Contribution of online music services and telecommunication providers to the promotion and the development of Canadian music: short and long term propositions

January 11, 2019

Presented to the members of the Broadcasting and Telecommunications Legislative Review Panel by the members of the Canadian Music Policy Coalition (CMPC):

ACTRA Recording Artists' Society (ACTRA RACS)

Association Québécoise de L'industrie du Disque, du Spectacle et de la Vidéo Inc. (ADISQ)

Association des professionnels de l'édition musicale (APEM)

Artisti

Canadian Federation of Musicians (CFM)

Canadian Council of Music Industry Associations (CCMIA)

Canadian Independent Music Association (CIMA)

Canadian Music Publishers Association (CMPA)

Canadian Musical Reproduction Rights Agency (CMRRA)

La Guilde des Musiciens and Musiciennes du Québec (GMMQ)

Music Managers Forum (MMF)

Re:Sound

Songwriters Association of Canada (SAC)

Screen Composers Guild of Canada (SCGC)

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

Société de Gestion Collective des Droits des Producteurs de Phonogrammes et de Vidéogrammes du Québec (SOPROQ)

Société Professionnelle des Auteurs et des Compositeurs du Québec (SPACQ)

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1 EXECUTIVE SUMMARY

The Canadian Music Policy Coalition (CMPC) consists of Canadian music professional organizations and music rights organizations representing a cross-section of the entire Canadian music industry. Together, we represent a wide section of Canada's music industry: approximately 630 music companies including record labels, music publishers, managers and distributors across the country, over 10,000 artists at the grassroots level, and 150,000 English and French-Canadian songwriters and composers. In short, the Canadian Music Policy Coalition represents a significant component of the music industry ecosystem

The CMPC is pleased to submit this document to share our trends, facts, data and experiences with the Telecommunications and Broadcasting Legislative Review Panel to assist with its review of the *Broadcasting Act*, *Telecommunications Act* and the *Radiocommunication Act*.

Interim, short-term recommendations:

1. The Governor in council should give directions to the CRTC to ensure that all online music services operating in Canada are subject to appropriate regulation.

2. The *Broadcasting Act* should be amended to provide the CRTC with powers of sanction that are similar to those it has under the *Telecommunications Act*.

3. The Governor in council should use its powers under the *Telecommunications Act* to require telecom carriers to contribute to Canadian music.

4. The government should allocate part of the next spectrum auction revenue to the development of Canadian music.

5. The Expert panel should endeavour to present its interim report to the government before the end of April 2019.

Long-term legislative review:

6. The two *Acts* should clearly distinguish the regulation of telecommunication activities from the regulation of cultural content, which can be delivered through different telecommunication activities.

7. The revised Broadcasting Act should maintain the main objectives of the Broadcasting Policy for Canada and add an objective on the protection and promotion of the diversity of cultural expressions

8. All activities involved in the delivery of cultural content should come under the jurisdiction of the next *Broadcasting Act*.

2 INTRODUCTION

On June 5, 2018, the Honourable Navdeep Bains, Minister of Innovation, Science and Economic Development, and the Honourable Mélanie Joly, the former Minister of Canadian Heritage, launched a review of the *Broadcasting Act*, *Telecommunications Act* and the *Radiocommunication Act* (*Acts*). One of the themes that the members of the Broadcasting and Telecommunications Legislative Review Panel (Panel) has identified as part of this review is "Supporting creation, production and discoverability of Canadian content." Our submission will focus on this aspect of the review.

Supporting Canadian creators to tell Canadian stories as a means of protecting and promoting Canadian culture is a cornerstone of our country. Canadian content remains as important as ever in the digital age. Canada's economy relies on a prosperous Canadian-owned and controlled music sector to discover, develop, support and promote local talent in commercial markets at home and abroad. We ask that the Panel look at any changes to the *Acts* through the perspective of Canadian creators and their business partners to ensure that Canadian stories will continue to be supported and told, both in Canada and abroad, for decades to come.

An historical Centerpiece of Canadian culture and music

For more than 100 years, starting with the Radiotelegraph Act of 1913, the Canadian Radio Broadcasting Commission of 1932, the Canadian Broadcasting Act and Canadian Broadcasting Corporation of 1936, Canada has enacted laws and regulations that shaped Canadian culture and music. This resulted in a musical landscape representative of the diverse influences of this country. The root objectives and principles that guided governmental intervention in connection with the protection of Canadian culture are still valid today and must not be forgotten.

2.1 The CMPC's positions are aligned with those of the Coalition for the Diversity of Cultural Expressions

The present recommendations of the CMPC are well aligned with the propositions put forward by the Coalition for the Diversity of Cultural expressions. Although the music sector has a unique focus on the regulation of online music services, we share the same need for and request governmental action and legislative changes, both in the short and long term.

3 Music, a transformed sector

The significant increase in the number and type of new online audio and video platforms has disrupted the music industry's traditional business models for more than 20 years. As discussed below, that transformation is continuing. In fact, it is clearly far from over and, in the absence of swift government intervention, it stands to have on those primarily responsible for the creation and development of Canadian culture in the field of music even greater harm than that already experienced.

