Coalition
for the Diversity of
Cultural Expressions

**CDCE's Recommendations for the Review of the *Copyright Act***


## Abstract

The CDCE recommends that the *Copyright Act* be reviewed as soon as possible to help restore a balance for cultural ecosystems. The COVID highlighted the fragile situation of cultural industries and the precarious condition of artists, creators and workers in the sector. The cultural sector has been shaken by the growing access to cultural expressions via the Internet during the 2010's and then by the revision of the *Copyright Act* in 2012, which added several exceptions that do not meet Canada's international obligations.

The pandemic has accelerated the move to digital. The market was already broken by digital; it is now collapsing. Beyond jobs and the contribution of culture to our economy, it is the vitality of the sector and the diversity of cultural expressions that is at stake. Meanwhile, companies providing access to cultural expressions online have made unprecedented profits. They have the means to better remunerate rights holders for the value they derive from the content protected by copyright.

At a minimum we can assess the impact of our recommendations to amend the Act to more than $136 million in autonomous revenues, paid by companies for the use of content that could be returned annually to the cultural ecosystems and the Canadian economy. At a time when public finances are already under pressure, the revision of the Act presents itself as a fair and relevant market based solution to contribute to the creation of rich, innovative and diverse cultural expressions.


## About the CDCE

The Coalition for the Diversity of Cultural Expressions (CDCE) brings together the main Anglophone and Francophone professional organizations in the cultural sector in Canada. It is made up of some 40 organizations that collectively represent the interests of more than 200,000 professionals and 2,000 businesses in the literature, film, television, new media, music, performing arts and visual arts sectors. The CDCE intervenes primarily to ensure that cultural goods and services are excluded from trade negotiations and that the diversity of cultural expressions is present in the digital environment.

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**Introduction**

The growing access to cultural expressions via the Internet in the 2010s has disrupted cultural ecosystems including by redistributing a growing share of the value that was accruing to creators, artists, professionals and cultural enterprises to technology companies, telecommunications services and foreign media offering online programming.

Canadian laws or the way we apply them have not been able to rebalance the situation. Worse, the 2012 revision of the *Copyright Act* has deprived cultural ecosystems of valuable revenues, notably by adding several exceptions that do not meet Canada's international obligations. Indeed, the International Literary and Artistic Association has officially expressed a wish to the Canadian government, inviting him to reduce the number of free exceptions in Canadian law.[1].

Many artists, creators and organizations have been building on the activities of the past few years to try to bridge the growing value gap. COVID has brought a new need to increase the delivery of content and performances to digital environments. For some, it was an impossible challenge, for others it's been overcome, but at what cost? While there have been some interesting breakthroughs, there has mostly been a huge demand for free or low-paying performances and accesses to culture. On April 28, 2020, WIPO Director Francis Gurry warned: "With the pandemic, free cultural products - books, films or concerts - have become widespread. But this infringement of intellectual property is not without danger for an already fragile sector. "[2] In France, the Ministry of Culture estimates that COVID will lead to an average 25% drop in turnover for the cultural sector in 2020. In France, the Ministry of Culture estimates that COVID will lead to an average 25% drop in turnover for the cultural sector in 2020[3].

Meanwhile, companies providing access to cultural expressions[4] online have made unprecedented profits (see Annex A). For example, Netflix revenues jumped 27% in the first quarter of 2020 and 25% in the second quarter, compared to the same periods in 2019, for a net profit of more than $1.4 billion in six months. Amazon's second quarter revenue reached 88.9 billion dollars, a 40% increase over last year, for a net profit of 5.2 billion dollars in three months[5]. Of course, not all the revenues of companies like Amazon are related to cultural products. However, they have the means to better remunerate rights holders for the value they derive from the content protected by copyright as we will propose in some of the following pages.

COVID has revealed the vital contribution that culture provides to people's lives, in their wellbeing and their mental health. Despite its significant contribution to the economy, representing nearly 3% of Canada's GDP[6], COVID has also highlighted the fragile balance of the cultural industries and the precarious situation of artists, creators and workers in the sector.

The Canadian government's response has, to date, helped individuals and many organizations through the declining revenues caused by the pandemic allowing them to maintain their current operations, develop creative projects and keep talent at the heart of their business. But the future is uncertain and the pandemic has accelerated the move to digital. The market was already broken by digital; it is now collapsing. Beyond jobs and the contribution of culture to our economy, which is in itself an important contribution, it is the vitality of the sector and the diversity of cultural expressions that is at stake.

Copyright is the main pillar of wealth redistribution for the cultural sector, and cultural activities always generate jobs and substantial revenues. At a minimum we can assess the impact of our recommendations to amend the Act to more than $136 million in autonomous revenues, paid by companies for the use of content

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[1] ALAI (2017). Wish Expressed By ALAI to the Government of Canada

[2] Our translation, from the excerp in : L'impact de la crise du Covid-19 sur les secteurs culturels, 6 juillet 2020, Le Devoir

[3] Ministère français de la Culture (2020), L'impact de la crise du Covid-19 sur les secteurs culturels

[4] See the UNESCO Convention Wikipedia page for more information on the concept.

