

THE VALUE GAP

ITS ORIGINS, IMPACTS AND A MADE-IN-CANADA APPROACH



www.MusicCanada.com

[f/MusicCanada](https://www.facebook.com/MusicCanada) [@Music_Canada](https://twitter.com/Music_Canada)

[05]

INTRODUCTION

[09]

SECTION 1 – HOW DID WE ARRIVE AT A VALUE GAP?

[17]

SECTION 2 – A SNAPSHOT OF THE MUSIC INDUSTRY TODAY

[25]

SECTION 3 – MAKING A LIVING AS AN ARTIST IN THE STREAMING ERA

[30]

SECTION 4 – RECOMMENDATIONS

[33]

CONCLUSION

[34]

APPENDICES

- 6 *What is the Value Gap?*
- 7 *Value Gap Impacts on Other Creative Industries*
- 7 *Bridging the Value Gap: Initiatives in Canada and Beyond to Obtain Fair Payment for Creative Works*
- 9 *Building Rules for a Dawning Digital Marketplace*
- 10 *From WIPO to the Adoption of Safe Harbour Laws and Exceptions*
- 11 *Outdated Safe Harbours and Exceptions are the Foundation of the Value Gap*
- 12 *Canadian Copyright Law: Widening the Value Gap*
- 15 *The Rise of the Digital Intermediaries, the Fall of Creative Content*
- 15 *Value Gap Impacts on Other Creative Industries*
- 17 *Evolving Technologies, a Transformed Music Business*
- 18 *Copyright Laws Have Failed to Keep Pace with an Evolving Digital Marketplace*
- 20 *The Role of Record Labels Today*
- 21 *The Music Business Involves Intensive Investment*
- 21 *Consumer Trends in Music Consumption and How They Contribute to the Value Gap*
- 23 *Stream Ripping Leads Resurgence in Music Piracy*
- 23 *Do Free UUC Music Streaming Services Really Pay Their Fair Share?*
- 25 *How the Value Gap Affects Artists*
- 27 *SPOTLIGHT on ‘Focus On Creators’*
- 28 *The “Golden Age” That Never Was*
- 30 *Measures for Canadian Decision-Makers to Address the Value Gap*
- 31 *Recommendation 1 | Time for Change: Focus on the Effects of Safe Harbour Laws and Exceptions*
- 32 *Recommendation 2 | Canada’s Creative Industries are Asking for Meaningful Reforms*
- 32 *Recommendation 3 | Remove the \$1.25 million Radio Royalty Exemption*
- 32 *Recommendation 4 | Amend the Definition of ‘Sound Recording’*

INTRODUCTION

This report explores an issue of critical importance to the current and future health of Canadian culture, our nation's cultural industries, and the creators of our cultural works. It's an issue rooted in a fundamental wrong – the failure to provide fair compensation to creators for the use of their works – that has a significant, direct impact on the livelihoods of Canadian artists who tell our stories in words, images and music. The issue is known as the “Value Gap.”

In the following pages, this report will describe the Value Gap and its causes, and will demonstrate how it impacts artists, businesses and our nation's cultural foundations, with a particular focus on music.

At the heart of this issue is the impact of the Value Gap on the creative middle class – the tens of thousands of talented people who seek to earn a decent living from their work, well outside the realm of superstars – who have been all but wiped out in a generation. In the music industry, virtually overnight, this once-thriving community of songwriters and performers has seen their chance of entering the middle class as professional musicians nearly vanish. The issues outlined in this report boil down to a troubling phenomenon that is occurring throughout our economy and society: wealth is becoming concentrated in fewer and fewer hands. In the creative world today, the vast majority of artists struggle to earn a living (as we shall see in the course of this report). Not so long ago, signing a recording contract with a record label (big or small) offered a realistic chance to become a full-time, professional musician, and enter the middle class. Contrasted to today, this path is now more akin to a lottery, with similar odds.

The gutting of Canada's creative middle class is not an inevitability, and it is certainly no accident. It is the result of public policies that have become markedly outdated in the wake of rapid technological developments – the very forces that have created the Value Gap. Above all, this situation is readily fixable. As such, this report proposes a range of practical, forward-looking solutions tailored to Canada's marketplace, institutions and legal framework.

The key findings detailed in subsequent sections are summarized below.

WHAT IS THE VALUE GAP?

The Value Gap describes the significant disparity between the value of creative content that is accessed and enjoyed by consumers, and the revenues that are returned to the people and businesses who create it. This occurs when the people who produce creative works are compensated inadequately – or not at all – by the organizations and businesses that use their works commercially. A large swath of the creative sector in Canada and around the world is affected, including publishing, journalism, film and television production and music.

The resulting mismatch undermines the ability of artists and creators to earn a living from their work. It also undercuts one of the overarching principles of the Canadian Copyright Act, which is to ensure that creators receive a just reward for the use of their works.¹

There is growing international recognition of the Value Gap and the need to address it. In Europe, the U.S. and beyond, the term is used most often to describe how the music sector is harmed by the value that ad-supported streaming services built on user-uploaded content (UUC) like YouTube extract from music and the relative pittance they return to music creators and investors.

In Canada's music sector, the term also encompasses other causes underlying the mismatch between music consumption and payment to creators. These include:

- *The Radio Royalty Exemption, and*
- *The definition of a 'sound recording' used in television and film soundtracks.*

Put together, the issues underlying the Value Gap have enriched other industries at the direct expense of Canada's music creators.

"There has been an enormous shift in wealth away from creators into technologically driven intermediaries who are amassing fortunes on a scale that at times beggars the

imagination,"² Music Canada President and CEO Graham Henderson told Parliament's Standing Committee on Canadian Heritage during its 2014 Review of the Canadian Music Industry.

A brief outline of each of these issues follows.

User Uploaded Content (UUC) Music Streaming Services

Music is being undervalued on an enormous scale by the online platforms where consumers most often access music: UUC-enabled, ad-supported streaming services. These services, of which YouTube is by far the largest, pay out royalties that are profoundly out of step with the massive level of music consumption they facilitate.

While music consumption overall has never been higher – in 2016, 90% of Canadians listened to music every week for an average of 24 hours per week³ – payments to those who create it have fallen far behind. Ultimately, this means that billions of dollars have been siphoned out of the hands of music creators, making it ever harder for artists to earn a living and for music businesses to earn a fair return.

THE VALUE GAP IS THE LARGEST THREAT FACING THE MUSIC SECTOR

According to IFPI, in its 2017 Global Music Report...

"The value gap is the biggest threat to the future sustainability of the music industry. ..."

"Inconsistent applications of online liability laws have emboldened certain services to claim that they are not liable for the music they make available to the public."

"Today, services such as YouTube, which have developed sophisticated on-demand music platforms, use this as a shield to avoid licensing music on fair terms like other digital services, claiming they are not legally responsible for the music they distribute on their site."⁴

The Radio Royalty Exemption

The “Radio Royalty Exemption” frees commercial radio stations from paying royalties (other than a nominal \$100 fee) to artists and record labels for the public performance and communication of their sound recordings on their first \$1.25 million in advertising revenue.⁵

The exemption cost artists and record labels nearly \$140 million in lost revenue from 1997 to 2016, and the losses continue to mount. It applies to every commercial radio station in Canada, regardless of the size of their revenues or station group.

The Definition of a ‘Sound Recording’ Used in Television and Film Soundtracks

Sound recordings as currently defined in the Copyright Act effectively exempt royalty payments to performers and creators (other than songwriters, composers and the music publishers they partner with) when the recordings are included in a television or film soundtrack. Artists and record labels lose approximately \$45 million in revenue annually as a result of this legislative anomaly.

VALUE GAP IMPACTS ON OTHER CREATIVE INDUSTRIES

Music artists and records labels are most profoundly affected by the Value Gap, but they are not the only impacted creative group. Intermediaries that don’t pay for the written content they aggregate create a Value Gap for journalists, writers and authors, and the newspapers, magazines and other publications that publish their work. The massive copying of textbooks and other published works by Canadian schools, colleges and universities under the guise of fair dealing and other exceptions results in unduly low payments to writers and publishers.

BRIDGING THE VALUE GAP: INITIATIVES IN CANADA AND BEYOND TO OBTAIN FAIR PAYMENT FOR CREATIVE WORKS

Momentum is building in Canada, Europe and the U.S. for measures to address the Value Gap.

In Canada, an artist-led advocacy campaign called Focus On Creators has brought the issue to the forefront. The initiative is advocating for legislative and regulatory reforms to improve the working environment for Canada’s creators and to put them “at the heart of our cultural policy.”⁶ Further details on Focus On Creators can be found in Section 3.



The initiative coincides with a cultural policy review by the federal government and a mandated review of the Copyright Act in 2017. These reviews provide opportunities to develop Canadian-made solutions to the Value Gap, which are outlined in Section 4.

Also in Canada, Access Copyright, a national organization representing Canadian writers, visual artists, publishers and

their works, has taken legal action to defend its members' rights. This resulted in a July 12, 2017, Federal Court of Canada ruling that fair dealing guidelines for the education sector adopted by York University "are not fair in either their terms or their application."⁷

Elsewhere, the European Commission has recognized the need to address the Value Gap and has proposed legislation to correct the existing market distortion. Members of Europe's creative community have been at the forefront of the drive for a solution through an initiative similar to Canada's Focus On

Creators. In October 2017, 23 organizations representing a wide range of creative industries wrote to the European Parliament's Rapporteur for Copyright Directive with a unified call for MEPs to support a legislative solution to the Value Gap.⁸

In the U.S., the Copyright Office is currently reviewing the Digital Millennium Copyright Act (DMCA) with an eye to proposing remedies of its own. There, too, artists and other participants in the creative economy have been leading advocates for reform.

“THE GROWTH AND SUPPORT OF TECHNOLOGY COMPANIES SHOULD NOT BE AT THE EXPENSE OF ARTISTS AND SONGWRITERS.”⁹

- Petition calling on the U.S. government to reform the DMCA

SECTION 1 – HOW DID WE ARRIVE AT A VALUE GAP?

BUILDING RULES FOR A DAWNING DIGITAL MARKETPLACE

The origins of the Value Gap extend back more than two decades following the negotiation of a pair of international treaties in anticipation of the then-dawning digital marketplace, and furthermore, in Canada, to rules governing the telecommunications industry that preceded those treaties by decades more.

The foundation for cultural industries to successfully operate in the digital environment stems from the treaties adopted in 1996 by the World Intellectual Property Organization – the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The WIPO Treaties translated longstanding copyright protections into the digital environment. As cultural products have transitioned to digital platforms, the WIPO Treaties have provided the foundation for creative industries to operate in this environment.