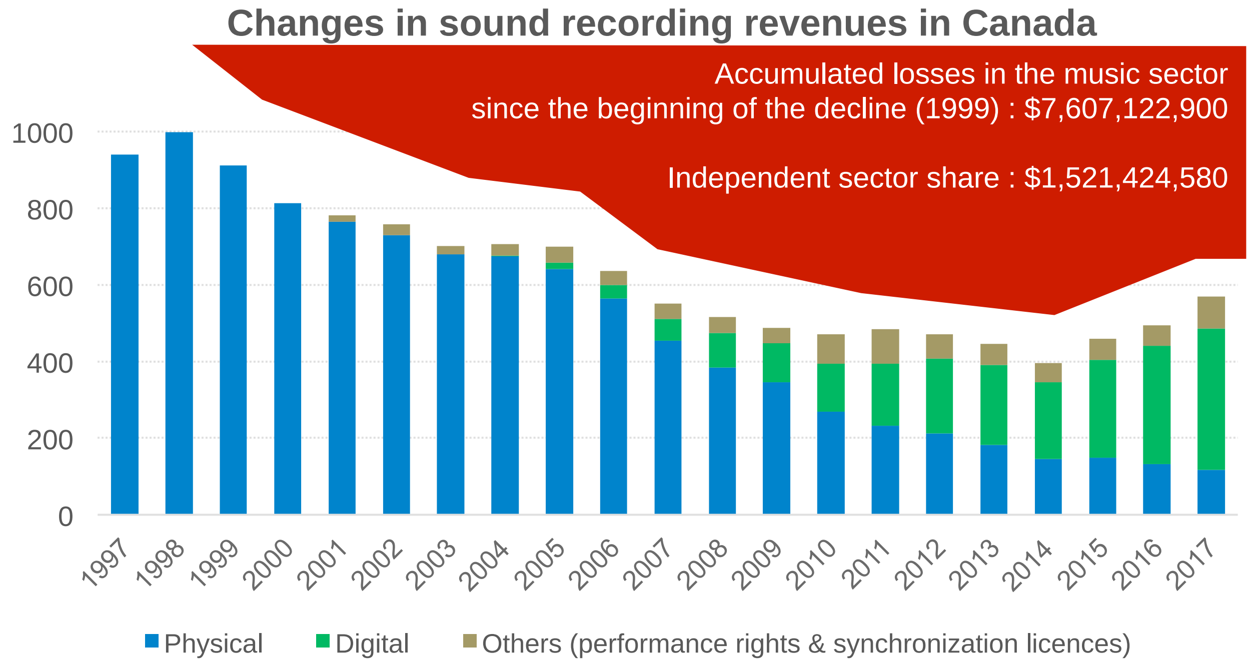
These numerous services and innovations related to the use of music have led to changes in the way we consume, make money from, produce, distribute and market music in Canada and around the world - yet each market has and should continue to have its own specific approaches.

It is well-known that the music sector was the first one to be significantly affected by the market shift away from physical sales (CDs or albums), and probably the most brutally impacted. That harm is ongoing and it now extends to virtually every aspect of the music industry, including the payment of reproduction and communication royalties to Canadian creators and their various business partners.

3.1 A rapid business model evolution

Essentially, over the last 20 years, the focus on physical distribution of recorded music as a traditional marketing and promotion tool has given way to the digital distribution and marketing platforms. However, this new model, while requiring a great deal of diversification, continues to yield just a fraction of the total revenues that were previously generated two decades ago.

Today, music creators, publishers and independent record companies continue to struggle significantly to make ends meet. This is particularly the case for the <u>Canadian</u> players who have been left behind by the digital transformation.



Source ; ADISQ, Music Canada

Simply put, revenues stemming from streaming are insufficient for the overwhelming majority of creators, publishers, artists and other Canadian music businesses, especially for those in the independent sector.

This is despite the fact that the investments required to create, market and promote music have increased, with costs now having to be incurred in both the traditional and digital markets. Among the many challenges brought on by digital music services, the marketing of Canadian music is among the greatest. For the typical creator, publisher and independent label, marketing is a key ingredient to ensure that our domestic content is discoverable on new platforms domestically and around the world. While mainstream media remains essential to ensure the success of a marketing campaign, that by itself is no longer sufficient. Online and internet-based marketing now require dedicated staff resources, cutting-edge knowledge that needs to be constantly updated and significant investments.

