https://www.nytimes.com/2018/07/18/technology/google-eu-android-fine.html>

¹⁰ There are compelling initiatives in spaces that recognize the value of a commons for the creative industries. Capital City Records at the Edmonton Public Library is one example of a digital public space that has local creators make their music available for anyone with a library card. The library provides artists with an honorarium

changes, which encourages the enforcement of copyright law by technological algorithm.¹¹ Suggestions made by Canadian industry to protect against piracy, like site blocking and de-indexing without court oversight in the “FairPlay” proposal, would involve undue intrusion and preemptive control over spaces where cultural appreciation and production occur. This ‘chill’ - the fear of every day citizens and creators to engage in cultural sharing, appreciation, and innovation - has a direct effect on reducing creativity and participation in cultural production.

The additional costs of aggressive regimes of copyright enforcement provide barriers and costs for new entrants into the market. Small creators would disproportionately feel the burden of this style of regulation. Treating the general public like pirates is unfair, especially after opening the space for legal options like Netflix and Spotify. There are now affordable, accessible, and ad-supported options for everyday users to watch and listen to cultural texts. Instead, we encourage efforts to provide artists with higher payout rates via streaming and online music services

Public Rights Recommendations

1. Retain limits to statutory damages for non-commercial infringement, so that individuals aren't faced with undue fear of exercising user's rights.
2. Protect the current notice-and-notice system and strengthen it to protect against misuse/spurious claims.¹²
3. Continue rejecting industry sponsored proposals for site blocking and de-indexing, which disproportionately harm small producers and the general public, for the gains of only a few large industry players.¹³

3. Consider automatic rights reversions as a way to mitigate the ill effects of term extensions.

In the music industries many artists are deriving revenue from copyright *adjacent* activity. Much artist revenue has to be sustained by aggressive touring,¹⁴ an option only open to a few and one that is difficult given Canada's vast geographical area. A *Future of Music* study¹⁵ found that the income

and makes content available for permanent download and streaming, with artists retaining rights to their content which can still be shared and sold anywhere else (<https://capitalcityrecords.ca/about>). Such an example highlights ways that listeners, artists, and cities can be connected through non-commercial, public spaces.

¹¹ We agree with the analysis of copyright as a crude mechanism found in Public Interest Advocacy Centre, “Brief of the Public Interest Advocacy Centre to the Standing Committee on Industry, Science and Technology's Review of the Copyright Act”, June 1, 2018,

<https://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR9947628/br-external/PublicInterestAdvocacyCentre-e.pdf>

¹² Public Interest Advocacy Centre, “Brief of the Public Interest Advocacy Centre to the Standing Committee on Industry, Science and Technology's Review of the Copyright Act,” Our Commons, June 1, 2018,

<https://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR9947628/br-external/PublicInterestAdvocacyCentre-e.pdf>

¹³ Myra Tawfik, et al., “Brief - Statutory Review of the Copyright Act submitted by Myra Tawfik on behalf of Canadian intellectual property law scholars”, October 22 2018.

<https://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10167017/br-external/TawfikMyra02-e.pdf>

¹⁴ “Artist Revenue Streams,” *The Future of Music Coalition*. <http://money.futureofmusic.org>

¹⁵ “Mythbusting: Data Driven Answers to Four Common Assumptions About How Musicians Make Money,” *The Future of Music Coalition*. <http://money.futureofmusic.org/mythbusting/4/>

derived from sound recordings is a small part of a musician's overall revenue pie and is decreasing, although sound recordings are "valuable for other reasons, serving as an artifact of creativity that can [be] used to leverage *other* income sources" including live performance. From 5,371 survey respondents, "the aggregated percent of income derived from sound recordings [over] 12 months was 6%."¹⁶

Another study¹⁷ found that, "on average, just 14% of sound recordings published between 1890 and 1964 had been re-released by right holders on compact disc. Non-right holders re-released twenty-two percent of those recordings without the benefit of any monopoly rights—over fifty percent more than those that did." It is worthwhile to consider how works in the public domain enjoy greater commercialization and dissemination than titles with restricted rights. A term extension risks preventing a vital public sphere to the benefit of major record labels, who may further exploit an artist's work after their death but are more likely to let the work languish.

Term extensions do not hold up to scrutiny in cultural economic theory.¹⁸ Most of the commercial value of a sound recording is extracted in the first 10 years, so a 70 years after death term provides no real additional incentive.¹⁹ By considering cultural depreciation and by discounting the value of future earnings, "it becomes clear that the period of exclusivity necessary to incentivize initial creation of even the most expensive works is far shorter than current copyright terms."²⁰

Copyright term extension is now reality in Canada. To mitigate the ill effects of the term extension we strongly encourage a careful consideration of automatic rights reversions, with rights reverting back to authors after a period of no greater than 25 years.²¹ This recommendation offers some balance to the historically imbalanced relationship between artists and record labels, where creators are often pressured to sign away their rights for life.²²

¹⁶ Specific genres with noted decreases in income from sound recordings included rock and jazz. Further, two-thirds, or 66%, of respondents "reported that 0% of their income was derived from sound recordings."

¹⁷ "One consideration by Congress in extending copyright protection to owners for such a long period was to give those owners an incentive to reissue, and thereby preserve, older recordings." Tim Brooks, Library of Congress, Survey Of Reissues Of U.S. Recordings V (2005), <https://perma.cc/4ZX2-SSW8>

¹⁸ Rebecca Giblin, "A New Copyright Bargain? Reclaiming Lost Culture and Getting Authors Paid," *Columbia Journal of Law & the Arts* 41 (2018): 369-411.