The preambles to these treaties shed light on WIPO's intentions at the time, which included:

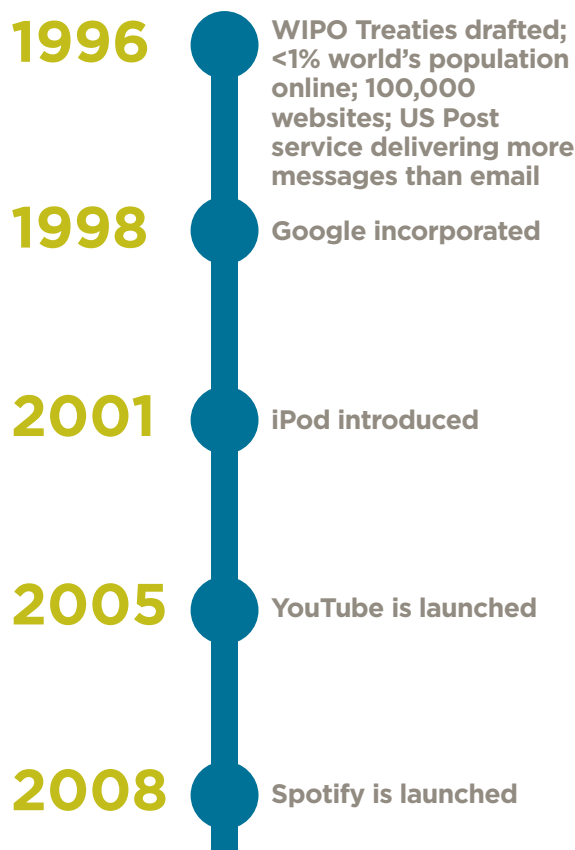
- Desiring to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible;
- Recognizing the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments;
- Recognizing the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works;
- Emphasizing the outstanding significance of copyright protection as an incentive for literary and artistic creation; and
- Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention.¹⁰

As laudable as these goals were, it must be kept in context that the treaties were drafted at a time when both the development and consumer adoption of digital technologies were nascent. In 1996, less than 1% of the world's population was online, there were only about 100,000 websites, and email had yet to surpass the U.S. Postal Service in volume of messages delivered.

The WIPO Treaties were adopted more than two years before either Google or Napster existed; more than four years before the introduction of the iPod; eight years before YouTube appeared and more than a decade before Spotify began streaming music.

However, the true effects of the Value Gap are not directly linked to the text of the WIPO Treaties – in fact, the treaties

provided effective protection of copyright in the emerging digital marketplace. The Value Gap is the result of how government policies were implemented around the world as part of that early digital landscape two decades ago. In short, the digital rule books that followed the WIPO Treaties were drawn up in an uncertain time, when it was virtually impossible to foresee how the digital marketplace would unfold and what consequences the new rules would have.



FROM WIPO TO THE ADOPTION OF SAFE HARBOUR LAWS AND EXCEPTIONS

At the time the WIPO Treaties began to be implemented, ISPs and search engines were viewed as neutral information pipelines that had no knowledge of or control over the content they conveyed. In keeping with this, the legislation that

was developed to govern the Internet included exceptions, limitations on liability, and “safe harbours” that exempt intermediaries such as ISPs and search engines from liability when third party users of their services infringe copyright.

This approach was reflected in the first implementation of the WIPO Treaties by a major, developed country – the 1998 U.S. DMCA.

The safe harbours and exceptions enshrined in the DMCA became the model for copyright legislation around the world. Limitations on liability in EU copyright rules first appeared in the European Union’s 2000 Directive on electronic commerce, which established “harmonized rules on issues such as... limitations of liability of intermediary service providers.”¹¹ The Directive was implemented in the UK two years later, under the 2002 Electronic Commerce Regulations.

Canada’s implementing law, the Copyright Modernization Act, was passed in 2012 (see below for further details).

As a result of these safe harbours and exceptions, creators would have to forego copyright royalty payments to which they were entitled. This created what is in effect a system of state-sponsored, direct subsidies. In return, it was argued, creators would profit from a larger, more diverse marketplace. Other choices could have been made. For example, if the policy goal was to enable the rapid development of digital marketplaces designed to benefit society at large, this burden could have been placed on society at large, as opposed to expecting creators to fund the development.

OUTDATED SAFE HARBOURS AND EXCEPTIONS ARE THE FOUNDATION OF THE VALUE GAP

The safe harbours and exceptions in various nations’ laws remain in place today even though the Internet, its

intermediaries and its standard business models have transformed fundamentally since that time. Certain intermediaries that were once passive pipelines now actively track, manage and control the content on their platforms. They employ technology advancements that have made it possible for them to promote content of their choosing and to earn money from it.

Unfortunately, the standard business models employed for distribution of copyrighted material on the Internet have outstripped outdated exceptions and safe harbour provisions. With today’s user-upload models, technology companies host copyrighted material to monetize creators’ recordings, films and writings. They are able to avoid liability for the material because it is posted by individual users, not the Internet hosts, who disclaim knowledge of the actual material being posted. All the while, they point users to the posted content and capitalize on it by selling advertisements and/or harvesting visitor data.

In light of these developments, today’s exceptions and safe harbour rules have become outdated; they are the foundation of the Value Gap. Today, YouTube, with its billions of users, and other user-upload, ad-supported services, take advantage of exceptions and safe harbour rules to avoid fairly remunerating creators and other rights holders for the music that flows through their platforms. Shielded from liability by the exceptions and safe harbour laws, they have cynically manipulated the system to set rates that are a small fraction of the rates paid by other types of services that can’t take advantage of such limitations on liability. In short, they underpay because they can.¹²

At the same time, creators and other rights holders are left without meaningful tools to prevent unauthorized exploitation of their creations, while those who host or facilitate such unauthorized exploitation and are the only means practically of preventing it are insulated against any obligations to do so.

As a result, these services siphon billions of dollars out of the system, and creators of music are not compensated fairly.

More music than ever is being streamed, and yet, creators and other rights holders are demonstrably worse off than they were in the pre-digital marketplace. “The effect of the value gap is reflected in the dramatic mismatch between the volume of music streamed globally and the rewards that this is generating for rights holders,” IFPI reported in its 2016 Global Music Report.¹³

The legal protection that user-upload streaming services use to avoid licensing music on fair terms also creates a distorted marketplace that makes it harder for subscription services that pay comparatively higher royalties, like Apple Music, to attract paying users as recent consumption trends demonstrate (See Section 2).

CANADIAN COPYRIGHT LAW: WIDENING THE VALUE GAP

The foundation of the Value Gap can be found in copyright law. This applies to each of the issues identified in this report: safe harbours and exceptions that shield internet intermediaries from liability; the Radio Royalty Exemption; and the exception exempting television and film productions from paying public performance royalties to music performers and makers.

Safe Harbours

The Canadian Copyright Act contains provisions meant to shield intermediaries such as telecommunications companies from liability for the transmission of infringing material over their systems. In the Internet era, these “safe harbours” were extended to shelter Internet intermediaries, such as ISPs, as well.

The implementation of the WIPO Treaties in Canada brought even more exceptions and limitations on liability. At least 40 new safe harbours and exceptions (including the expansion of existing exceptions and the rollback of limitations to existing exceptions) were added by the 2012 Copyright Modernization Act, including new fair dealing provisions and interpretations

that further extended the scope of activity shielded from liability.¹⁴ The term “exception” is a somewhat bloodless, anodyne term that disguises what is really going on: every single “exception” is a subsidy.

Canada’s legislation took the exceptions and limitations on liability in the DMCA and other countries’ legislation a step further. It failed to adopt standard provisions that aim to protect creators and rights holders.¹⁵ It also adopted a host of new exceptions that potentially interfered with the ability of creators, along with the record labels and music publishers they partner with, to participate in the digital marketplace.¹⁶

The exceptions in Canada’s 2012 Copyright Modernization Act provided no meaningful means to address the digital technology and marketplace developments in the 16 years since the WIPO Treaties had been completed.

Law firm Fasken Martineau, in a December 2011 web posting, said the reforms don’t “adequately reflect the dramatic changes that have occurred over the past two decades in how we access content in digital form over the Internet and with connected devices such as tablets and smartphones.”¹⁷

The implementing legislation and the case law that created today’s safe harbours and exceptions traded away creators’ rights to lay the groundwork for the development of digital technologies and platforms. Under this tradeoff, creators would in effect subsidize the digital economy.

If there were ostensible logic to the arrangement in 1996, the rationale is undermined in a contemporary world in which giants like Google, Apple and Facebook are pre-eminent and seemingly unassailable. Moreover, the sustained contraction of the music and publishing sectors belies the argument that digital technologies would ultimately benefit the creative economy.

Radio Royalty Exemption

The Radio Royalty Exemption was added to Canadian copyright law by the 1997 Copyright Act amendments. The

exemption was introduced alongside provisions that fulfilled the right of performers and producers of sound recordings to be paid when their music is played on the radio, in keeping with Canada's commitments under the Rome Convention. By that time, the right of composers and songwriters to be paid for radio play had been in place in Canada for more than three-quarters of a century.¹⁸

In the lead-up to the 1997 amendments, the radio industry had protested that the obligation to pay for the music they play would hurt smaller radio stations. Therefore, when the 1997 amendments established royalty payments for artists and record labels for music played on commercial radio, an exemption from payments on the first \$1.25 million in advertising revenue at each station was incorporated as a compromise to the radio industry (a nominal amount of up to \$100 on the first \$1.25 million in advertising revenue is required).¹⁹

The exemption overrides tariff rates set by the Copyright Board. Those rates therefore apply only to ad revenues above the \$1.25 million threshold, whether the Copyright Board believes radio stations are capable of paying or not. In fact, the Copyright Board has found that the radio broadcasting industry would be fully capable of paying full royalties if the \$1.25 million exemption were eliminated. The Copyright Board has agreed with the irrational consequence of this provision, and its lack of relevance moving forward.²⁰ In its 2005 Commercial Radio decision,²¹ the Copyright Board elaborated on its view, describing the \$1.25 million exemption as a "thinly veiled subsidy" and suggesting that the issue of smaller stations' ability to pay could be dealt with by the Board's practice of rate tiering; it stated:

The Board is conscious of two things. First, capping the rate for smaller stations deprives rights holders of royalties. Second, only independent smaller stations truly need a cap; small stations that are owned by large corporate groups probably do not.

[...]

Allowing large, profitable broadcasters to escape payment of the full NRCC tariff on any part of their revenues constitutes at best a thinly veiled subsidy.

Subsection 68.1(i) is seemingly based on no financial or economic rationale.

[...]

The evidence presented during the hearing clearly demonstrates that the commercial radio industry has the ability to pay the full tariff, notwithstanding the increases approved by the Board. Even if the increases had been applied as far back as 1999, the industry's profit margins would have continued to increase significantly. CAB's own financial expert stated that in all likelihood, profit levels will continue to rise unabated even if the full requested tariffs were certified."²²

The exemption has resulted in ongoing revenue losses to music artists and record labels that totaled nearly \$140 million between 1997 and 2016. It applies to each of the nearly 700 commercial radio stations in Canada, regardless of the size of their revenues. Furthermore, large commercial radio conglomerates are entitled to claim the exemption for each radio station they own. For example, a commercial radio group that owns 100 radio stations benefits from the exemption 100 times, which results in an annual loss of almost \$2 million for performers and producers of sound recordings.

Canada's radio landscape has changed dramatically since the exemption was implemented. Most of the smaller stations have been acquired by large media conglomerates whose profits from radio have ballooned over the ensuing years. In the 1990s, the top ten commercial radio groups claimed just over half of the industry's revenue share. By 2015, their share had grown to 82%.

Commercial radio industry profits have grown as well.

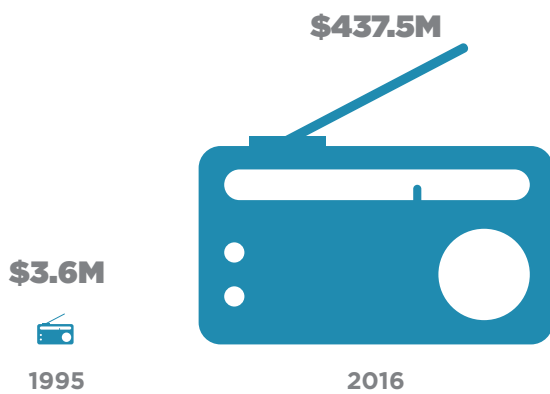
According to Statistics Canada figures, the industry experienced steady growth in net profits (loss) before income tax from 1997 onward. Whatever the intent was behind the introduction of the exemption, the result is that it has directly benefited commercial radio broadcasters, particularly the large conglomerates that dominate the industry. In 1995 and 1996, as the government was considering the merits of the exemption, the industry's net profits (loss) before income tax were approximately \$3.6 million and \$6.7

million, respectively; one year after the exemption was enacted, in 1998, that figure ballooned to \$92.1 million, and it has continued to increase steadily until 2016, at approximately \$437.5 million.²³

In effect, the exemption has become a subsidy by creators to highly profitable radio businesses owned by large conglomerates.