[5] Voir annexe A pour les sources et les données des géants du Web.

[6] Statistics Canada (2019), Provincial and Territorial Culture Indicators, 2017

that could be returned annually to the cultural ecosystems and the Canadian economy. At a time when public finances are already under pressure, the revision of the Act presents itself as a fair and relevant market based solution to contribute to the creation of rich, innovative and diverse cultural expressions.

## 1. Organizations that benefit from culture need to deliver a greater share of the value generated by copyrighted content

As Me Ysolde Gendreau reminded us when she appeared before the INDU Committee in 2018[7], businesses that benefit from cultural expressions always resist the payment of copyright royalties. But most of them have been doing so for more than 100 years now, and new balances have been struck each time progress has demanded it.

We are once again invited to seek this delicate balance following the development of new technologies over the last two decades. Indeed, rights holders have witnessed two major trends in recent years: on the one hand, an enormous reluctance on the part of public authorities to regulate new players in order to encourage innovation, and on the other, a legislative and jurisprudential movement that favors the user to the detriment of the creator.

Today's reality, exacerbated by the pandemic, remains that digital players are taking full advantage of the various exceptions to the Act that lower the value of creators' rights well below what is reasonable.

The main focus of this section will be to recommend that organizations that benefit from the online dissemination of cultural expressions pay their part in the fair remuneration of rights holders.

### 1.1. Making network services accountable

In 2012, an exception was introduced in Article 31.1 for network services. This exception covers a variety of services: Internet service providers, mobility services, content sharing sites such as YouTube, search engines, hosting, data storage, social networks, etc.

Thus, because they are not responsible for the content that passes through their services, these providers are not required to remunerate the rights holders of the works that transit through their services, nor are they required to assume responsibility when copyright infringements occur.

However, even if it is possible that these services, when acting as pure intermediaries, do not directly share copyrighted works, they still authorize their users to do so. By doing so, these services thus benefit from an influx of users and a huge volume of data, as well as facilitating the exchange and dissemination of our cultural expressions with impunity. They extract an immense value from access to culture, whether through subscriptions, the sale of advertising or the exploitation of users' personal data, without contributing in return. Some of these services now occupy a central position in access and distribution of contents. And the dumb pipe argument no longer holds as these services develop algorithms to recommend content to users based on corporate interests[8].

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[7] Testimony of Ysolde Gendreau (as an individual), Full Professor, Faculty of Law, Université de Montréal, December 10, 2018

[8] See, for example, this analysis of the YouTube algorithm, which shows that the goal is to retain users as long as possible by offering them longer and more popular videos: Pew Research Center (2018), Many Turn to YouTube for Children's Content, News, How-To Lessons, By Aaron Smith, Skye Toor and Patrick Van Kessel, 28 p.

A category as broad as "network services" should have no place in the Act. Since service providers are very different, the obligations should be adapted according to the type of service they each provide.

For example, Youtube is the platform most used in Canada to access music in recent years[9]. This company benefits from the exception and could pretend that it has no obligation to negotiate with right holders to obtain a licence.

Indeed, YouTube has decided to give a portion of its revenues, while emphasizing over and over again that it remains subject to the exceptions provided for in the Act. In this context, it is difficult for rights holders to obtain fair compensation for their contribution.

At the same time, these services are under little obligation to report on their activities or on the cultural content that transitions every hour on their network. The current system does not provide for a precise reporting mechanism that would allow rights holders to ensure sufficient royalties, nor to know precisely and exhaustively what cultural content circulates on their network.

For their part, telecommunication service providers should be held liable for infringing activities, in particular to encourage them to participate in initiatives that stem piracy with other stakeholders. At present, the remedies available are limited, place the burden of proof on rights holders and require the initiation of procedures against individual users. In this regard, during her appearance before the INDU Committee in 2018, Me Ysolde Gendreau explained that "Faced with massive uses of works, collective management began in the 19th century precisely because winning a case against a single user was perceived as a sword in the water"[10].

Finally, the CHPC recommended the establishment of tariffs for online services regulated by the Copyright Board for equitable remuneration and the review of exceptions and statutes to ensure that service providers are accountable for the use of protected content[11].

**Recommendation 1: distinguish the different network services and establish new responsibilities according to the type of service they offer, including, but not limited to:**

- **The obligation, for any service offering access to copyright-protected content in Canada, even if this content is shared by users, to negotiate fair licences with collective societies for all types of content present on the platforms;**
- **Modify safe harbor rules to ensure that network services play a proactive role in copyright protection. For example, services that are aware that the means they make available to users are used to perpetrate infringements should put in place measures that stop abuses.**

### 1.2. Improving the Act to counter piracy

In Canada, a copyright owner may report copyright infringement to a network or storage service provider. The provider must then forward the notice to the person responsible and keep the name of the person in a record. This system is called "notice and notice". The rights holders will thus have to generate individual notices, or possibly lawsuits, which may accumulate against the same user while the latter may continue to infringe copyright. In many other countries, service providers who receive a notice must ensure that the copyrighted content is removed. This is known as the "notice and takedown" system.