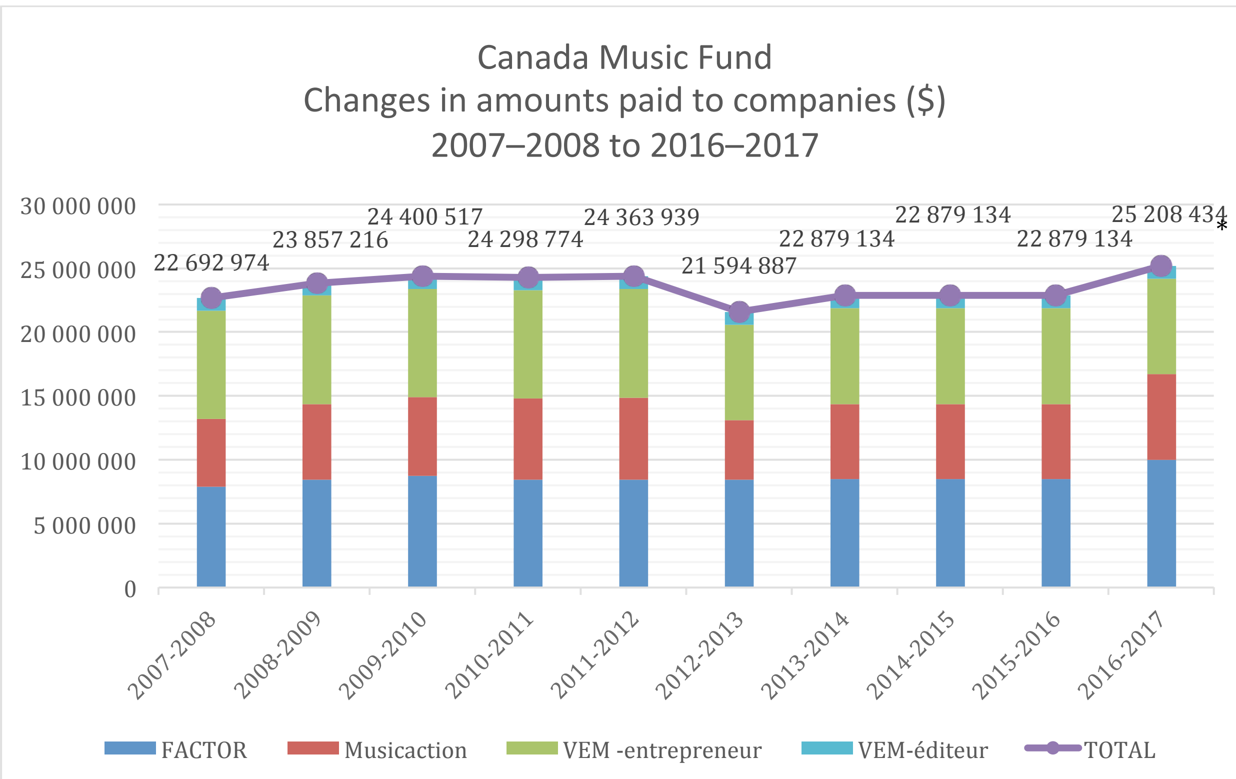
Yet, in dealing with foreign platforms that have little knowledge of our domestic content, and operate in a highly opaque manner, there continue to be significant limits on the ability of Canadian creators and their business partners to successfully promote their material.

These foreign entities, including music streaming platforms, are winning over a growing number of Canadian clients. Yet, they do so while sidestepping all of the rules in force in Canada, being exempt from most government regulation. Even though they are often very powerful, and among the most valuable companies in the world, these foreign entities do not contribute significantly enough to the financing or visibility and promotion of the content they distribute, even though that content, including Canadian music, is at the heart of their business models.

Of course, in the absence of regulatory measures, they choose to focus on what is needed to grow their businesses financially (some in the billions of dollars) without taking a significant enough role in their dissemination of Canadian cultural content.

Meanwhile, federal public financing for production and commercialization in the music sector has remained stagnant at a time when it is needed more than ever before.

Unlike other users of music in Canada who rely almost exclusively on the distribution of cultural content (e.g., traditional radio and television services), Internet service providers do not contribute funding to support the music industry.



Source : ADISQ, Musicaction, FACTOR, PCH.

For individual creators and independent music companies, profitability has become a near unattainable goal.

In the case of sound recordings, we estimate that average production and commercialization costs for an album range from approximately $45,000 to $75,000, respectively. While an independent label, generally speaking, can make a profit on 15,000 sales of a physical album, it takes 30 million streams of all the songs of an album combined to achieve a profit in the case of online music services, a threshold that is seldom reached by an independent Canadian artist and even more rarely for French Canadian artists.

While it has always been the case that concerts occupy a central place in the career of most artists, revenues from live performances have never compensated for the lower amounts received from digital companies and a declining physical market. Nor should they, as they are a completely different use of musical works.

Creators and their publishers also continue to face significant financial challenges. Using just one example, the Copyright Board, based on its interpretation of 2012 amendments to the 2012 the *Copyright Act*, took away tens of millions of dollars from the industry in the form of royalties previously paid by radio stations for their reproduction of music.

Music creators and their partners have adopted several strategies as they continue to look for ways to offset the overall decline in their revenues, including the establishment of more diversified portfolios of (smaller) revenue streams. Creators and their publishers have attempted to expand their revenue from licensing their material to new content providers, including new content forms like video games. As well, some rights owners appear to be benefitting from more efficient collection of royalties in Canadian and foreign markets.