The exemption does not apply to composers', songwriters' and music publishers' royalties. Only performers and record labels are subject to it. Asymmetries such as this are dangerous signals to which policy makers need to pay heed: they create marketplace anomalies that breed distrust and resentment.

Commercial Radio Station Profits (\$Millions)



The commercial radio industry has increased its net profits (loss) before income tax from \$3.6 million in 1995, to over \$437.5 million in 2016.

Furthermore, only commercial radio stations receive this special treatment under the Copyright Act. No other businesses that publicly perform or communicate music are exempted from paying royalties. Canada is the only country in the world to grant such a subsidy to commercial radio stations.

The Definition of a 'Sound Recording' Used in Television and Film Soundtracks

Under the 1997 Copyright Act amendments, public performance royalty payments to performers and record labels were required for the use of music in a wide range of applications, from fitness classes to satellite and terrestrial radio broadcasts. In response to concerns from broadcasters and movie theatres, the government effectively excluded performers and record labels from receiving music royalties on television and film soundtracks.

The compromise is seemingly arbitrary, because the exception applies solely to performers and record labels – and not to composers, songwriters and music publishers – and only on television and film soundtracks. The exclusion seems all the more untenable in today's context, as it provides "free use" of a profoundly important and ubiquitous component of any television show or film to for-profit businesses, many of which are thriving. For example, every time a film is aired on television, the composer of the film's theme song receives a royalty, but the singer earns nothing.

“(E)ven though I played on almost every episode of CBC’s Republic of Doyle, which is now syndicated worldwide, I only receive the one-time union rate I got per session, which was around \$280, while the composer collects residuals every time that show airs. 44 countries around the world – the UK, France and Australia among them – afford performers and record labels the right to receive public performance royalties when their sound recordings are used as a part of a soundtrack in television and film. This contributes to the fact that there are very few ways my work will make me money unless I am there performing it in real time.”²⁴ – Artist Miranda Mulholland, in a May 24, 2017 keynote address to the Economic Club of Canada

THE RISE OF THE DIGITAL INTERMEDIARIES, THE FALL OF CREATIVE CONTENT

Digital technology companies, online service providers and media conglomerates have harnessed the extraordinary opportunities made possible by the Internet to gain a firm position at the apex of the global economy. Their rapid ascent occurred simultaneously with the sharp decline in the fortunes of artists and the creative economy, even as the creative industries embraced the new digital landscape.

The rise of Google, Facebook and their Silicon Valley neighbours over the past two decades is well known. So too is the rise of the businesses that own the Internet “pipelines” – the media companies like Bell and Rogers that have transformed into huge, vertically integrated conglomerates. Today, they control not only the pipeline through their telecom and cable networks, but much of the content that flows through it via television networks, radio stations and other media properties they own.

In large part because of the rules first established for previous generation telecommunications companies and subsequently enhanced in the Copyright Modernization Act of 2012 and other legislation, the growth of the new titans has come at great cost to artists and the businesses and professionals who work with them. This has occurred despite the enormous efforts of the creative industries to change and evolve with the digital revolution. The impact of these developments on the music sector are explored in Section 2.

VALUE GAP IMPACTS ON OTHER CREATIVE INDUSTRIES

The Value Gap has broad impacts on the creative sector beyond music. Journalists, writers and authors, and the newspapers,

magazines and other publishers they work with have all been profoundly affected.

The Impact of Online News Aggregators on Journalists, Writers, Authors and Publishers

Internet services such as Google and Facebook post written works and aggregate news online without payment to creators. These news aggregators typically produce little, if any, original content, and instead curate content from “traditional” publications, while earning money on the content through online ad sales.

While news aggregators normally provide hyperlinks to the original sources’ websites, only a minority of visitors click through. An article in Techpolicy.com noted that “less than half of users’ views of the Google News home page result in visits to any online newspapers. Thus, users may read their news from Google News without ever generating page views or revenues for any of the content creators. Clearly, this undermines the incentives for newspapers to invest in journalism.”²⁵

The impact of the Value Gap on journalism was captured in a 2017 Public Policy Forum study, “The Shattered Mirror.” The report examined the news media after several years of disruption in the digital marketplace. It found that global technology platforms have taken over large parts of the news media marketplace, but return a fraction of the ad revenue to the news outlets and the journalists who conduct the research and reporting to create the content.²⁶

This not only affects the ability of news media to pay their reporters and editors to create quality journalism, the report suggests, but it also threatens democracy itself by placing the flow of news and information under the control of algorithms designed by some of the most powerful technology companies in the world.

This issue came to the forefront in a June 2017 report by the House of Commons Standing Committee on Canadian Heritage, which recommended that the federal government “level the playing field” by requiring foreign aggregators that publish Canadian news and sell advertising directed at Canadians to bear the same tax obligations as Canadian providers.²⁷

The situation in Canadian journalism has become so bleak that News Media Canada, an association of Canadian newspapers, called for the federal government to provide \$350 million per year in assistance.²⁸

Copying of Published Works in Schools and Post-Secondary Institutions

The works of authors, writers and journalists remain as valued as ever by educators and students. Yet for years, schools and post-secondary institutions across Canada have copied millions of pages of text books and other published works without compensating publishers or authors.

The copying has occurred under the umbrella of fair dealing content guidelines established by the education sector, but without the approval of rights holders. The guidelines developed by the Council of Ministers of Education, Canada; Canadian School Boards Association and Canadian Teachers' Federation unilaterally declared that it was permissible to copy up to 10% of a chapter of a work, entire newspaper, magazine and journal articles and more.²⁹

As a result, many post-secondary institutions and all public schools outside Quebec stopped paying royalties for their copying of published works. The impact on publishers, writers and authors has been widespread and often devastating.

A study conducted by PricewaterhouseCoopers (PwC) on behalf of Access Copyright found that the fair dealing guidelines have significantly harmed the educational publishing industry, and will reduce the level of investment in Canadian titles and content. Access Copyright is a copyright collective that represents the creators and publishers of printed and digital works.

With royalties collected by Access Copyright having dropped by 80% since 2013, publishers including Oxford University Press have ceased producing Canadian school books, and Canadian writers and editors have lost their livelihoods.

"Critics of Access Copyright and advocates of broad exemptions for educational copying ... often argue that the fees will overburden impoverished students or cash-strapped educational institutions," journalist Kate Taylor wrote in the Globe and Mail. "Why it is that authors and publishers should pay for society's education with their livelihoods is never explained."³⁰

According to the Writers' Union of Canada, it is becoming ever-harder for Canadian writers to earn a living from writing. Writers earned 27 percent less in 2015 than they did in 1998 from their writing, after taking inflation into account.³¹ Income from writing was below the poverty line for 81% of writers, averaging \$12,879 per year, about one quarter of the national average income.³²

"IN THE LONGER TERM, CANADIAN K-12 AND POST-SECONDARY STUDENTS, TEACHERS, AND PROFESSORS—NAMELY, THE USERS OF EDUCATIONAL CONTENT—WILL ALSO BE SUBJECT TO A LIMITED AVAILABILITY OF DIGITAL AND CANADIAN CONTENT, A DETERIORATION IN THE DIVERSITY AND QUALITY OF CONTENT USED IN THE CLASSROOM, AND A MARKET FRAMEWORK THAT ELIMINATES INCENTIVES AND DISCOURAGES INNOVATION IN THE CANADIAN DIGITAL, KNOWLEDGE-BASED ECONOMY."

- Access Copyright, in a July 30, 2015 media bulletin.³³

SECTION 2 - A SNAPSHOT OF THE MUSIC INDUSTRY TODAY

EVOLVING TECHNOLOGIES, A TRANSFORMED MUSIC BUSINESS

A succession of new technologies has transformed the way people acquire and listen to music over the past two decades. These changes have upended the way artists and their partners in the music industry get paid, and how much they earn.

Physical sales of vinyl records, 8-track and cassette tapes, and then CDs held sway for successive generations of music fans. In order to enjoy a song, you had to either wait for it to be played on the radio or buy it at a bricks and mortar store and, with few exceptions, listen to it at a set location, likely your home. What you listened to was limited to what you owned.

Then along came the Internet and in 1999, Napster, followed by Limewire and other peer-to-peer file sharing services. For many people, the combination of new technologies, a jump in the power of home computers, high speed Internet and new levels of digital interconnectedness blurred previously understood legal boundaries. With a click of a mouse, music became “free”. This sparked a rapid erosion of music sales worldwide.

But “free” music came with many hidden and some not-so hidden costs. The peer-to-peer platforms alienated audiophiles as mp3s became more and more compressed, shoddy and bogus files proliferated on these services and malware and viruses wreaked havoc with users’ computers.

Next came Apple and its explosively popular combination of iTunes and the iPod. For many consumers, music went “legit” again. Physical music collections were replaced over time with downloaded songs and albums. Downloading on iTunes and progressively larger iPods made it possible to access large digital music libraries anywhere, anytime. The music industry struggled at first, but it reorganized and embraced this first digital revolution.

Music sales overall continued a long, virtually constant descent that began around the turn of the millennium. Between 1999 and 2013, global music revenues decreased by approximately 70% in real terms.³⁴ In Canada, between 1997 and 2015, music revenues fell to just one-fifth of what they would have been had they kept pace with inflation and real GDP growth.³⁵ This resulted in a cumulative revenue gap of \$12.6 billion.³⁶

Then the second digital revolution began – music and music video streaming. With streaming, consumers have traded away ownership for instant mobile access to almost every song ever recorded. At home and at work, in cars and on the street, people are playing and listening to music wherever they are. Consumers could now listen to practically any song ever recorded on their phones – for free if they watch some commercials.

The growing popularity of paid audio streaming music services like the subscription service offered by Spotify has

helped to stabilize the music market. Ultimately, this led to a modest uptick in overall sales beginning in 2015, halting almost two decades of virtually unbroken decline. Modest market gains continued in 2016 with strong indications that the trend will continue. What is important to remember is that the growth in numbers, while encouraging, is fragile. If the past 17 years have taught us anything, it is that nothing can be taken for granted in the digital economy. What we can say, is this: in 2016, half of the global music industry’s \$15.7 billion in revenues was from digital sales. Notably, however, this figure is far below the industry’s 1999 revenues of \$23.8 billion. The industry is recovering from a dramatically reduced foundation. The music sector remains a long way from a return to robust growth and a solid business footing.

COPYRIGHT LAWS HAVE FAILED TO KEEP PACE WITH AN EVOLVING DIGITAL MARKETPLACE

If it is not for lack of changing consumer preferences and embracing new technologies, and if not for decreasing music consumption, then what is behind the overall decline in recording industry revenue? The answer lies in the fact that unlike the market adaptations undertaken by creators, governments have yet to reassess, modernize and rebalance the rules they established over 20 years ago.

No matter how successfully the music community adapts to technology and marketplace changes, in the face of a legal regime that effectively facilitates free music sites and makes it difficult to address piracy, it seems unable to achieve fair compensation levels.