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[9] Innovation, Science and Economic Development (2018), Study of Online Consumption of Copyrighted Content: Attitudes Toward and Prevalence of Copyright Infringement in Canada – Infographic, p. 3

[10] Testimony of Ysolde Gendreau (as an individual), Full Professor, Faculty of Law, Université de Montréal, December 10, 2018

[11] CHPC (2019), Paradigmes changeants, recommandations 9 et 5.

The current Act is not effective in fighting piracy. In a study for which data was collected in 2017, just over one-quarter of all people who accessed online content accessed at least one piece of content in contravention of Canadian law[12]. The study also estimates that the volume of illegal content use per year in Canada amounts to 124 million music tracks, 48 million movies, 64 million television shows and 4 million e-books[13].

That being said, the notice-and-takedown system is not always effective against all piracy strategies. Indeed, for certain forms of piracy, the Canadian Federation of Musicians considers that, while adopting a "notice and takedown" system, it would be important to also maintain the "notice and notice" system, because blocking sites or the "notice and takedown" system is not effective against peer-to-peer applications[14]. Similarly, the "notice and takedown" system would not be much more effective in connection with certain hacking strategies that increasingly use stream extraction, virtual private networks and digital boxes. Anti-piracy mechanisms should adapt to all these new practices. Nevertheless, it is interesting to note that the study commissioned by ISED also shows that the vast majority of people who have received a notice in Canada have taken action as a result[15].

**Recommendation 2:**

- **Establish a notice-and-takedown regime alongside the notice and notice regime;**
- **Enable an injunction to be obtained to force service providers (search engines, telecommunications services, etc.) to block access to a piracy site or deindex it.**

### 1.3. Abolish the royalty exemption for commercial radios

In 1997, a public performance royalty exemption for performers and producers of sound recording – which limits to $100 royalties payable on the first $1.25 million of annual advertising revenues - was introduced for radio stations. This exception was intended to be temporary, because the radio sector was going through a difficult period at the time.

That is no longer the case. As the Canadian Music Policy Coalition pointed out, "the commercial radio industry has changed profoundly and is now dominated by a few large - and extremely profitable - companies with total profits up 8,300% from 1995[16].

In addition to the fact that it discriminates between the various musical rights holders (the exemption only applies to performers and sound recording producers and does not apply to authors), this exemption is no longer relevant.

In 2011, CIMA estimated that the removal of this exemption would return $7-8 million annually to the Canadian music ecosystem[17].

Finally, the Standing Committees on Canadian Heritage (CHPC) and Industry, Science and Technology (INDU) both supported this recommendation in 2019.

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[12] Innovation, Science and Economic Development (2018), Study of Online Consumption of Copyrighted Content: Attitudes Toward and Prevalence of Copyright Infringement in Canada – Final Report, p. 7

[13] Idem, p. 41.

[14] Canadian Federation of Musicians (2016), Canadian Content in a Digital World, p. 19.

[15] Idem, p. 10.

[16] Canadian Music Policy Coalition (2017), Sounding Like a Broken Record: Principled Copyright Recommendations from the Music Industry, p. 24. Data cited are from Statistics Canada, Private Broadcasting, 2014, The Daily (June 16, 2015), p. 1.

[17] Canadian Independent Music Association, "CIMA Requests Elimination of Royalty Payment Exemption," news release, 29 November 2011.

**Recommendation 3: Abolish the public performance royalty exemption for performers and producers for commercial radio stations.**

## 2. Restore the balance so that Canadian law allows creators and rights holders to recover royalties on their works

In this section we will see that copyright has been far too badly abused with the 2012 revision and we will see that copyright no longer allows for fair remuneration for the use of the work of many artists and creators, nor does it ensure the long-term diversity of cultural expressions.

The addition of more than 30 exceptions in as many years, some of which are in contravention of international law, has completely unbalanced cultural ecosystems. As noted by the Société des auteurs de radio, télévision et cinéma (SARTEC), the exceptions now occupy 40% of the text of the Act, a striking picture[18].

In order for the system to return to its mission and accomplish it adequately in 2020, we also propose that Canada catch up with a number of rights that are still not recognized.

### 2.1. Extending the copyright term

Several reasons had already convinced the CHPC and INDU (albeit to a lesser extent), to increase copyright protection from 50 to 70 years after the death of the author. Canada committed to this extension in the Agreement between Canada, the United States and Mexico (CUSMA).

Today we are insisting on the immediate and automatic implementation of this commitment. While critics of copyright term extension have no evidence to back up their arguments or support their demands (mandatory registration, payment of fees, etc.), an impact assessment conducted by the European Commission concludes that a term extension would not necessarily lead to price increases, but would have a positive impact on cultural diversity by increasing the resources available to support the development of new talent[19].