However, the monetization of streaming continues to be problematic for music owners, and debates with streaming services are ongoing on this point. Some of the key disputes relate to the "value gap" attributed to inadequate monetization of both licensed and unlicensed user-generated content; low revenues generated by ad-supported streaming services; the disparity between revenues of major labels and creators; and the practice of 'stream ripping', whereby consumers download streamed media as audio files.

As this brief review of the effects of technology on the music sector illustrates, the money to be earned from the use of music appears to have been severely compromised, at least to date, by digital platforms. CMPC members and their stakeholders are affected by and witness first-hand, how the music industry has radically changed over the last few decades following the advent of the internet and digital music services, both legal and illegal.

While it is true that new revenue streams now exist, the ongoing challenges faced by creators remain formidable, and today's reality is that the sluggish revenues returning to Canadian creators and music companies are serving to weaken Canadian music. However, this can be corrected, if the right policies regulating digital platforms are put in place in Canada and elsewhere.

3.2 Discoverability, a challenge for Canadian music

Exposure and discoverability of Canadian musical content has always been of great importance in our country. With the advent of streaming services, they have become critical.

The digital world has created an abundance of choice. Virtually all the world's music repertoire can be accessed instantaneously on a hand-held device at the press of a button. The average consumer can choose any song they want, at any time.

However, without regulatory obligations pertaining to Canadian content, streaming services have little or no incentive to enhance the exposure of Canadian music to their listeners. The CMPC proposes the implementation of regulatory means to facilitate and encourage access to the Canadian musical works made available by streaming services in order to maximize their discovery and use in a manner that will result in financial support for the rightsholders. Music will only generates income if it listened to, and in order to be listened to, consumers need to be exposed to Canadian music. The business and marketing models of current streaming services in the market do not allow for that to happen in any meaningful way. The simple reality of today is that if consumers do not know the exact songs they wish to listen to, they often rely on the service's "search" feature or the music recommendation-type tools (typically algorithms) made available by many services. Yet it has been said, in the case of YouTube, that 80 percent of all of watch time is recommended and the idea that music is listened to by search is a misconception.[1]

As far as algorithms are concerned, they are often reliant on artificial intelligence and data-driven techniques that are not designed to promote diverse[2] and local music for audiences of the size typically found in Canadian markets. A Pew Research Center Study[3] on YouTube's algorithm published in November 2018 found that 64% of the recommendations went to music videos that had more than 1 million views. At the same time, only 5% of the recommendations went to videos that had fewer than 50,000 views. These figures show that the algorithm is not tailored to promote diverse and emerging music coming from our relatively small Canadian music markets.

A study commissioned by the European Commission on Spotify Playlists[4] came to the conclusion that the service has a clear capacity to influence consumption decisions, song success and new artist success. It also demonstrates the importance of playlists for the financial success of songs.

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[1] https://www.recode.net/2017/5/8/15575938/lyor-cohen-youtube-warner-music-interview
[2] https://cdec-cdce.org/wp-content/uploads/2018/11/EN-CDCE-AI.pdf
[3] http://www.pewinternet.org/2018/11/07/many-turn-to-youtube-for-childrens-content-news-how-to-lessons/
[4] https://ec.europa.eu/jrc/sites/jrcsh/files/jrc112023.pdf

The absence of major platforms specializing in Canadian music means that our music has no choice but to struggle to be discovered on giant international online music services like Apple music, Google play music, Spotify and YouTube. This challenge is especially difficult for independent and emerging Canadian artists if the discovery of their music is limited by the parameters used by recommendation algorithms of online music services.

The promotion of Canadian content on theses services is essential, and this is reinforced by the fact that younger demographics are increasingly relying on recommendation tools to shape their musical tastes, and Canada's cultural landscape.

The CMPC strongly encourages the expert panel (and ultimately the federal government), as it prepares to assess the extent to which new digital technologies can, should or should not be regulated, to not succumb to the simplistic proposition that these new forms of content distribution cannot be regulated. Experience in other jurisdictions is already demonstrating such claims to be without foundation.

Specifically, the CMPC submits that the European Union's example should be carefully considered. The steps recently taken thereto address these very similar issues demonstrate that governments and regulators are not powerless to regulate online platforms, and that political will can prevail over the lobbying of such platforms against regulation.

Promoting European works

The AVMS Directive sets out stricter requirements regarding the promotion of European works in on-demand audiovisual services. Providers of such services will need to guarantee that at least 30% of the catalogs on their platforms consist of European content, which should be additionally featured in an appropriate manner. The preamble to the AVMS Directive explains how such a distinction can be achieved, e.g. by setting up a separate catalog for European works that will be accessible from the homepage, using European works in advertising campaigns or by featuring European works in banners or similar tools. While the requirements imposed on on-demand service providers are still less stringent than for traditional broadcasters, there is a clear trend towards convergence.[5]

While critical about that EU policy, Netflix, for example, has indicated in their 3Q 2018 earnings report[6] that they would comply: "We anticipate being able to meet these requirements by evolving our content offering" and that this would "only marginally reduce member satisfaction".