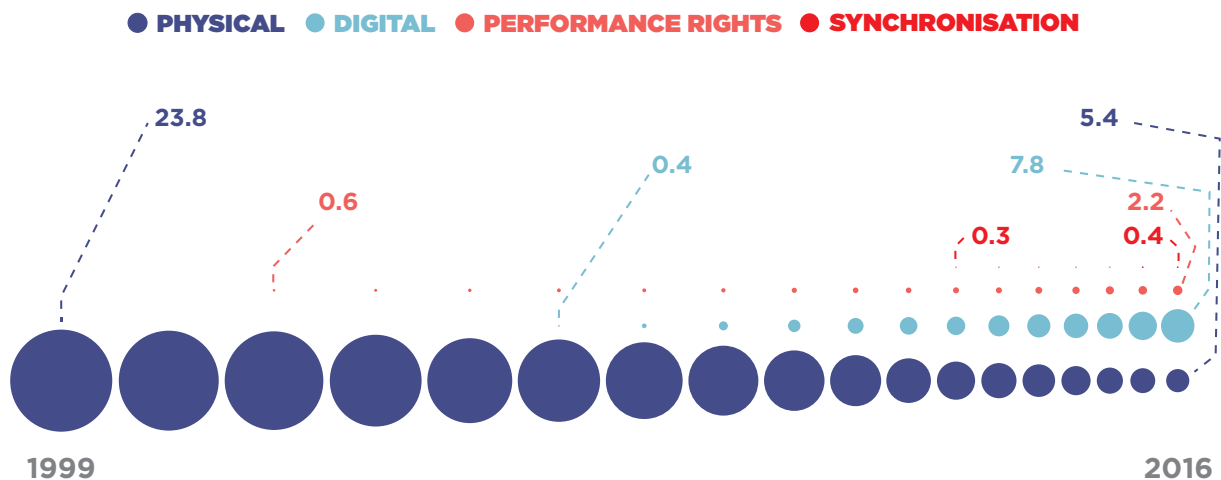
YouTube has long positioned itself as a passive intermediary, a neutral ground for user-generated content and user-initiated music discovery. But in an interview with online publication

Recode, YouTube's music ambassador, Lyor Cohen, revealed that "80 percent of all of watch time is recommended by YouTube."³⁷ He added, "That's one of the biggest misconceptions. Everybody thinks that all the music that's being listened to and watched is by search."

What this means is that YouTube actively identifies music consumption patterns and predicts what users will enjoy. Or to

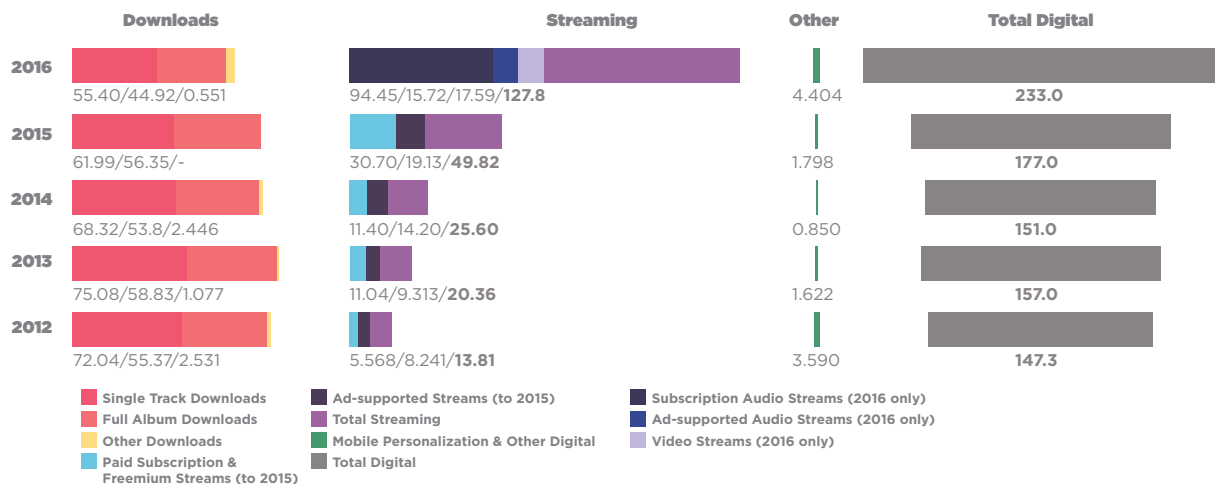
put it another way, YouTube is like any other music service that actively picks and curates music, and directs most of its traffic. This directed traffic generates enormous revenues. Yet YouTube is able to pay far lower royalties than other music services by claiming it is a passive intermediary and therefore is entitled to safe harbour protection.

Global Recorded Music Industry Revenues (US\$ Billions)



Source: IFPI Global Music Report 2017, pg. 11.

Digital Music Revenues by Format (US\$ Millions, Trade Value)

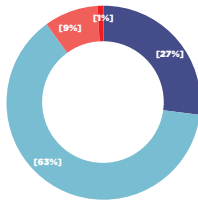


Source: IFPI Global Music Report 2017, pg. 80.

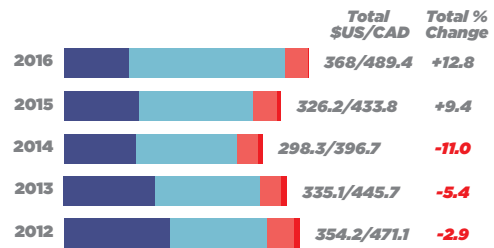
CANADA

Recorded Music Revenue
by Sector

(% , Trade Value)



World Ranking

Recorded Music Revenue
(US\$ Millions, Trade Value)

● PHYSICAL ● DIGITAL ● PERFORMANCE RIGHTS ● SYNCHRONISATION

THE ROLE OF
RECORD LABELS
TODAY

An idea that was promoted widely over the past 15 years or so is that a key “dividend” of the digital revolution would be the disappearance of intermediaries such as record labels. Taking their place would be newly available tools that enable artists to engage directly with their fans. In this scenario, all artists would also become entrepreneurs who record, market and sell their music directly to consumers, bypassing the “middleman”.

The capabilities to do this exist today. But in practice, working as an artist-entrepreneur has fallen far short of the utopia promised by those who promoted this scenario. In reality, the desire to gain access to record labels’ expertise and support remains as strong as ever for most artists today. In the UK, for example, a 2014 survey found that 70% of unsigned artists want a record deal.³⁸ The labels, for their part, continue to actively support emerging artists: globally, one-fifth of the artists with a record deal was signed in the previous 12 months.³⁹

Record labels fulfill essentially the same roles now as they always have: finding, nurturing, financing and marketing artists. Importantly, labels provide funding to artists that allows for a broad range of services that free artists to focus their talent, time and passion on creating and performing music.

Labels discover and break new artists, build their careers and bring their music to fans. Together, they work as a team – a partnership in which both parties take an active interest in artists’ careers and success.

Though their core role remains fundamentally unaltered, record labels have indeed undergone great changes as the analog marketplace has given way to digital technologies. By both necessity and design, record labels, along with their artist partners, have become digital experts. They have embraced this change and have dramatically retooled. Today, more than 60% of their revenue in Canada is generated in the digital realm.⁴⁰ Record labels, unsurprisingly, are populated by young employees who are as digitally savvy as the artists they work with.

The challenges facing record labels and artists stem from the fact that they operate within rules formulated in the 1990s – rules that have not been rethought and retooled to account for changes in the marketplace. What’s missing is a recognition by national governments, including in Canada, that two decade-old rules don’t work in today’s marketplace and that they need to rebalance the rules to sustain and advance the creative economy.

The Value Gap has exacted a heavy toll on record labels’ revenues and profitability. In Canada, in 1998, trade sales peaked at \$998 million; in 2014, that figure reached a record low of \$397 million, and then rose to \$494 million in 2016.⁴¹ This means that billions of dollars are cumulatively missing – dollars

that formerly nurtured and funded careers and underwrote thousands of jobs. And when billions of dollars had disappeared from their balance sheets, the ability of record labels to invest in artists was dramatically diminished. Despite this, record labels did continue to invest at levels proportionately identical to the pre-digital levels. For example, globally in 2015, record labels invested about 27% of their revenues, or more than US\$4.5 billion, on A&R and marketing (discovering, nurturing and promoting artists and their music).⁴²

Artists and record labels both want a music marketplace that creates more private sector jobs, launches more artists' careers and gives more of them the opportunity to join the middle class. Canadian musician, songwriter and producer, Jim Vallance – who is known for his songwriting partnerships with many successful Canadian and international artists, such as Bryan Adams – made this simple but important point recently at a government consultation roundtable: “Artists want a functioning marketplace.”⁴³ This is a view that is embraced broadly within the creative community. There is another important dividend that is derived from a functioning marketplace – jobs. In the past 17 years, tens of thousands of high paying jobs, jobs with benefits, have been shed within the music sector. All Canadians should want a thriving private sector creative economy that reduces the reliance of Canada's creators on taxpayer-funded grants and other support programs. Like most everyone else, creators crave self-sufficiency and a path to prosperity. However, the regulatory and legislative framework is letting them down.

THE MUSIC BUSINESS INVOLVES INTENSIVE INVESTMENT

Record labels, both major and independent, have long been the largest investors in music. They remain so today, both in Canada and globally.

For record labels to fulfil their role requires significant financial investments and, particularly for emerging artists, up-front risk-taking. As noted above, in 2015, these investments totaled US\$4.5 billion worldwide in talent development (known in the industry as A&R, for artists and repertoire) and marketing, equal to 27% of labels' revenues.⁴⁴

Investments by record labels in talent development and marketing are proportionately higher than the comparable research and development spending in pharmaceuticals and biotechnology, software and computer services, the aerospace and defense sectors and other investment-heavy sectors.⁴⁵

Breaking a newly-signed artist typically costs hundreds of thousands of dollars and, in a major market such as the U.S. or UK, can range upward of US\$2 million.⁴⁶ This includes artist advance payments, funding of recording costs, music video production, deficit funding of artist touring activities and marketing and promotion.

The role of record labels in Canada mirrors that of its counterparts in other countries. The multinational labels, Sony Music Canada, Warner Music Canada and Universal Music Canada, are managed and operated by Canadians. They employ Canadians. And they reinvest a significant portion of their revenues in Canada, much of it in emerging Canadian artists. As such, they continue to play a significant and important role in Canada's music ecosystem.

CONSUMER TRENDS IN MUSIC CONSUMPTION AND HOW THEY CONTRIBUTE TO THE VALUE GAP

Music consumption has grown significantly in recent years as consumers take advantage of easily accessible digital music wherever they are – at home, work, school and on the move.

An explosion of digital technologies and services has made this possible: devices like the iPhone and, today, virtually any smartphone; along with online services providing digital downloads and, more recently, streaming music. While these technologies have made music ubiquitous, they have also transformed if and how music is paid for and how much, if any, is paid. In the process, these trends have helped to create the Value Gap.