**Recommendation 4: Proceed with the immediate implementation, without exception or condition, of the extension of the term of copyright from 50 to 70 years after the death of the author.**

### 2.2. Ending illegal practices regarding fair dealing for educational purposes and circumscribing the exception

Within weeks of the introduction of "education" as a new allowable purpose under the fair dealing exception in 2012, several educational institutions outside of Quebec adopted self-defined policies for the copying of works which promote widespread and systematic free copying of published works [20]. Since then, the causes are multiplying for collecting societies, especially in the field of book publishing. Legal costs are therefore being swallowed up in defending the rights of authors and publishers. As an example, both the Federal Court and the Federal Court of Appeal have recognized that the policy developed by York University (which are

[18] Société des auteurs de radio, télévision et cinéma (2018), Mémoire de la SARTEC au Comité permanent du Patrimoine canadien dans le cadre de son Étude du modèle de rémunération pour les artistes et les créateurs à l'occasion de l'examen quinquennal de la Loi sur le droit d'auteur, p. 4.

[19] «Summary of the Impact Assessment on the Legal and Economic Situation of Performers and Record Producers in the European Union», COM(2008) 464 final, SEC(2008) 2287

[20] As mentionned by Access Copyright (2018), citing the example of Universities Canada

virtually identical to policies adopted by many other educational institutions) is not fair dealing[21]. These rulings have not resulted in any change on the part of users and the case could still drag on if it were to be heard by the Supreme Court.

Several CDCE members have demonstrated that losses related to this exception have resulted in an estimated $30 million in lost annual licensing revenues for creators and publishers[22]. For Me Erika Bergeron-Drolet, "The 2012 amendments to the exceptions regime of the Copyright Act are significant, not only in terms of their number, but in that they ignore collective management mechanisms and the payment of royalties as tools to counterbalance the increased rights granted to users"[23].

Outside Quebec, since the 2012 revision, most public elementary and secondary educational institutions, as well as post-secondary institutions, have stopped paying licence fees to Access Copyright for the reproduction of published works[24].

Thus, royalties from the education sector outside Quebec decreased by 89% between 2012 and 2017, resulting in a decrease of nearly 80% in royalties to rights holders[25].

In Quebec, while the majority of institutions continued to operate under the terms of their licences, the introduction of the 2012 exceptions resulted in a decrease of approximately 23% in royalties to rights holders between 2012 and 2017[26], with universities paying only about half of what they used to pay per student and rights holders only receiving negligible compensation for the copying of their work by educational institutions outside Quebec.

The average annual salary of writers in Canada in 2017 was only $9384 per year, a decrease of 27% from 2014 and 78% from 1998[27]. While other factors may help explain some of this decrease, it is clear that the 2012 changes have had a very negative impact. Copyright royalties constitute a non-negligible part of creators' revenues for their literary works (20%), while they provide 16% of publishers' revenues[28]. The economic impact of this exception is certainly difficult to quantify, but there is no doubt that the reduced amounts have a significant impact on the viability of a small publishing house.

And there is more. Copying practices introduced in the education sector in 2012 have accelerated the decline in sales of books for the education sector, with royalty-free copying replacing books[29]. As a result, there has been a 41% (47% taking inflation into account) drop in book sales to educational institutions between 2010 and 2016[30]. Three major publishers have withdrawn altogether from the production of Canadian content for the K-12 education sector. As noted by the Association of Canadian Publishers, "publishers can no longer continue to produce free educational materials" [31].

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[21] *Canadian Copyright Licensing Agency* v. *York University*, 2017 FC 669, para. 14

[22] PricewaterhouseCoopers LLP (2015), Economic Impacts of the Canadian Educational Sector's Fair Dealing Guidelines, pp. 7 & 10.

[23] Érika Bergeron-Drolet (2016), Les exceptions de la Loi sur le droit d'auteur : rétrospective et état des lieux, *Les Cahiers de propriété intellectuelle*, vol. 28, no. 2, p. 318, our translation.

[24] Access Copyright (2018), Access Copyright's Submission to the Standing Committee on Canadian Heritage for the Study on Remuneration Models for Artists and Creative Industries, p. 2

[25] Access Copyright (2017) *Access Copyright Annual Report*, p.13

[26] Testimony of Frédérique Couette, Copibec, before the Standing Committee on Canadian Heritage, November 29, 2018.

[27] The Writers' Union of Canada (2018) Diminishing Returns: Creative Culture at Risk.

[28] PricewaterhouseCoopers LLP (2015), Economic Impacts of the Canadian Educational Sector's Fair Dealing Guidelines, pp. 7 & 10, cited by Access Copyright (2018)

[29] PricewaterhouseCoopers LLP (2015), Economic Impacts of the Canadian Educational Sector's Fair Dealing Guidelines, pp. 7 & 10

[30] In Access Copyright (2018), using data from Statistics Canada for 2010 & 2012, 2014 and 2016

[31] ACP (2018), Statutory Review of the *Copyright Act*, Submission to the Standing Committee on Industry, Science and Technology, p. 1.

This exception has an impact not only on the production of knowledge, the diversity of points of view, and the quality of education, but also on the entire Canadian economy, with the loss of thousands of jobs (3,800 between 2012 and 2016 for the book industry in Canada) [32].

This has also favoured a greater judicialization of copyright issues, leaving it to the courts rather than elected officials to adapt copyright to contemporary realities. This judicialization of the law weakens Copyright Management Organization, consolidates and encourages infringing practices, and ends up generating a flagrant imbalance between users and authors.