[5] See: https://www.dentons.com/en/insights/articles/2018/october/12/changes-to-the-audiovisual-media-services-directive-approved-by-the-european-parliament
https://ec.europa.eu/digital-single-market/en/audiovisual-media-services-directive-avmsd and https://ec.europa.eu/digital-single-market/en/promotion-and-distribution-european-works

[6] https://s22.q4cdn.com/959853165/files/doc_financials/quarterly_reports/2018/q3/FINAL-Q3-18-Shareholder-Letter.pdf

Canadian content requirements for such services should be part of future discussions on the best way to implement any new regulatory framework for Internet platforms, including a potential requirement for prescribed levels of Canadian TV program and film titles among the total number of titles they make available to their Canadian subscribers.

There is also a potential for requiring digital streaming services to release additional important data, including crucial marketing data, to creators and other Canadian music rightsholders, including data that they make available to international labels. Such mechanisms could help raise additional funds for the further development of Canadians in the music business.

The importance of transparency and information

We believe that the Expert panel, the CRTC and all parties involved in the future of broadcasting and telecommunication should have access to information on what is happening to our online music market. We do not know how online music services replied to the procedural letters sent by the CRTC in February 2018.

In addition to typical information currently missing, we believe that the CRTC should obtain information and data to measure the frequency of Canadian content recommendation on online music services.

The music of Canada not only reflects the diverse influences that have shaped the country, but the principle behind Canadian public policy, which holds that popular cultural industries must be financially supported and protected if they are to survive and maintain a national identity. In effect, the Canadian government has for years played a significant role in shaping Canada's musical life through legislation, regulation and consultation, as well as through direct or arm's length financial and organizational assistance. That policy and its long-standing instruments continue to be needed now more than ever before. That new digital services are somehow different is not and should not be a valid reason for being exempt from regulation.

3.3 CMPC observations in respect of rightsholder revenue generation by Traditional Media and New Media

It can be challenging to make appropriate comparisons between rightsholder revenues generated by the use of their works on traditional media (e.g., radio and television stations) and their revenues from the same uses on new media (e.g., online music services such as Spotify and Apple, or online AV services such as Netflix and Crave). While all of these services ultimately compete with one another for the attention and dollars of potential advertisers and other customers, their business models can be different in many respects, as are the listening and viewing habits of their audiences.

From an administration of rights perspective, there may also be significant differences in the manner by which content providers and licensing bodies track usage, negotiate revenue models and develop distribution rules (e.g., viewership, tonnage, revenue weighting, stream counts, etc).

SOCAN, a member of CMPC, is Canada's music performing rights society. It has traditionally licensed the world repertoire of music for traditional performing and communication uses and now does so for new media as well.

Generally speaking, and using its licensing of music communication rights for films and television programs as an example, SOCAN's experience in recent years suggests that:

a. Music uses forming part of television programs on traditional media generate much higher revenues for royalty distribution to SOCAN members.

b. This much higher revenue is associated with many fewer performances by comparison to new media uses. Whereas SOCAN traditionally dealt with tens of <u>thousands</u> of TV/Cable performances in Canada, it now processes tens of <u>millions</u> of digital AV performances (in fact, <u>billions,</u> if one includes YouTube).

c. The result is that on an individual performance basis, the performance of a television program in the digital realm is worth considerably less to a rightsholder than a performance of the same program on traditional media.

d. Again, generally speaking, the gap between the two can be as high as 80% or more (in terms of annual SOCAN royalty earnings relating to a TV series). In other words, and by way of example, when SOCAN looks at the 100th ranked earning TV show in its traditional TV distributions, and compares it to the 100th ranked earning TV show in its online AV service distributions, the show in the latter can earn approximately 80% less than what the same ranked show earned on traditional TV.

Based on the above, it is not surprising that SOCAN and other content licensors take little comfort in the fact that new digital AV services have created "additional" revenue for uses of their content. What we are witnessing is a migration from high revenue generating uses on traditional media, to digital platforms where uses and revenue generation are but a small fraction of what is being generated on their traditional media counterparts.

However, the above is just part of the story. It is also important to note that, for Canadian rightsholders, the revenue shortfall described above stands to be significantly exacerbated by the fact that there are no Canadian content protections in respect of Internet platforms.

Both traditional television and radio services are, of course, subject to long-standing CRTC regulations requiring them to broadcast minimum levels of Canadian content. Continuing to use SOCAN as an example, this has ensured a relatively steady stream of revenue for its Canadian writer and publisher members, because their works have a much better chance of being included in those minimum levels of required Canadian content.

In the online world, those protections do not exist, given the refusal by the CRTC and the federal government to implement similar protections in the case of new media. Consequently, performances of Canadian content on the platforms of online services are vastly inferior in number. This necessarily results in more SOCAN royalties being distributed to foreign rightsholders, and less income for its Canadian members.