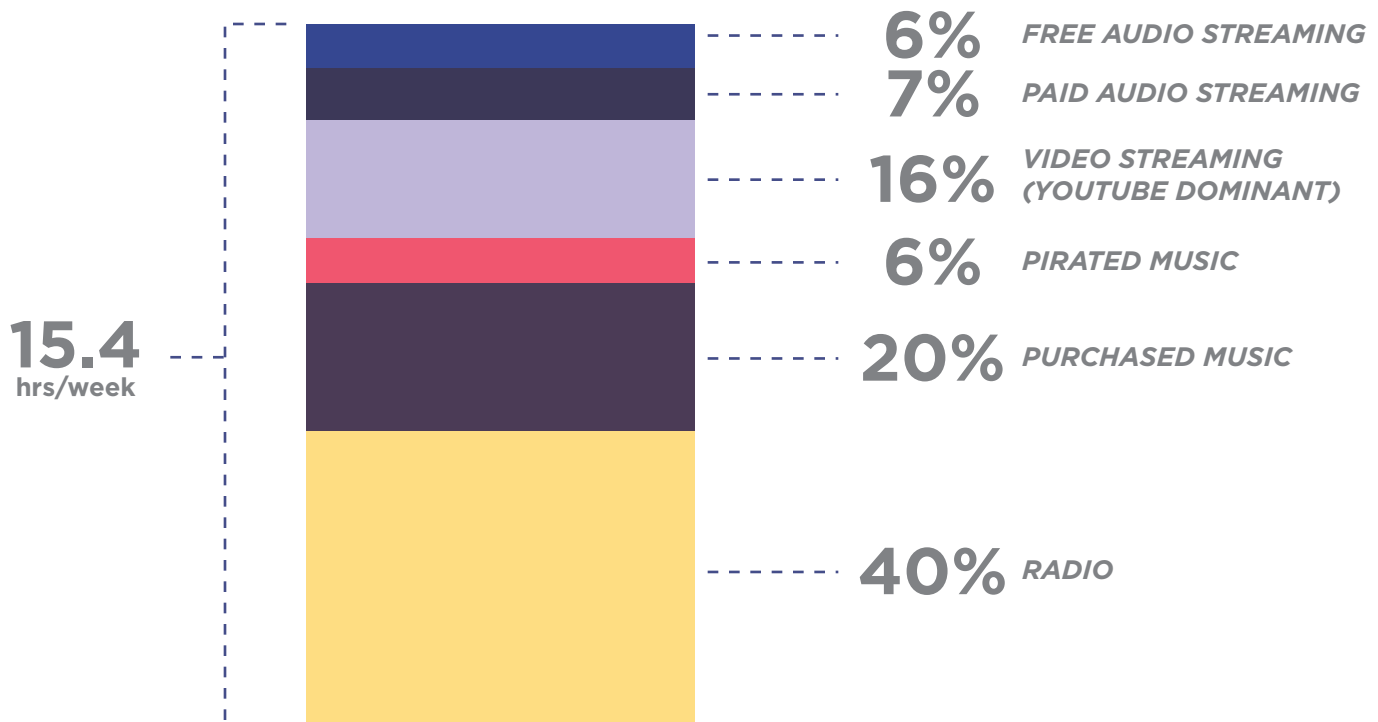
A September 2017 music study commissioned by IFPI found that a significant portion of music activity today takes place on formats that pay little or nothing to music creators. The “Connecting With Music: Music Consumer Insight Report”⁴⁷ explored consumer usage of licensed and unlicensed music services among Internet users aged 16-64 in 13 of the world’s top music markets, including Canada.

The study found that Canadians spend 15.4 hours per week listening to music on average.⁴⁸ Of that time, 6% on average was spent listening to free audio streaming; 7% to paid audio streaming; 16% to video streaming (a format dominated by YouTube); and 6% to pirated music. Another 20% of the time was spent listening to purchased music and 40% to radio.

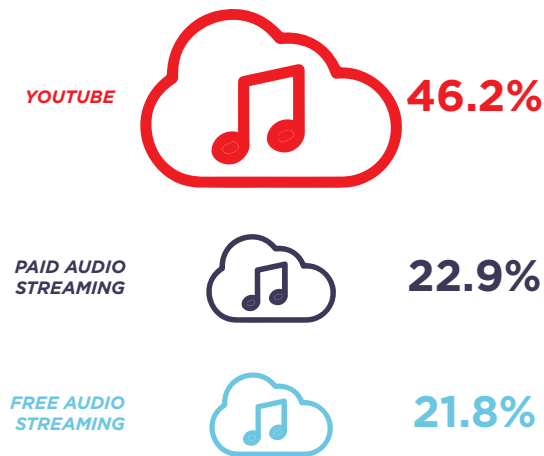
The study also found that 44% of respondents purchased licensed downloads or physical media such as CDs (38% in Canada), and 87% listened to music on broadcast or Internet radio (94% in Canada).

According to the study, YouTube remains the dominant player in global online music streaming. YouTube’s share of on-demand streaming was 46.2%, compared with 22.9% for paid audio streaming and 21.8% for free audio streaming. This single fact looms in significance when you take age groups into consideration. It is the under-30 audience that predominantly consumes music through on-demand streaming. This segment of the market is our future. Addressing the Value Gap that is a systemic feature of ad-supported streaming services built off user-uploaded content is therefore critical at this juncture.

The availability of free music on YouTube is one of the biggest reasons survey respondents cited for not using a paid subscription streaming service. Of Canadian respondents, 24% said they do not use paid services because “anything I want to listen to is on YouTube.”⁴⁹



Global Online Music Streaming



STREAM RIPPING LEADS RESURGENCE IN MUSIC PIRACY

Overlaying the issues identified above, Ipsos found that music piracy is becoming more prevalent globally, even with the wide availability of paid and free alternatives. Globally, 40% of the survey respondents engaged in digital music piracy in 2017 (in Canada, the figure is 33%). Getting music for free was by far the biggest reason cited for using pirate sites.

Stream ripping has rapidly emerged as the leading form of music piracy, having overtaken all other types of unauthorized downloading. Stream ripping is the process by which users turn a song accessed on YouTube or Spotify into a download that can be stored and replayed at will, with no royalty payment to rights holders. Dozens of websites, software programs and apps make this possible with the push of a key.

Globally, 35% of the Ipsos survey respondents engaged in stream ripping (27% in Canada), up from 30% a year earlier.⁵⁰ That compares with 22% who used P2P or cyber locker sites in Canada in 2017. Inevitably, stream ripping cannibalizes premium subscription services that allow users to store music they like for offline listening, in exchange for a monthly

subscription fee, which in turn supports higher royalty payments to rights holders. Stream ripping, in effect, has become the new Napster, amplifying the Value Gap impact of free streaming services built on user-uploaded content.

The three major record labels – Universal, Sony and Warner Bros. – banded together to file a lawsuit in 2016 against a major stream-ripping service, the German-based site YouTube-mp3.org, arguing that “Stream ripping has become a major threat to the music industry, functioning as an unlawful substitute for the purchase of recorded music and the purchase of subscriptions to authorized streaming services.”⁵¹ The plaintiffs noted that “tens, or even hundreds, of millions of tracks are illegally copied and distributed by stream ripping services each month.”⁵²

The successful legal action by the record companies caused the service, which profited from advertising served to the site’s 60 million monthly visitors, to cease operations in September 2017, and to agree not to operate a similar infringing service anywhere in the world.⁵³

DO FREE UUC MUSIC STREAMING SERVICES REALLY PAY THEIR FAIR SHARE?

Proponents of free UUC music streaming services assert that they deliver significant net benefits to artists and the music industry.

Google’s chief refrain is that it paid out more than US\$1 billion to the music industry from ad revenues in 2016. Google points to how YouTube is used mainly for music discovery and thereby helps expose artists’ work to consumers, and how Google’s Content ID system enables the industry to control content on YouTube and earn revenues from user-uploaded content.

More recently, Google commissioned a study by RBB Economics that found YouTube deters many users from visiting pirate music sites.⁵⁴ According to the May 2017 study,⁵⁵ which was conducted

in Europe, removing music from YouTube would not drive music streaming activity on other platforms; instead, about 85% of the time users spend on the platform would shift to lower value channels such as radio. Time spent listening to pirated content would increase 29%, and just 15% of heavy users – those who watch more than 20 hours of music videos a month – would switch to paid streaming services and other higher value options.

Holes in the Argument

The US\$1 billion annual royalty figure heralded by Google may sound impressive at face value, but a closer look shows it is decidedly otherwise.

The truth is that YouTube pays out a relative pittance to music creators in return for YouTube's commercial exploitation of their music. With the protection of safe harbour rules and exceptions creating limitations on liability for the music it makes available, YouTube essentially negotiates with music rights holders in the shadow of the law. For instance, so long as YouTube is permitted to shield itself from liability for what flows through its platform, it can bargain differently and more aggressively with rights holders. The safe harbour regime has, in effect, provided YouTube with a massively-advantaged bargaining position – allowing it to start from a 'take-it or leave-it' position – a fact which distorts the marketplace. The safe harbour rules have

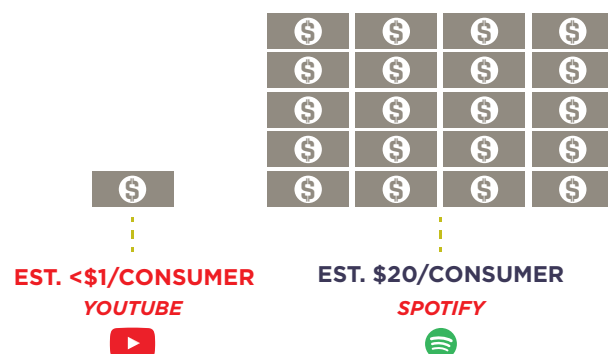
created a barrier to growth of legitimate music services that must compete with unlicensed (or underlicensed) services that use safe harbours and exceptions as a strategic shield. This was never intended by the original framers or the rules.

Those licensing arrangements generated just US\$1 per user in royalties annually compared with US\$20 from Spotify in 2015, according to IFPI.⁵⁶ Ad-supported services, with more than 13 times more users than paid services, delivered less than one-third as much money to artists and other rights holders.⁵⁷

On the argument that YouTube helps artists by serving as a destination for music discovery, as previously discussed, YouTube's Global Head of Music debunked it when he disclosed that four-fifths of watch time on the site is directed traffic.⁵⁸ This means that eighty percent of all watch time consists of content that has been chosen for and directed to the user based on algorithms – meaning that a very small fraction of the content that is being listened to on YouTube is by search. The 2017 Ipsos survey found that almost four-fifths of Canadians prefer to use YouTube for music they already know.

As for the assertions put forward in Google's RBB Economics study, they seem to be little more than a self-interested effort to distract attention from YouTube's failure to pay a fair, market-based price for their exploitation of music.

A striking disparity between revenues returned to rights holders by two leading online music services – estimated revenue (USD) per consumer (2015):



"(S)ervices like YouTube, that are not licensing music on fair terms, hinder the development of a sustainably healthy digital music market," IFPI said in a May 11, 2017 statement.⁵⁹ "Rather than Google/YouTube's 'my way or the highway' approach, where they say they can't behave as other digital music services do, legislative action is required to address the 'value gap' that is denying music creators a fair return for their work and investment."

It may be that YouTube draws some users away from pirate sites, as asserted in the RBB Economics study, but there is a countervailing, offset force at work here as well. The Ipsos survey found that YouTube's parent, Google, was used by 17% of users to search for "free pirated music" and by 28% to search for "free music".

SECTION 3 - MAKING A LIVING AS AN ARTIST IN THE STREAMING ERA

HOW THE VALUE GAP AFFECTS ARTISTS

The challenges faced by music artists and other creators in the digital marketplace are by now well-known and understood. For artists, the digital “marketplace” appeared in the form of the infamous file-sharing service, Napster, which was followed by numerous other unauthorized online file sharing sites. For many consumers, music in effect became free, and it grew harder than ever for artists to earn a living from their work.