The trivialization of copyright in educational institutions, where plagiarism is not tolerated and where one claims to value knowledge, is all the more disturbing. One cannot imagine universities illegally installing licensed software and going to court to avoid paying for it, or asking building contractors to build their real estate developments for free.

Canada has attracted the criticism of the international community because of this exception[33]. As the UNEQ pointed out, the former Deputy Director of the World Intellectual Property Organization (WIPO), Mihály J. Ficsor, explained that with this exception, Canada is in violation of four international instruments to which it is bound: the Berne Convention for the Protection of Literary and Artistic Works, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty[34].

In order to restore fair compensation to creators, Canada should adopt the UK, Ireland and new Zealand Approach and limit the availability of fair dealing for educational purposes to when a work is not commercially available through a licence, including a licence by a collective society. This is also consistent with Recommendation 18 from the CHPC *Shifting Paradigms* report.[35]

**Recommendation 5: Amend the fair dealing provisions in the context of education so that they only apply:**

- **Where a work is not commercially available under a licence by the rightsholder or a collective society.**

### 2.3. Improving the private copy regime

The principle of private copying allows for a compromise between the rights of users and the creators' right to remuneration. It allows users to multiply the opportunities for access to cultural expressions and to let their creativity run wild by arranging the tracks as they wish while ensuring that creators are compensated for the copies thus created.

There are two problems with the Canadian private copy regime: it is not technologically neutral and it applies only to the music sector.

Logic would dictate that the system should be technologically neutral in order to adapt to new and constantly evolving user practices. Today, the private copy levy is only applied to recordable CDs, a product that is practically no longer sold. This is why royalties are declining: from a peak of $38 million in 2004, they only

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[32] Statistics Canada. Table 36-10-0452-01 Culture and sport indicators by domain and sub-domain, by province and territory

[33] For example, the International Authors Forum, the International Publishers' Union, the Syndicat national de l'édition en France, the Federation of European Publishers, IFFRO (International Federation of Reproduction Rights Organisations), which brings together all the collective management societies (one hundred members).

[34] UNEQ, Étude sur les modèles de rémunération pour les artistes et les créateurs dans le contexte du droit d'auteur : mémoire de l'Union des écrivaines et des écrivains québécois (UNEQ) au Comité permanent du patrimoine canadien, 11 décembre 2018, pp. 4-5

[35] CHPC (2019), *Shifting Paradigms*, recommendation 18.

reached $1.1 million in 2019[36]. Meanwhile, royalties from the various private copying regimes around the world increased by 6% between 2007 and 2015[37].

Technical reasons and differences between the French and English versions of the Act have prevented the application of a levy in the case of MP3 players[38]. Rather than remedy the situation, new exceptions were introduced in 2012 for reproduction for private purposes (section 29.22) and for listening or viewing on a deferred basis (29.23).

With regards to the first exception, according to the Société des auteurs et compositeurs dramatiques and the Société civile des auteurs multimédia (SACD and SCAM), "...Canada would not have met its international obligations since this new exception does not meet the requirements of the Berne Convention's three-step test, which provides that limitations or restrictions on the exclusive rights of authors must be subject to conditions which limit their application to certain special cases where they do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author" [39].

Despite the increase in streaming, users are still using private copies in Canada. The Canadian Private Copying Collective conducted a survey in 2019 that estimated that there are 5.95 billion copies of songs on telephones and tablets in Canada, and that half of those copies are unlicensed . Interestingly, half of these copies were made in the past year[40].

If the regime were technologically neutral, the private copying levy could be collected on a wide range of physical media and devices (telephones, USB keys, hard drives, computers, tablets, etc.), as is the case in many countries around the world, or services (cloud computing space).

In the majority of countries (80%) where a private copying regime is in place, it also generates royalties for the audiovisual sector, while other countries are also beginning to remit royalties to the literary and visual arts sectors[41].

It would be up to the Copyright Board to determine the levies according to media and devices. For example, the average royalty in Europe on the sale of a smart phone is $3 CDN (for private copying of music). It is difficult to assess the financial impact of our recommendations, but they should logically generate at least 40 million dollars in royalties annually.

**Recommendation 6: improve the private copying regime by**

- **Clarifying the Act to make the private copying regime truly technology-neutral;**
- **Allowing the payment of royalties for rights holders in the audiovisual, literary and visual arts sectors**
- **Eliminating the exceptions introduced in 2012 to sections 29.22 and 29.23 for private copying and time-shifted listening and viewing.**

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[36] Canadian Private Copying Collective (2020), Written Submission for the Pre-Budget Consultations in Advance of the Upcoming Federal Budget (2021)

[37] WIPO & Stichting de Thuiskopie (2017), *International Survey on Private Copying, Law & Practice 2016*, p. 15.

[38] Testimony of Lyette Bouchard, INDU, June 14, 2018

[39] Société des Auteurs et Compositeurs Dramatiques et Société Civile des Auteurs Multimédia - SACD-SCAM (2018), Mémoire Présenté dans le cadre de l'examen prévu par la loi de la Loi sur le droit d'auteur au Comité permanent de l'industrie, des sciences et de la technologie, pp.8-9. The text refers the reader to Article 9(2) of the Berne Convention. Our translation.