In the case of online AV services, Canadian composers received just 3% of the total amounts distributed by SOCAN. For AV programs shown on Cancon regulated platforms i.e., (cable specialty services and terrestrial TV stations), they received 18% and 22% respectively.

Similarly, in the case of online music services, Canadian writers received just 6% of the total royalties distributed, compared to 19% for Cancon regulated terrestrial radio stations.

These figures reflect an average over a two year period.

These discrepancies are alarming. Yet there is nothing surprising about them. Greater usage of Canadian content results in more money for Canadian creators, and vice-versa when there are higher levels of foreign content made available by online platforms and consumed by their subscribers.

That is not to say that these are easy issues to address. From CMPC's perspective they require timely and extensive assessment by the federal government and the CRT, and it is our hope that the expert panel will take the necessary steps to convince them to do so.

3.4 Anticipating the future

Making predictions is difficult. Nevertheless, we note that over the last few years, some patterns have emerged and are now evident: sound recording sales continue to decline, online music consumption is increasing—but still too few consumers are willing to pay for the music content they find online. While it is hard to know how each of these areas will evolve, it becomes increasingly clear that market concentration is a growing trend, and that foreign undertakings will dominate the industry (in the case of online music services, a small group of three foreign-based companies generate approximately 90% of SOCAN's total revenues from all licensed services).

Indeed, in the past, Canadian entities have unsuccessfully tried to break into the streaming market. It seems reasonable to believe that the situation will remain the same, and that there will be no choice in the future but to make our domestic content available through foreign services, in order to be consumed by the Canadian public.

Under the circumstances, it seems essential to critically reflect on the means that should be created to ensure an equitable future for our domestic content on those platforms. It is certainly a complicated issue, but not an unsolvable one.

4 INTERIM, SHORT-TERM MEASURES

The review and amendment of complex legislation such as the Broadcast and Telecom Acts is likely to take a considerable amount of time[7]. Given the rapid and problematic changes that the music sector is continuing to experience, we believe that the following short-term interim measures need to and should be taken.

4.1 Recommendation #1: The Governor in council should give directions to the CRTC to ensure that online music services operating in Canada are subject to appropriate regulation.

It is questionable whether it ever made sense for online music services to be exempted from CRTC requirements, considering the major role they have played in the distribution of cultural content from their inception. If so, it is certainly no longer the case. They should be fully integrated into the Canadian regulatory framework and required to contribute to the promotion and the development of Canadian music in both languages, along with providing relevant information to the CRTC.

These services fall squarely within the definition of a programming undertaking in the *Broadcasting Act*:

> "programming undertaking means an undertaking for the transmission of programs, either directly by radio waves or other means of telecommunication or indirectly through a distribution undertaking, for reception by the public by means of broadcasting receiving apparatus."

[7] The adoption of new Acts could take up to seven years: https://cartt.ca/article/analysis-why-were-still-seven-years-away-new-acts

This definition should apply to all online music services, Canadian or not, that operate in the Canadian market. Section 4 of the Broadcasting Act states that it applies "in respect of broadcasting undertakings carried on in whole or in part within Canada," And a broadcasting undertaking is, among other things, a programming undertaking. This means online music services operating in Canada, fall under the scope of the Broadcasting Act.

Our proposal would not affect current regulations such as the Commercial radio policy. It would use the broadcasting exemption order mechanism[8] to impose requirements to programming undertakings operating in Canada.

Simply put, the CRTC should hold public hearings to determine how online music services operating in Canada should be regulated to meet the objectives of the *Broadcasting Act*, especially for the development of Canadian music through financial contributions, promotional requirements and information sharing with the CRTC, as discussed above.

Should algorithms be regulated?

We do not believe that algorithms should be regulated. We believe that we should regulate algorithm-driven companies to meet the objectives of the Broadcasting Policy for Canada.

How could streaming services be regulated to promote Canadian music?

The CRTC could require the services to achieve a minimal percentage of Canadian content recommendations to its users located in Canada. The platforms would be required to promote Canadian content in both languages to their users when they choose to rely on recommendation features to listen to music. With today's cutting edge technology, the services would be able to recommend Canadian content relevant to the listener's musical taste through playlists, vignettes or any other form of recommendation.

To ensure compliance, the CRTC would obtain the necessary data to measure Canadian content recommendations by the services. In parallel, the music sector would facilitate the identification of Canadian content through metadata tags.

User generated content and music streaming services

We of course do not believe that individual end-users who upload content to online platforms should be regulated pursuant to the *Broadcasting Act*. But music services, including those who rely on their users to upload content (eg.,. YouTube and Facebook) should be regulated to ensure that they contribute to the system, both in terms of Canadian content promotion targets and funding.

[8] By definition, a broadcasting exemption order lets certain types of services operate without a licence, but comes with criteria to be followed by the services.