The advent of Apple’s iTunes and other digital download sites offered a measure of relief. Digital album and song sales grew rapidly, helping to buffer the decline of physical sales. But it was not enough to stem the long slide in artists’ earnings that were derived from the purchase of recorded music.

The most recent digital revolution, music streaming, is the next opportunity to help artists offset the declines in revenues from both digital and physical sales. But with very low per-stream royalties, particularly from free, ad-supported video streaming services built on UCC, the prospect of ever getting to the promised “Golden Age” for artists remains dim. No wonder: when considering artist revenues per play from the major music streaming services (i.e. which range between US\$0.0006 and US\$0.0167 per play), artists need hundreds of thousands – if not millions – of plays to earn minimum wage.⁶⁰

Music fans, which is to say almost everyone, visit intermediary websites not to experience the intermediary, but to enjoy music. In a system that shelters intermediaries from any obligation to pay a fair share, however, the creators – the artists – do not receive fair remuneration.

This situation was condemned in a May 2016 article in *The Guardian* by Canadian singer-songwriter Nelly Furtado.

“The revenue to labels and artists, per user, is much lower from YouTube than from streaming services,” Furtado wrote. “Let’s have the proper payouts. People can still have fun uploading and sharing – just pay the creators of all this intellectual property properly.”⁶¹

She added, “(W)hile it is true that YouTube pays more than nothing, that does not make it fair.”

A study conducted by research firm Nordicity on behalf of the Canadian Independent Music Association demonstrated exactly how tough it is for artists in the digital marketplace. The study found that, in 2011, individual artists in Canada earned an average of \$7,228 per year from 29 hours per week of music-related work.⁶²

The reality for most artists is that the work into which they pour their passion and talent has effectively become at best a part time occupation and for many a mere hobby. Many of them have little choice but to supplement their income with other work and put whatever time and energy remains into their music.

Canadian artist Zoe Keating has spoken out about the impact of the Value Gap on her earnings. A July 2017 *Washington Post* article described how Keating, a Canadian cellist, earned US\$261 from 1.42 million views on YouTube.

“YouTube revenue is so negligible that I stopped paying attention to it,” Keating said.⁶³

A comparison of Keating’s streaming music earnings to physical and digital sales of her work revealed another wide gap. In 2013, according to a February 2014 article in *The Guardian*, 92% of Keating’s income came from physical and digital sales.⁶⁴ She earned US\$75,341 from sales of 32,806 singles and 8,365 albums. More than 2.8 million streams, by comparison, earned Keating just US\$6,380.

EXACTLY HOW HARD IS IT FOR ARTISTS TO EARN A LIVING FROM MUSIC?

While few artists have shared their earnings as Keating has, attempts have been made to calculate earnings from various services. According to a 2017 infographic prepared by *informationisbeautiful.net*, a song must be played 2.4 million times on YouTube for an artist to earn “minimum wage”, which it benchmarks as \$1,472.⁶⁵

Canadian artist Miranda Mulholland has experienced much the same type of impact.



In a May 24, 2017, speech to the Economic Club of Canada, Mulholland said, “I have a serious problem. My problem is that because of [the Value Gap], I’m barely able to make a living.”⁶⁶

Addressing Google in the second person, she remarked, “Your rates are the lowest in the world! Your revenue is built on the backs of other people’s talent and work and you refuse to acknowledge it. Accountability means acknowledging value and compensating for it.

This is not a business model. And it’s a far cry from a fair marketplace for our work.”

Concern over the challenges faced by Canadian artists in the digital marketplace are shared by Minister of Canadian Heritage Mélanie Joly.

At a May 30, 2017, meeting of Parliament’s Standing Committee on Canadian Heritage, Joly was asked by MP Julie Dabrusin about her government’s plans to review the Copyright Act in light of the challenges artists face in the digital marketplace, as outlined in Mulholland’s speech a week earlier.

Joly responded, “I am very ... concerned about the question of fairness to creators, in the context of this digital disruption. And that’s exactly why I decided to launch a conversation, an international conversation, about the importance of cultural diversity and fairness to creators with digital platforms.”⁶⁷

She added, “(W)e know that there is a parliamentary review of the Copyright Act that is coming. We will be working on this, and certainly the importance of fairness to creators and protecting IP for creators is something that we will be putting forward.”

SPOTLIGHT ON ‘FOCUS ON CREATORS’

The challenge of earning a living as an artist in today’s digital environment has been brought to light by a recent initiative called Focus On Creators. The initiative, launched in November 2016 with a joint letter to Minister of Canadian Heritage Mélanie Joly signed by more than 1,000 professional creators, urged the government to put Canada’s creators at the heart of our cultural policy. The letter can be found at Appendix C.

A news release announcing Focus On Creators summarized the reasons behind its creation:

“Canadians are consuming more digital content than ever before, and creators have led the shift – they have digitized their work, mastered the Internet, and become their own social media directors,” the news release stated.⁷⁵ “Yet the laws and regulations that allow creators to monetize their works to make a living are now out of date. Without urgent attention from government, thousands of Canadian creators will not be able to tell their uniquely Canadian stories.”

Since Focus On Creators was launched, the list of signatories to the joint letter has grown to approximately 3,500 creators. It includes both emerging and prominent Canadian musicians, authors, songwriters, composers, music producers, poets, playwrights, film composers, actors, directors and other creators. Among the signatories are musicians Gord Downie, Alanis Morissette and Michael Bubl , celebrated authors Marie Claire Blais and Rudy Weibe, award-winning poets Gary

“ALL ARTISTS DESERVE FAIR TREATMENT. WE DEVOTE OUR LIVES TO OUR CRAFT. THE GOVERNMENT SHOULD MAKE SURE THAT OUR ARTISTS, WHO HELP DEFINE THIS COUNTRY, CAN EARN A LIVING FROM THEIR WORK.”⁷³

– Dougie Oliver, Professional Musician, Cold Creek County

THE “GOLDEN AGE” THAT NEVER WAS

In the 1990s, governments around the world were trying to facilitate the transition into the digital marketplace, and they enacted laws and regulations that made it easier for technology companies to launch and succeed. The idea was that with innovative technology would come new and lucrative opportunities for those in the creative economy. Yet as artists navigated their new environment in tandem with technological advancement, the promised boon never came. Time after time exemptions (which are nothing more than subsidies) were codified into law, reducing or in some cases eliminating a creator's right to be paid.

Over the past 25 years, a social quid pro quo was articulated over and over and over again: creators would ultimately be better off. In return for the technology companies being shielded from liability, and from making royalty payments, it was argued, the Internet would flourish, and consequently, so too would creators. Creators would benefit from direct access to a larger, more immediate marketplace. It would be win-win, and a “Golden Age” for creators.

This arrangement amounted to more than an article of faith: it was a social contract; a social contract that today is imperiled. Restoring that social contract is one of the primary challenges facing creators and the creative industry today.

In his essay entitled, “A “Golden Age” for the Creative Sector? The Effect of Digitisation and the Spread of the Internet on Creative Industries,”⁶⁸ Dr. George Barker reviews the ‘Golden Age hypothesis’ – that is, that advancements in digital technologies and the proliferation of the Internet have produced a ‘Golden Age’ for the creative sectors reliant on copyright since 2000. Dr. Barker refutes this hypothesis, noting that the positive effects of digitization and Internet proliferation (i.e., a reduction in creation and distribution costs) have been offset by the negative effects of greater unauthorized appropriation of copyrighted material that is enabled by digitization and the Internet. This appropriation includes both uses that are simply unauthorized by rights holders, as well as what Dr. Barker refers to as “under-

authorized” uses: that is, where rights holders reluctantly consent to license their rights at below market rates, because copyright safe harbours, exceptions and barriers to enforcing their rights (such as requiring rights holders to fully litigate against end users before intermediaries will cooperate) make such sub-value licensing the only viable option for rights holders to receive any compensation whatsoever for the commercial exploitation of their material by intermediaries.

This, according to Dr. Barker, has resulted in a significant value gap. As discussed earlier in this report, total music trade revenues in Canada had fallen from their peak of \$998 million in 1998 to \$397 million in 2014 – more than a billion dollars lower than if they had kept up with the rate of inflation and real GDP growth rate from 1997.⁶⁹

Dr. Barker's study also found that the Internet effects underlying the Value Gap similarly affected investment and employment levels in the creative sector.⁷⁰ He concluded that:

“[A]ll of the shortfall in Canadian music revenues ... was due to the adverse effects of digital music distribution occurring without the full consent of copyright owners. From the mid-1990s, the digitisation of content and spread of the Internet reduced the effective level of copyright protection. At the same time, copyright law was weakened by the introduction of immunities or safe harbours and exceptions for internet intermediaries. Together these technological and legal changes substantially weakened the ability of rights holders to enforce their rights in digital music distribution. As a result, there was a rapid growth in market bypass involving both unauthorized, and “under-authorized” or “forced” use, at below sustainable market prices, that in turn led to the collapse of the music market in Canada.”⁷¹

“[T]he spread of content digitisation and the growth of the Internet, together with the immunities, safe harbours and exceptions introduced to copyright law from the mid-1990s have been associated with significant negative impacts on sales, investment and employment. ... This evidence refutes the Golden Age hypothesis.”⁷²

“I’M REALLY CONCERNED FOR THE NEXT GENERATION OF MUSICIANS AND HOW THEY’RE GOING TO DEVELOP.”

– Metric's Emily Haines in an interview with the Niagara Falls Review ⁷⁴

Barwin and Alice Major, and distinguished playwrights Sharon Pollock and Daniel David Moses.

The letter urges legislative and regulatory reforms to improve the working environment for creators: “(W)hile some of us have found success, too many others are being squeezed out of the marketplace. The middle class artist is being eliminated from the Canadian economy. Full-time creativity is becoming a thing of the past.”⁶

The initiative cites powerful evidence of the disappearance of Canada’s creative middle class:

- Independent artists earned an average of \$7,228 per year from music-related activities in 2011, according to a Canadian Independent Music Association study. This is not nearly enough to allow them to pursue a music career full-time; and
- Canadian writers earned 27% less income from their writing in 2015 than they did in 1998, a study by The Writers’ Union of Canada (TWUC) found. While the work

of writers fuels a nearly \$2 billion industry, more than 80% of them earn an income from their writing that falls below the poverty line.

Focus On Creators points to two major federal cultural policy initiatives as opportunities to re-establish a fair working environment for creators: Minister Joly’s “Canadian Content in a Digital World” consultation; and the 2017 mandated review of the Copyright Act. The letter asks Minister Joly to stand up for creators in these two initiatives, and to put them at the heart of future cultural policy.

Recent statements by Minister Joly appear to respond to the call to action. During a June 9, 2017, online town hall hosted by HuffPost Canada, Joly said, “I know the issue of fairness to creators is really important, and that is why actually I raised (it) with the important digital platforms. ... And it’s something that I have certainly at heart, and in the context of the revision of the Copyright Act ... I’ll have that in mind as well.”⁷

“THE CAREFULLY DESIGNED LAWS AND REGULATIONS OF THE 1990S WERE INTENDED TO ENSURE THAT BOTH CANADIAN CREATORS AND TECHNOLOGICAL INNOVATORS WOULD BENEFIT FROM DIGITAL DEVELOPMENTS. WE HOPED THAT NEW TECHNOLOGY WOULD ENRICH THE CULTURAL EXPERIENCES FOR ARTISTS AND CONSUMERS ALIKE. UNFORTUNATELY, THIS HAS NOT HAPPENED. INSTEAD, OUR WORK IS INCREASINGLY USED TO MONETIZE TECHNOLOGY WITHOUT ADEQUATELY REMUNERATING ITS CREATORS. INCOME AND PROFIT FROM DIGITAL USE OF OUR WORK FLOW AWAY FROM THE CREATIVE CLASS TO A CONCENTRATED TECHNOLOGY INDUSTRY. ALLOWING THIS TREND TO CONTINUE WILL RESULT IN DRAMATICALLY FEWER CANADIANS BEING ABLE TO AFFORD TO “TELL CANADIAN STORIES,” MUCH LESS EARN A REASONABLE LIVING FROM DOING SO.”