[40] Canadian Private Copying Collective (2020), Letter to Minister Guilbeault and Bains

[41] WIPO & Stichting de Thuiskopie (2017), *International Survey on Private Copying, Law & Practice 2016*, p. 15.

### 2.4. Changing the definition of sound recording

The definition of sound recording in the Act excludes sound recordings that accompany cinematographic works, thus depriving performing artists and producers of sound recordings of royalties from equitable remuneration for the communication to the public of recordings that takes place during the broadcasting of cinematographic works, unlike authors and composers who collect equivalent royalties for such communications to the public.

The Canadian Federation of Musicians (CFM) reminds us that the WIPO Performances and Phonograms Treaty (WPPT), which was ratified by Canada on May 13, 2014[42] protects phonograms as well as the performances incorporated therein even when they are integrated into audiovisual content after their recording and that the rights related to sound recordings are in no way affected by their incorporation in audiovisual media[43].

Artisti estimates that changing this definition would have returned $58 million in 2015 to performing artists and producers of sound recordings[44]. Finally, it should be noted that the CHPC recommended that the definition be amended in its 2019 report.

**Recommendation 7: Amend the definition of sound recording to include sound recordings that accompany audiovisual works.**

### 2.5. Recognizing the rights of performing artists on audiovisual media

The Beijing Treaty on Audiovisual Performances came into force 28 April, 2020. It has been ratified by 33 states and signed by 58 others. It grants "performers new economic and moral rights in their performances fixed on audiovisual media"[45].

It should be recalled that currently, performers participating in sound recordings have economic and moral rights while performing artists whose performances are incorporated into cinematographic works have no equivalent. This sometimes leads to aberrant situations, as in the case of music videos, where the artist will benefit from copyright protection for his or her performance incorporated into the sound recording but will not be able to benefit from it on the video recording of the same performance. Moreover, this creates discrimination between performers, depending on whether they are filmed or not[46].

The Beijing Treaty would therefore make it possible to give performers participating in audiovisual recordings, regardless of the nature of their performance (acting, music, dance), the same rights as those available to performers participating in sound recordings. The CHPC supported this recommendation in 2019.

The Canadian Federation of Musicians argues that the granting of these new rights should go hand in hand with an amendment to the definition of a sound recording (previous point) in order to ensure that all musicians' contributions to audiovisual content have equivalent rights[47].

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[42] WIPO (2014), WPPT Notification n° 86
[43] Canadian Federation of Musicians – CFM (2016), Canadian Content in a Digital World, p. 12.
[44] Artisti (2016), Mémoire d'Artisti Déposé dans le cadre de la consultation publique sur le contenu canadien dans un monde numérique p. 10
[45] Gazeau, Maxime-Pierre (2020), Entrée en vigueur du Traité de Beijing, Artisti.
[46] Artisti (2016), Mémoire d'Artisti Déposé dans le cadre de la consultation publique sur le contenu canadien dans un monde numérique p. 10
[47] Canadian Federation of Musicians – CFM (2016), Canadian Content in a Digital World, p. 13

For its part, the Alliance of Canadian Cinema, Television and Radio Artists (ACTRA) explains that "the need for a well-designed legislative framework is increasingly important in Canada and abroad, where the digital distribution and consumption of audiovisual content has increased dramatically, but the average income of professional artists has remained low"[48]. Indeed, according to ACTRA, the average annual income of performers was less than $11,000 in 2017.

**Recommendation 8: That Canada ratify the Beijing Treaty and grant rights to performing artists on audiovisual medias in the Act.**

### 2.6. Establishing resale right of artistic works

Currently, visual artists have two main sources of income: proceeds from the sale of their works, and royalties for the exhibition and reproduction of their works.

The resale right allows the artist to recover a portion of the resale of his works each time they are resold publicly, either at an auction or by a commercial gallery. Although this right is in place in 93 countries around the world, it is still not recognized in the Act[49]. In 2019, the CHPC recommended that resale right be added to the Act.

It is not uncommon for artists' work to appreciate over the years as their reputation increases. The establishment of a resale royalty, which the Canadian Artists' Front (CARFAC) suggests setting at 5%, would allow artists and their successors to benefit from the increased appreciation they enjoy throughout their careers.

CARFAC explains that "...various studies by the European Union, the World Intellectual Property Organization (WIPO) and others have shown that [resale right] has no negative effect on the foreign art market. On the contrary, it is not uncommon for this market to continue to grow"[50]. Moreover, contrary to the fears of other stakeholders, there is no evidence that the introduction of resale right would lead to a relocation of sales. According to CARFAC, "the costs associated with exporting a work are invariably higher than the royalties" [51].

Finally, in Australia, a country that can be considered comparable to Canada, the introduction of resale right has resulted in the payment of nearly $1 million per year to artists or their successors (in about half of the cases). The majority of recipients are Aboriginal people[52].

**Recommendation 9: That resale right be incorporated into the *Copyright Act*.**

### 2.7. Introduce neighbouring right for newspaper publishers

The cultural sector is affected and concerned by the crisis in the information sector.