To implement this recommendation the Governor in council should instruct the CRTC to:

- Amend the exemption order for new media broadcasting undertakings[9], as well as all necessary regulations, to impose financial contributions, Canadian content promotion obligations, information collection and CRTC registration requirements on all programming undertakings, including those that are not licensed or eligible to become licensed, and adopt any other regulations if necessary;
- If necessary, amend the Broadcasting Information Regulations or mobilize the Chief Statistician's powers to ensure information collection regarding the online music market like Canadian content market share, by province and language, the level of Canadian content recommendation, and any other relevant information.

4.2 The *Broadcasting Act* should be amended to provide the CRTC with powers of sanction that are similar to those it has under the *Telecommunications Act.*

To ensure all undertakings active in Canada respect our broadcasting regulations, we believe the government should amend the *Broadcasting Act* to give the CRTC powers of sanction, similar to those it has under the *Telecommunications Act.*

The CRTC has powers of criminal sanctions in telecommunications to ensure compliance with certain provisions and it should be granted similar powers in broadcasting. In telecommunications, these powers exist to ensure, among other things, that any carrier, Canadian or foreign, complies with the rules limiting unsolicited telecommunications.[10]

In broadcasting, this power already exists, but only to sanction undertakings that charge fees to their customers who request a paper invoice for services rendered.[11] If monetary penalties of up to $250,000 for a first offence and $500,000 for a repeat offence are provided for a paper bill charge, there is nothing incongruous or shocking about the fact that refusing to cooperate on priority aspects of monitoring the system and achieving the objectives of the *Act* – such as promoting and financing Canadian content or providing the information required by the CRTC and registering with the CRTC – also entails severe monetary sanctions for the offenders.

These new powers would apply to both foreign and Canadian undertakings, when programs are carried other than by BDUs or through a CRTC licence with a broadcasting certificate issued under the Radiocommunication Act.[12] Since the CRTC already deals with

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[9] Broadcasting Order CRTC 2009-660
[10] Telecommunication Act, S.C. 1993, c. 38, Art. 41 and seq.
[11] Broadcasting Act, S.C. 1991, c. 11, Art. 34.1 to 34.3
[12] Radiocommunications Act, R.S.C., c. R-2.

sanctions in regards to Telecommunications, it could easily implement its new powers under Broadcasting.

The enforcement of sanctions against foreign undertakings could be challenging, but should not be considered insurmountable. The Canadian government could set up a bonding system for foreign undertakings that have no assets in Canada or look at how European countries enforce their laws within the continent.

4.3 Recommendation #3: The Governor in council should use its powers under the *Telecommunications Act* to require telecommunications providers contribute to Canadian music

Internet service providers and telecommunication providers greatly benefit from the distribution of cultural content. They should contribute to the development of Canadian music.

Section 8 of the *Telecommunications Act* states that "The Governor in Council may, by order, issue to the Commission directions of general application on broad policy matters with respect to the Canadian telecommunications policy objectives."[13]

The Governor in Council could direct the CRTC to adopt, through regulatory policy that will then be implemented via regulations, measures to ensure that telecommunications carriers contribute to Canadian music, thereby "serv[ing] to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions,"[14] and reaffirming their "essential role in the maintenance of Canada's identity and sovereignty."[15]

Canadian content and music being a pillar of our identity and social and economic fabric, we believe that this action is both justified and necessary. By issuing its Direction in 2006[16], the GIC severely limited the Commission's discretion by imposing on it a validation mode for its decisions that translates into an order of priority among the objectives of the Canadian Telecommunications Policy.

Financial contributions to Canadian music

Funding mechanisms make possible the creation of content that would otherwise not exist. We need strong and steady contributions to independent funds to which music creators and their

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[13] Telecommunication Act, S.C. 1993, c. 38, Art. 8.
[14] Telecommunication Act, S.C. 1993, c. 38, Art. 7a).
[15] Telecommunication Act, S.C. 1993, c. 38, Art. 7.
[16] Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy objectives, SOR/2006-355

business partners can apply for the creation and discovery of diverse Canadian music.

4.4 Recommendation #4: The government should allocate part of the next spectrum auction revenue to the development of Canadian music.

The 700 MHz Spectrum Auction generated 5,27 billion dollars in 2014[17]. The revenue from this auction was deposited in the Consolidated Revenue Fund. We suggest that part of the revenue generated from the next auctions be allocated as financial contributions to the development of Canadian music, while our industry is still going through several changes.

The CRTC, in its *Future of Programming Distribution in Canada* report, mentioned this possibility:

"A restructured funding strategy should be based on a revised contribution structure that is broad-based, equitable and sustainable in the longer term. It could integrate or at minimum align the existing contributions of the federal government directed to audio and video content. It could also incorporate a portion of the revenues derived from spectrum licensing and auctions, since the demand for spectrum is driven to a large extent by the demand for audio and video content."[18]

The upcoming auction of 600MHz spectrum should take place soon. It is expected that it will generate approximately 1 billion dollars and that it may be the last important auction.

4.5 Recommendation #5: The Expert panel should endeavour to present its interim report to the government before the end of April 2019.

Considering that short-term measures are urgent and can be dealt with rapidly, we believe that the Expert panel should deliver its report to the government early, in order to ensure that short-term actions can be taken before the next federal election.