–Focus On Creators letter

SECTION 4 - RECOMMENDATIONS

MEASURES FOR CANADIAN DECISION-MAKERS TO ADDRESS THE VALUE GAP

Straightforward and accessible solutions are available to Canadian policy-makers to address the Value Gap.

Measures that can be taken by the Canadian government include those specific to Canada, and others, where a service provider's enabling laws reside elsewhere, involving joint policy initiatives with Europe, the U.S. and other nations. This section provides a roadmap for action through effective policy reform, with a focus on solutions that can be implemented within Canada.

As Music Canada President and CEO Graham Henderson described in his November 2016 address to the Economic Club of Canada, governments around the world – including in Canada – made decisions that laid the groundwork for the Value Gap. Those same governments, therefore, can take steps to address it. As Henderson explained, there is nothing natural about the Value Gap, nor is it a creature of the free market. Instead, it is the result of government policies that emphasized growth and development of the technology sector without fully understanding or accounting for their impact on creators and the cultural sector. Henderson argued that it is now time to reset those policies and thereby ensure that artists and their partners in the creative economy are fairly remunerated when their work is commercialized by others.

Canada is joined in this task. As outlined in the introduction to this report, public policy initiatives to address the Value Gap are already well underway in Europe and the U.S.

However, the root of the Value Gap problem is the misapplication of safe harbour laws and exceptions. Globally, and in Canada, safe harbour laws and exceptions were designed

THE MUSIC INDUSTRY IS SPEAKING UP - IN CANADA, AND AROUND THE WORLD

The European Commission has now acknowledged that the market isn't functioning properly, has identified the problem as the Value Gap, and agreed that a legislative fix is needed. In the Fall of 2016, the European Commission published its proposed Copyright Directive, which largely clarified EU law to lessen the impact of the Value Gap.



In November 2016, the Focus On Creators campaign was launched. More than 3,500 Canadian musicians, authors, songwriters, poets, music producers, visual artists and other members of the creative class, have urged Minister Joly to put creators at the heart of future policy. For the music industry, the campaign is intended to highlight that music is increasingly used to monetize technology without adequately remunerating its creators – and that we need the help of Canada's government right now.



Hundreds of thousands of U.S. songwriters, composers, music publishers, recording artists, record labels, studio professionals, and others who rely on copyright protection for their livelihood, came together and filed a joint submission as part of the ongoing review of the Digital Millennium Copyright Act. The message is clear: U.S. safe harbour provisions are wholly out of date, and need to be changed.



Here in Canada, the Copyright Act contains provisions that allow and, in some cases, even encourage the commercialization of creators' work without the need for proper remuneration. To address these inequities, the federal government should take the following actions:

1. TIME FOR CHANGE: FOCUS ON THE EFFECTS OF SAFE HARBOUR LAWS AND EXCEPTIONS

It is now clear that the Value Gap is the result of safe harbour laws and exceptions and their subsequent misapplication by some technology companies. Certainly, in Canada, there are additional pernicious issues that are having a dramatic effect on the creative industries and the ability of creators to earn a living from their craft – such as the cross-industry subsidies that are described below under Recommendations 3 and 4, and earlier in this report.

to achieve policy objectives that would limit liability on the Internet. The goal was to protect the companies that were delivering Internet access to consumers, because it was believed at the time these companies could not track or control what was coming and going through their systems. But today, we know that the Internet is not a series of “dumb pipes.” Today's tech companies know exactly what we are browsing or streaming, they know when we do it and they can target advertising and suggest content based on users' interests. These are in fact the smartest pipes man has ever made.

With this context in mind, we must review these safe harbour laws and exceptions that were designed for one intention but are in fact being utilized to accomplish something else entirely.

We urge Canadian policy-makers to focus their attention on the effects of safe harbours and exceptions the same way EU and U.S. decision-makers are doing so. Canada must join the international trend to review and modernize safe harbour laws, particularly as they apply to online services that are more than mere passive intermediaries.

2. CANADA'S CREATIVE INDUSTRIES ARE ASKING FOR MEANINGFUL REFORMS

This report (as well as previous submissions by Music Canada and others in the cultural industries) has brought to the table in Canada the conundrum in which creators find themselves: if there is no meaningful review and reform of the rules and regulations that oversee Canada's cultural sectors, then why have creators been asked by government to provide input? Creator-led groups like Focus On Creators have united and are expecting results – results that include a meaningful review of the Copyright Act and meaningful reforms that will have a dramatic effect on the standard of living of creators in Canada.

The mandated five-year review of the Copyright Act slated to begin in late 2017 creates an opportunity: creators need the government's help, and that help must result in concrete change.

We urge the government to take this review seriously. The government should examine the entire Act for instances that allow others to commercialize creative works without properly remunerating artists, and it should respond with amendments in favour of Canada's creative class. At the same time, the government should not give in to the countervailing forces that may attempt to guide this process into a routine, cursory review of a narrow band of the Copyright Act.

Creators – especially Canada's music community – are hopeful that real, meaningful change is coming, and are actively reminding the government that it is within its power to turn its current creator-focused narrative into tangible improvements for creators. For instance, Recommendations 3 and 4, below, if adopted, would dramatically change the standard of living for artists in Canada and redirect money back into the music ecosystem.

3. REMOVE THE \$1.25 MILLION RADIO ROYALTY EXEMPTION

Since 1997, commercial radio stations have been exempted from paying royalties on their first \$1.25 million advertising revenue.⁷⁹ The Radio Royalty Exemption, found at section 68.1(1) of the Copyright Act, has run its course. It amounts to an \$8 million annual cross-industry subsidy paid by artists and their recording industry partners to large, vertically-integrated and highly profitable media companies. Internationally, no other country has a similar exemption, and the exemption does not apply for songwriter and publisher royalties – meaning that performers and record labels are the only rights holders whose royalties are used to subsidize the commercial radio industry. The exemption is unjustified and should be eliminated.

4. AMEND THE DEFINITION OF 'SOUND RECORDING'

The current definition of a "sound recording" in the Copyright Act is worded in such a way that performers and record labels are excluded from receiving royalties for the use of their work in television and film soundtracks. This exception is unique to television and film soundtracks, and does not apply to composers, songwriters and music publishers. It is inequitable and unjustified, particularly in light of the profound role music plays in soundtracks, and it is costly to artists and record labels, who continue to lose approximately \$45 million per year. Section 2 of the Copyright Act should be amended to allow for sound recordings used in television and film to be eligible for public performance remuneration, pursuant to section 19 of the Copyright Act.

CONCLUSION

At the outset of the digital era, creators were promised that they would be ushered into a Golden Age that would deliver them financial and artistic rewards. As this report has demonstrated, the reality for artists and their partners in the creative industries has been almost exactly the opposite. As a result of rules established two decades ago, wealth has been diverted from creators into the pockets of massive digital intermediaries, and what little is left over for creators is concentrated into fewer and fewer hands. As a result, the creative middle class is disappearing, and with it, numerous jobs and opportunities.

When we compare the global revenue from the sale of recorded music in 1999 with today (i.e. a massive decline), it is obvious to anyone that jobs and opportunities have been lost. This is a problem worth solving – help us put Canadians back to work in the creative sectors; help artists and other creators get back to full-time creative work.

The government can address this and other effects caused by the Value Gap by taking simple, moderate steps to rebalance rules created at a time when everyone was guessing how the digital age might unfold. The guessing is over. Now we know: the Golden Age promised to creators never happened. We therefore collectively owe it to them to address the rules that have so profoundly undermined their careers. These rules must be adapted to the reality of today's digital marketplace in a way that is fair to all stakeholders.

There is no need to point fingers. No one planned for the creative middle class to suffer. The important thing at this juncture is to move forward purposefully and without delay to get the rules right.

APPENDIX A

Artist Miranda Mulholland Sheds Light on Creators' Challenges, and Proposes Solutions

Miranda Mulholland is an acclaimed fiddler, performer and boutique label owner. She plays in numerous bands, and has sung and played fiddle with many iconic Canadian artists and bands and on over 50 records. Mulholland has also toured extensively in Europe and North America and has appeared in various theatre productions. As an artist advocate, Mulholland is a member of the Board of Governors of Massey Hall/Roy Thomson Hall, and is a leading voice for the Focus On Creators campaign – a coalition of Canadian creators in support of major changes to Canada's cultural policies.

On May 24, 2017, Mulholland became the first creator to deliver a keynote address to the Economic Club of Canada. Her speech, titled "Redefining Success in a Digital Marketplace,"⁸⁰ drew on her years of experience as a musician, label owner and entrepreneur to shed light on the reality artists face in the digital era. In her speech, she also identified actions that government, the music industry and music fans can take to help bring balance to the world in which creators live.

The overarching theme of Mulholland's speech was accountability, and she pointed to a number of ways that digital music services eschew accountability to the music creators who make all of the content off of which they profit. Mulholland was particularly critical of YouTube's claims that it is merely a passive service, and as such, should be free from liability for the content that appears on the site: "YouTube says – 'it isn't our fault – we are just the shop window. We didn't put the items in the window, so we are not accountable for them. We are a passive intermediary. We are not liable for this massive copyright infringement.' But – once again – wait. A top brass at Google just bragged that '80% of all watch time is recommended by YouTube.' He explained that 'Everybody thinks that all the music that's being listened to and watched is by search.' But it isn't, and in his words, 'that's a really important and powerful

thing.' This means that YouTube actively directs consumers. This doesn't seem all that passive to me. Zero accountability."⁸¹

Mulholland described the ways in which we can correct the situation faced by artists, saying, "We all have a role to play as artists, as consumers, as industry and as government."⁸²

Mulholland encouraged artists to be honest about their lifestyle, protect their intellectual property, support robust copyright laws and to pay back into the music ecosystem by championing young talent.

She encouraged music fans to be tastemakers, to create playlists of their favourite music, and to write reviews and rate albums and songs, actions that help shift algorithms in favour of artists. She also encouraged fans to buy albums on their release days, another action that can help to drive albums to the front pages of music services. She also encouraged music fans to subscribe to a streaming service, as the subscription model delivers a much better return to artists than ad-supported streaming.

As for government, Mulholland called for the paring of unjustified safe harbour laws that provide technology companies with immunity from copyright infringement liability. In Canada, she pointed to eliminating industry cross-subsidies that shift wealth away from music creators, and used the \$1.25 million radio royalty exemption as an example – an exemption that was established in 1997 excusing radio stations from paying no more than \$100 in royalties to performing artists and record labels on their first \$1.25 million in advertising revenue.