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[48] Alliance of Canadian Cinema, Television and Radio Artists – ACTRA (2018), *Mémoire sur l'examen des modèles de rémunération des artistes et des industries créatives dans le contexte du droit d'auteur, présenté au Comité permanent du patrimoine canadien de la Chambre des communes*, p. 4-5.

[49] Access Copyright (2018), Access Copyright's Submission to the Standing Committee on Canadian Heritage for the Study on Remuneration Models for Artists and Creative Industries

[50] Front des artistes canadiens – CARFAC (2018), Mémoire produit par le CARFAC et présenté au Comité permanent du patrimoine canadien. Modèles de rémunération pour les artistes et les industries culturelles, p. 4.

[51] Idem, page 5.

[52] Idem, p. 6.

A large part of the news media produce cultural content and all of them produce information about culture. From a more fundamental point of view, the diversity of voices and the quality of information, especially local information, are vital for democracy.

A CEFRIO survey carried out in 2018 showed that 79% of adults used social networks to follow news or current affairs[53]. This explains why a much higher proportion of advertisers choose to buy advertising from these companies:

> *It is estimated that Google and Facebook receive nearly 75% of online advertising revenues in Canada. In comparison, the websites of traditional television stations and newspapers account for only 8.5% of all Internet advertising[54].*

This is why the European Union included a neighbouring right for newspaper publishers in the latest revision of its directive on copyright and related rights[55]. It is indeed logical that Web giants and other companies that profit from information content should contribute to their financing. This new right allows press publishers to obtain a royalty from online services when their publications are used on online services (social networks, search engines, news aggregators, etc.).

We agree that the introduction of a neighbouring right presents challenges, and that it alone could not offer a complete solution to the media for the production of diversified and quality information. Rather, it is part of a range of solutions needed to continue to finance the production of quality information content.

**Recommendation 10: Introduce a neighbouring right for newspaper publishers.**

### 3. Strengthening the collective management system

Me Ysolde Gendreau stated in her appearance before the INDU Committee that "the direction our Copyright Act has taken in 2012 goes against the very purpose it was supposed to serve. The answer to mass use can only be mass management - that is, collective management - in a way that is commensurate with the scale of the phenomenon" [56].

Collective management is an essential pillar for promoting access to works without sacrificing the rights and income of artists, creators, producers and other rights holders. Artisti also pointed out that with the amendments to the Act in 1988 and 1997, "[...] Canada had made the modern choice to favour collective management. This collective management had been facilitated in order to ensure that rights holders have a right to remuneration when the exploitations made possible by modern technologies were not compatible with the absolute control of rights holders over these exploitations through the exercise of their traditional exclusive rights to authorize or prohibit" [57].

This system is now being questioned and the government must confirm its desire to safeguard and strengthen it.

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[53] CEFRIO (2018), L'usage des médias sociaux au Québec, Net Tendances, édition 2018, vol. 9, no. 5, p. 13

[54] Broadcasting & Telecommunications Legislative Review Panel, *Communications Future: Time to Act*, final report, January 2020, p. 154, which cites: Dwayne Winseck, Media and Internet Concentration in Canada 1984 – 2017 (Ottawa, Media Concentration Research Project, 2019), p. 66, Table 5, andThinkTV, Net Ad Volume in Canada including Television, Radio, Internet, Newspaper, Magazine and OOH (11 décembre 2018).

[55] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC

[56] Ysolde Gendreau (2018), Op. Cit.

[57] Artisti (2016), Op. Cit., p. 4.

### 3.1. Clarify the mandatory nature of tariffs approved by the Copyright Board

The conclusion of the Federal Court of Appeal in the litigation between Access Copyright and York University that tariffs approved by the Copyright Board have no mandatory effect against users has shaken many. If this conclusion of the Federal Court of Appeal was to be confirmed by the Supreme Court of Canada, it will severely damage creators' ability to enforce their rights and receive fair compensation for the use of their works.

Any recourse granted to collectives over time to strengthen their ability to collect the sums owed to rights holders for access to their works would be severely undermined, including Parliament's intent in 1988 and 1997 to provide collectives with effective enforcement mechanisms against users who use works of rights holders without their authority. Such mechanisms work only if the tariffs are mandatory.

Irrespective of whether the Supreme Court decides to hear the case, or not, the government should Act immediately to fix uncertainty created by the decision of the Federal Court of Appeal.

**Recommendation 11: Amend the Act to confirm the binding nature of tariffs set by the Copyright Board.**

### 3.2. Harmonising the remedies of collecting societies

Behaviour that contravenes the Act should be subject to penalties. Authors, visual artists and publishers should have the same ability to enforce their rights as musicians and songwriters have had historically. Only the performing rights collective societies, such as SOCAN and Re:sound, can claim statutory damages of three to ten times the value of the tariff that has not been paid. But other collectives, such as Access Copyright or the Canadian Musical Reproduction Rights Agency (CMRRA), cannot claim damages in excess of the value of the tariff that has not been paid.