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3252838

¹⁹ "Gowers Review of Intellectual Property," December 2006.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228849/01184_04830.pdf

²⁰ Rebecca Giblin, "A New Copyright Bargain? Reclaiming Lost Culture and Getting Authors Paid," *Columbia Journal of Law & the Arts* 41 (2018): 369-411.

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3252838

²¹ This echoes other arguments that have been put forth in favour of reversions, including Bryan Adams advocating for rights reversions with the ability of creators to reclaim ownership of creations 25 years after they have been given away.

²² Rebecca Giblin, "Everything he does, he does it for us. Why Bryan Adams is on to something important about copyright," *The Conversation*, September 24, 2018. <http://theconversation.com/everything-he-does-he-does-it-for-us-why-bryan-adams-is-on-to-something-important-about-copyright-103674>

With rights reverting back to creators, they would have the ability to dedicate works to the creative commons or engage in direct licensing. Additionally, it would enable creators to enter into renewed or revised contracts, which would be beneficial if a work was to be adapted or re-released.

Key to creators being able to exercise these rights is clarification that these rights cannot be contracted away. Record labels, publishers, and platforms should not be able to add contractual stipulations that override creators' moral rights, or a hypothetical reversion right. Rights reversions could be used to further fund the production of music through direct selling to listeners or serve as a retirement fund for musicians, lessening the precarity of artists' futures.

Rights Reversions Recommendations

1. Copyright Act Amendment that provides for automatic rights reversions to creators after 25 years.
2. Clear language in the Copyright Act that prevents contractual override of rights granted in the Act.²³

4. Support vibrant arts communities through direct funding and policies other than applying new limitations via the Copyright Act.

Public funding is crucial for independent Canadian creators. One example²⁴ of this is the additional \$2.5 million in funding that has been committed to FACTOR by the Department of Canadian Heritage for funding the export of independent Canadian music.

In comparison to direct funding, copyright related revenue for independent musicians is generally quite low. The *Future of Music* study²⁵ indicates that musicians are making less money on recorded music sales for multiple reasons. Royalty payments are becoming based more on sales of singles than albums, and now that streaming has overtaken the sale of digital downloads, dismal per-stream rates are a dwindling source of revenue. There is a drop in record label support as artists now pay for things that labels used to, and musicians must perform branding and marketing roles themselves. Public funding can fill these gaps and promote access to diverse and exciting Canadian content.

However, we are extremely wary of cultural funding falling on users in the form of a smartphone tax. The variety of uses for these devices are numerous and the vast majority of these uses are going to be for necessary connectivity, not piracy related activities.

²³ Pascale Chapdelaine, et al., "Brief - Statutory Review of the *Copyright Act* submitted by Pascale Chapdelaine, on behalf of Canadian intellectual property law scholars", October 22 2018.
<https://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10166923/br-external/ChapdelainePascale01-e.pdf>

²⁴ FACTOR, *Annual Report 2017-2018*.
https://factorportalprod.blob.core.windows.net/portal/Documents/Annual_Reports/FACTOR_Annual_Report_2017-2018.pdf

²⁵ "Are Musicians Making More or Less Money?" *The Future of Music Coalition*, 2012.
<http://money.futureofmusic.org/are-musicians-making-more-or-less-money/>

To help Canadian independent artists, the Government should prioritize strong connections and relationships with provincial and municipal governments, particularly when it comes to policies and initiatives that fund and support live music venues, small record labels, do-it-yourself and artist-run spaces, and campus and community radio stations. Living in a “music city” has its benefits with respect to financial opportunities that are open to artists, enabling one to more readily make a living for oneself, but these locations often have a higher cost of living.²⁶ In Canada, we have seen issues with balancing “music city” initiatives with increased costs of living, especially in large cities like Toronto.²⁷

Public Arts Funding Recommendations

1. Any device or user taxes that are implemented to support culture should be progressive and not unduly impact lower income citizens.
2. Increased public funding of new and emerging artists and labels, with fewer restrictions on label size and distribution, and lifetime caps for larger labels.
3. Increased support for local initiatives that support musicians and communities.
4. Support provincial and municipal models of funding and support that recognize the shifting nature of artist income streams.

Conclusion

The main principles we would like to see applied by both the INDU and Heritage Committees, when it comes to legislating and regulating the music industry in Canada, are:

- 1. Recognize that increasing market consolidation is at odds with a vibrant and diverse music industry.**
- 2. Recognize that user rights and the creative commons have value for Canadian creativity and culture and that these should be protected.**
- 3. Consider automatic rights reversions as a way to mitigate the ill effects of term extensions.**
- 4. Support vibrant arts communities through direct funding and policies other than applying new limitations via the Copyright Act.**

We think that the specific recommendations given in each section may help to protect a vibrant and diverse Canadian artistic community, while providing more opportunities for independent creators to share in the profits from the industry.

²⁶ “Money from Music: Where We Live,” *The Future of Music Coalition*, 2013.

<http://money.futureofmusic.org/location/4/>

²⁷ A 2018 article in *NOW Magazine* article highlights a “venue crisis” in the city as live music venues, namely smaller venues, struggle to sustain themselves and remain open. This points to two challenges: 1) Ensuring that larger urban centres do not only cater to superstars and megatours; and, 2) Enabling smaller and mid-sized Canadian cities to also provide resources and support for live music initiatives. It is imperative that live music can be programmed and promoted by a variety of organizations and that live music events are affordable and easy to attend. See: Michael Rancic, “Vanishing Music Venues: A Progress Report,” *NOW Toronto*, January 2018.

<https://nowtoronto.com/music/features/vanishing-music-venues-a-progress-report/>