[17] https://www.ic.gc.ca/eic/site/ic-gc.nsf/fra/07398.html
[18] https://crtc.gc.ca/eng/publications/s15/pol1.htm - p2

5 LONG TERM LEGISLATIVE REVIEW

5.1 Recommendation #6: The Broadcasting and Telecommunications Acts should clearly distinguish the regulation of telecommunication activities from cultural content regulation, which can be delivered through different telecommunication activities

The Canadian Telecommunications Policy is an instrument of economic development. The Canadian Broadcasting Policy is one of protection and promotion of cultural sovereignty. We may criticize, perhaps even rightly so, that in the 1980s the legislator chose to use the technological differences between these two industrial sectors as a differentiator rather than openly recognizing the complementarity of both ideological approaches.

The result remains, and is now the starting point for the ongoing legislative review: we have two statutes whose playing fields should be well defined to have an optimal impact. Yet the two fields have been gradually morphing into each other for more than 20 years, at a rate that is constantly accelerating. It is now necessary to dissociate cultural objectives from a specific mode of transmission, namely broadcasting.

In 2012, the Supreme Court of Canada recognized the dichotomy between broadcasting undertakings and telecommunications carriers under the CRTC's regulatory framework. Attempting once again to disguise the concept of a telecommunications carrier as a broadcasting service is very likely to lead to the same dead end. However, this does not mean that telecommunications companies should not have responsibilities to shoulder when carrying cultural content.

The way in which the CRTC's powers have been delegated to it, through two separate Acts, leaves the CRTC no choice: it must follow the regulatory classification provided by Parliament. An undertaking, depending on the type of service it offers, will be subject to the *Broadcasting Act* or the *Telecommunications Act*. The provision of any service cannot be subject to both laws at the same time, nor can we choose the regulatory framework we like based on a desired policy objective.

The distinction between content and its transportation vehicle is the best way to ensure that in the future, communications technology developments will cause less disruption in the development of Canadian content. Besides, the idea is not new. The architects of the current version of the *Broadcasting Act* believed they had put in place a preventive measure[19] to ensure that new methods of transmission did not result in circumvention of

[19] Paragraph 9(1)f) of the Act

the objectives of the *Act*, which they considered a priority over any transportation arrangement issues.

5.2 Recommendation # 7: The revised Broadcasting Act should maintain the main objectives of the Broadcasting Policy for Canada and add an objective on the protection and promotion of the diversity of cultural expressions

Fundamentally, the review of the *Broadcasting Act* needs to focus on the adaptability and flexibility of the system, and not to review the fundamental objectives it carries. The ability for Canadian content to exist, and to reach the public, needs to be at the center of the next *Act*.

As described above, technological changes have not eliminated the need to protect Canadian culture, including the fostering and nurturing of Canadian music. The cultural sovereignty of Canada will always be in need for a system where our music is promoted and nurtured, along with other public interests.

We believe a new objective on the protection and promotion of the diversity of cultural expressions should be added to the Broadcasting policy for Canada, with a reference to the UNESCO 2005 convention. Canada was the first country to ratify this international treaty, that partly relies on broadcasting activities for the achievement of its objectives. This Convention also reaffirms « the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory »[20].

5.3 Recommendation #8: All activities involved in the delivery of cultural content should come under the jurisdiction of the next *Broadcasting Act*

In order to be flexible and make it possible to reach its objectives, the next *Act* should have jurisdiction over any entity involved in cultural content delivery in Canada. Telecommunication service providers, distribution undertakings, broadcasting licensees, programming undertakings and others should be subject to regulation for their cultural content delivery activities.

By participating in the delivery of cultural content, these entities benefit from the cultural industries and impact Canadian culture and content. The CRTC need the flexibility to regulate the activities where it is the most effective in order to reach the objectives of the Broadcasting Policy of the *Act*.

[20] https://en.unesco.org/creativity/sites/creativity/files/convention2005_basictext_en.pdf - page=16

The need for devices and terminals to treat all contents equally

Smartphones, smart speakers and other devices should treat all services and contents equally. In the context of vertical integration, we would not want a device to facilitate or hamper the access to specific services or contents.[21]

6 Conclusion

Canadian content rules were introduced more than thirty years ago to safeguard and enrich Canadian culture in the face of overwhelming foreign competition in the marketplace. While technology has changed the delivery of content and increased foreign competition, it has not changed the purpose behind Canadian content rules and the importance of protecting Canadian stories and our national identity.

The music sector has been going through rapid changes. It is now the time to adopt short-term measures to ensure that online music services properly contribute to the promotion and the development of Canadian music. The proper long-term review of the *Acts* need to better distinguish telecommunication activities from cultural content delivery activities.

The CMPC looks forward to discussing, contributing and learning on any topic related from the Broadcasting and Telecommunications legislative review.

[21] For more, see https://www.arcep.fr/uploads/tx_gspublication/rapport-terminaux-fev2018.pdf