Refusal to pay is thus of no real consequence. This means that creators and rights holders in some sectors have tools to incentivize users to pay for the use of their works while others are left with a lack of penalties available to them. The CHPC had recommended in 2019 the harmonization of the remedies of collecting societies.

**Recommendation 12: Ensure that right holders in the various sectors have the same tools by ensuring that all collecting societies can claim statutory damages of three to ten times the value of the tariff that has not been paid.**

### 3.3. Provide for dissuasive sanctions in case of misuse of the system

The 2012 revision lowered the upper limit on the statutory damages that a court can award a rights holder to only $5,000 for non-commercial use. Several organizations such as the ACP have argued that this cap is far less than the legal costs of a copyright infringement lawsuit, which of course discourages the use of these penalties for rights holders, as much as it reduces the risk that users are willing to incur to contravene the Act.

As a result, it does not provide an incentive for organizations, such as educational institutions, to negotiate licences or to honour the Board's tariffs.

It should be noted that both INDU and CHPC had recommended that damages be reviewed in 2019. However, it does not seem sufficient to raise the upper and lower limits of statutory damages for non-commercial violations. These limits should, of course, be raised, but a judge should be able to award higher damages in the case of systematic and massive use.

**Recommendation 13 :**

- **Raise the upper and lower limits of statutory damages for non-commercial violations;**
- **Allow the establishment of higher damages in case of systematic and massive use.**

## 4. Take into account the needs and realities of Indigenous artists, creators and organizations

Several Indigenous artists and organizations participated in the consultations conducted by INDU and CHPC in 2018. The CDCE does not currently have Indigenous members on its membership. The CDCE does not have the expertise or legitimacy to make a specific recommendation, but wishes to support elements that have been raised through the testimonies and contributions of Indigenous individuals and organizations.

First of all, it seems clear that the *Act* is not adapted to the protection of traditional cultural expressions, and that, as a result, the *Act* may even promote the cultural appropriation of traditional expressions. As stated in the INDU report,

> *Under the Act, an expression will not be recognized and thus protected as a work under the Act unless it is fixed in a more or less permanent form. Many traditional cultural expressions, however, are not fixed in such forms. A non-Indigenous person can, however, fix such cultural expressions in a permanent form and thus claim copyright over the resulting work or subject-matter for themselves*[58]*.*

The abuses can be numerous and dramatic. For example, associating Indigenous cultural expressions with commercial products or services without consent or preventing Indigenous people from interpreting or creating based on traditional expressions.

This situation seems to us to contravene article seven of the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, to which Canada is the first signatory:

> *1. Parties shall endeavour to create in their territory an environment which encourages individuals and social groups:*
>
> *(a) to create, produce, disseminate, distribute and have access to their own cultural expressions, paying due attention to the special circumstances and needs of women as well as various social groups, including persons belonging to minorities and indigenous peoples;*
>
> *(b) to have access to diverse cultural expressions from within their territory as well as from other countries of the world.*[59]

In his testimony, Tony Belcourt asked that the *Copyright Act* be amended to take into account the cultural rights recognized in the United Nations Declaration on the Rights of Indigenous Peoples (Article 11):

> *1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their*

[58] Report of the Standing Committee on Industry, Science and Technology (2019), Statutory Review of the *Copyright Act*, Dan Ruimy, chair, P. 27.

[59] 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Article 7, paragraph 1: https://en.unesco.org/creativity/sites/creativity/files/convention2005_basictext_en.pdf#page=18

*cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.*

*2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent....*[60]

Finally, several stakeholders requested that the government undertake consultations "to explore ways to protect traditional arts and cultural expressions from misappropriation and copyright infringement, and to reconcile Indigenous notions of ownership with the Act"[61].

[60] Passages read by Tony Belcourt on October 31, 2018 during his testimony before INDU

[61] Report of the Standing Committee on Industry, Science and Technology (2019), STATUTORY REVIEW OF THE COPYRIGHT ACT, Dan Ruimy, chair, p. 29.

**APPENDIX A: Net Profits and Turnover of Some Web Giants in 2020**

| | Q1 (January-March) | | | Q2 (April-June) | | |
|---|---|---|---|---|---|---|
| | Net earnings ($USD million) | Turnover (millions $USD) | Variation Q1 2019 vs 2020 | Net earnings ($USD million) | Turnover (millions $USD) | Variation Q2 2019 vs 2020 |
| Amazon | 2 500 | 75 500 | +26% | 5 200 | 88 900 | +40% |
| Apple | 11 200 | 58 300 | +1% | 11 253 | 59 700 | +11% |
| Alphabet | 6 800 | 41 200 | +13% | 6 959 | 38 300 | -2% |
| Microsoft | 10 750 | 35 020 | +15% | 11 200 | 38 000 | +13% |
| Facebook | 4 900 | 17 740 | +18% | 5 178 | 18 687 | +11% |
| **Total GAFAM** | **36 150** | **227 760** | | **39 790** | **243 587** | |
| Netflix | 709 | 5 700 | +27% | 720 | 6 150 | +25% |
| Spotify | 1 | 2 182 | +22% | -420 | 2 228 | +13% |
| **Total** | **36 860** | **235 642** | | **40 090** | **251 965** | |

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