APPENDIX B

Zoë Keating: Thanks to YouTube, Success as an Artist Doesn't Pay the Bills

Zoë Keating is a cellist, composer and performer. She is a self-described “one-woman orchestra,” who has risen to global fame. Her self-released albums have several times reached #1 on the iTunes classical chart, she has over 1 million followers on Twitter and her grassroots approach and artists' advocacy has garnered her much public attention and press. Keating has played and recorded with numerous artists, including Imogen Heap, Amanda Palmer, Tears for Fears, DJ Shadow, Dan Hicks and Thomas Dolby.⁸³ She has composed music for ballet, theatre, film and radio and her music is featured regularly in film, television and dance productions, and commercials. She has worked on scores for the A&E series “The Returned” and for “Manhattan”, a drama about the making of the atomic bomb.⁸⁴

Yet despite this incredible success and acclaim, Keating is not seeing a return of royalties that matches the widespread demand and consumption of her music on YouTube. Keating recently disclosed her royalty statements comparing YouTube and Spotify.⁸⁵

YouTube	1.42 million views	US\$261
Spotify	230,000 streams	US\$940

This meagre rate of monetization is challenging for today's artists, who operate in a predominantly digital environment, particularly when the world's most popular digital music service offers the worst remuneration. In fact, YouTube devalues music so much that Keating can't rely on it to support her career. She remarked, “YouTube revenue is so negligible that I stopped paying attention to it.”⁸⁶

APPENDIX C



The Focus On Creators campaign has prepared the following joint letter to Minister of Canadian Heritage Mélanie Joly.

Dear Minister Joly,

We are Canada's musicians, songwriters, composers, music producers, authors, poets, playwrights, film composers, actors, directors and visual artists – a creative class of artists and entrepreneurs that has defined this country. We've done so through creativity, innovation and hard work. Yet economically we're worse off today than we were in the 1990s.

We're a diverse, passionate, proudly Canadian collection of innovative storytellers with roots around the world. Our work tells uniquely Canadian stories to the world and global stories to Canadians. It is consumed in greater volume than ever before. It can be accessed anywhere, at any time, simply by opening an app on a phone.

Yet while some of us have found success, too many others are being squeezed out of the marketplace. The middle class artist is being eliminated from the Canadian economy. Full-time creativity is becoming a thing of the past.

Canada's creative professionals have led Canada in the digital shift, but we struggle to earn a livelihood from it. It's not from lack of trying. We've digitized our work and mastered the internet. We've become social media directors for our projects. We connect directly with our fan bases, and monetize everything that we can. So why are more and more of us being forced to abandon creative work? And why do Canada's youth increasingly seek career paths outside the creative sector?

The carefully designed laws and regulations of the 1990s were intended to ensure that both Canadian creators and technological innovators would benefit from digital developments. We hoped that new technology would enrich the cultural experiences for artists and consumers alike. Unfortunately, this has not happened. Instead, our work is increasingly used to monetize technology without adequately remunerating its creators. Income and profit from digital use of our work flow away from the creative class to a concentrated technology industry. Allowing this trend to continue will result in dramatically fewer Canadians being able to afford to "tell Canadian stories," much less earn a reasonable living from doing so.

We will continue to do what we can to succeed in the evolving digital landscape, but we need the help of Canada's government right now. Canada has two major opportunities to stand up for creators over the next year: your Department's ongoing cultural policy review and the five-year mandated review of the Copyright Act in 2017. We know you understand the cultural significance of our work; we hope you also see its value and crucial place in Canada's economy. We ask that you put creators at the heart of future policy.

Sincerely,

Focus On Creators

Signatories available at <https://focusoncreators.ca/>

cc The Right Honourable Justin Trudeau P.C., M.P., Prime Minister of Canada

ENDNOTES

¹Théberge v. Galerie D'Art du Petit Champlain Inc., 2002 SCC 34 at para. 30. Available at: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1973/index.do>

²Review of the Canadian Music Industry, Report of the Standing Committee on Canadian Heritage, June 2014, pg. 5. Available at: <https://www.ourcommons.ca/Content/Committee/412/CHPC/Reports/RP6661036/chpcrp05/chpcrp05-e.pdf>

³Nielsen, Nielsen Music 360: Canada Study 2016, pg. 7. Available at: <http://www.nielsen.com/ca/en/insights/reports/2017/nielsen-music-360-canada-report-2017.html>

⁴IFPI, IFPI Global Music Report 2017: Annual State of the Industry ["IFPI Global Music Report 2017"], pg. 25. Available at: <http://www.ifpi.org/dl?url=http://www.ifpi.org/downloads/GMR2017.pdf>

⁵Copyright Act, s. 68.1(1). Available at: <http://laws-lois.justice.gc.ca/PDF/C-42.pdf>

⁶Focus On Creators, "Our letter to Heritage Minister Mélanie Joly," November 2016 ["Focus On Creators Letter"]. Available at: <https://focusoncreators.ca/ourletter/>

⁷Access Copyright, "Court Decision a Big Win for Creators and Publishers," July 12, 2017. Available at: <http://www.accesscopyright.ca/media/announcements/court-decision-a-big-win-for-creators-and-publishers>

⁸IFPI, "IFPI unites with coalition of creative industry organisations in call for fix to value gap in the EU", October 4, 2017. Available at: <http://www.ifpi.org/news/IFPI-unites-with-coalition-of-creative-industry-organisations-in-call-for-fix-to-value-gap-in-the-EU>

⁹Ashley Cullins, "Music Industry A-Listers Call on Congress to Reform Copyright Act," Billboard, March 31, 2016. Available at: <http://www.billboard.com/articles/business/7318658/music-industry-stars-congress-reform-copyright-act>

¹⁰WIPO Copyright Treaty. Available at: http://www.wipo.int/treaties/en/text.jsp?file_id=295166

¹¹European Parliament, Council of the European Union, Directive No. 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce). Available at:

<http://www.wipo.int/wipolex/en/details.jsp?id=6393>

¹²In its 2017 Global Music Report, IFPI explains that, "Inconsistent applications of online liability laws have emboldened certain services to claim that they are not liable for the music they make available to the public. ... Today, services such as YouTube, which have developed sophisticated on-demand music platforms, use this as a shield to avoid licensing music on fair terms like other digital services, claiming they are not legally responsible for the music they distribute on their site." IFPI Global Music Report 2017, *supra* note 4, pg. 25.

¹³IFPI, IFPI Global Music Report 2016: Annual State of the Industry, pg. 8. Available at: <http://www.ifpi.org/downloads/GMR2016.pdf>

¹⁴For example, see the following sections of the Copyright Act that were added by Bill C-11: s. 29, 29.21, 29.22, 29.23, 29.24, 29.4, 29.4(1), 29.4(2), 29.5(d), 29.6, 30.01, 30.02, 30.02(4), 30.02(5.02), 30.04, 30.1(1), 30.21, 30.6, 30.61, 30.62, 30.63, 30.71, 30.8, 30.9, 31.1(1), 31.1(4), 32(1), 32.2(1)(f), 41.11-41.18, 41.21, 41.27 and 67(4). Copyright Act. Available at: <http://laws-lois.justice.gc.ca/PDF/C-42.pdf>

¹⁵For instance, under the U.S. *Digital Millennium Copyright Act* (DMCA) in the U.S., safe harbours are granted to internet intermediaries and search engines only if they have a policy in place to address repeat infringers and comply with their notice-and-takedown obligations (Canada doesn't even have such obligations, although it does have a notice-and-notice requirement, but safe harbours are not conditioned on compliance with it). Safe harbours under the DMCA are also limited in certain circumstances to true "innocent intermediaries" – a condition lacking under Canadian law. In addition, the current safe harbours make it almost impossible to require infringing content to be removed from a Canadian-hosted website or a Google cache. Unlike in the U.S., Canada utilizes the much less effective notice-and-notice approach, rather than a notice-and-takedown (or stay-down) model.

¹⁶For example, see: user-generated content exception (s. 29.21); reproduction for private purposes (s. 29.22); backup copies (s. 29.24); fair dealing (s. 29); temporary reproduction for technological processes (s. 30.71); and ephemeral recordings (s. 30.8-30.9): Copyright Act. Available at: <http://laws-lois.justice.gc.ca/PDF/C-42.pdf>

¹⁷Gerald (Jay) Kerr-Wilson, "Canada's new Copyright Act earns a mixed review," December 2011. Available at: <http://www.fasken.com/canada-new-copyright-act/>

¹⁸Copyright Act, 1921, S.C. 1921, c. 24, s. 3(1)(f). Available at: <http://unesdoc.unesco.org/images/0014/001439/143937eb.pdf>

¹⁹Each station is required to pay a nominal sum of \$100 on the first \$1.25 million of revenue: Copyright Act, s. 68.1(1). Available at: <http://laws-lois.justice.gc.ca/PDF/C-42.pdf>

²⁰In its 1999 decision regarding Commercial Radio, the Copyright Board concluded that "the evidence provided by Re:Sound...clearly established that the industry could have absorbed the full tariff, absent any special statutory provisions" and observed that "neither the CAB nor its witnesses took issue with the validity or quality of Re:Sound's evidence upon this point." Copyright Board, *Public Performance of Sound Recordings 1998-2002*, August 13, 1999, pg. 34. Available at: <http://www.cb-cda.gc.ca/decisions/1999/19990813-m-b.pdf>

²¹Copyright Board, *Public Performance of Musical Works 2003-2007 and Public Performance of Sound Recordings 2003-2007*, October 14, 2005, pg. 38. Available at: <http://www.cb-cda.gc.ca/decisions/2005/20051014-m-b.pdf>

²²*Ibid.*, at paras. 32, 37 and 39.

²³Statistics Canada, Table 357-0002 – Radio broadcasting industry, by North American Industry Classification System (NAICS). Available at: <http://www5.statcan.gc.ca/cansim/a26?lang=eng&retrLang=eng&id=3570002&pattern=&stByVal=1&p1=1&p2=37&tabMode=dataTable&csid>

²⁴Miranda Mulholland, "Redefining Success in a Digital Marketplace," Economic Club of Canada, May 24, 2017, Toronto Marriott Eaton Centre, Toronto, ON. Keynote Address ["Mulholland ECOC Keynote"]. Available at: <https://www.mirandamulholland.ca/advocacy>

- ²⁵ Susan Athey and Markus Mobius, "Local News Consumption: The Impact of Aggregators on Traditional Media," August 20, 2012. Available at: <http://www.techpolicy.com/Blog/August-2012/Local-News-Consumption-The-Impact-of-Aggregators-o.aspx>
- ²⁶ Public Policy Forum, *The Shattered Mirror*, January 2017. Available at: <https://shatteredmirror.ca/>
- ²⁷ Val Maloney, "The nitty gritty of the Heritage Committee report," *Media in Canada*, June 15, 2017. Available at: <http://mediaincanada.com/2017/06/15/drop-digital-ads-from-the-cbc-tax-foreign-news-aggregators-standing-committee-on-canadian-heritage/>
- ²⁸ Susan Krashinsky Robertson, "Newspaper coalition seeks \$350-million per year in federal aid," *The Globe and Mail*, June 17, 2017. Available at: <https://beta.theglobeandmail.com/report-on-business/newspaper-coalition-seeks-350-million-per-year-in-federal-aid/article35342298/>
- ²⁹ Wanda Noel & Jordan Snel, "Some Key Questions & Answers for Teachers," Council of Ministers of Education, Canada, Canadian School Boards Association, Canadian Teachers' Federation, 2012, pg. 3. Available at: http://ojen.ca/wp-content/uploads/Copyright-Matters_3rd-Ed_ENG.pdf
- ³⁰ Kate Taylor, "Canada's lax copyright reputation puts artists' livelihoods at risk," *The Globe and Mail*, July 21, 2017. Available at: <https://beta.theglobeandmail.com/arts/canadas-lax-copyright-reputation-puts-artists-livelihoods-at-risk/article35771846/>
- ³¹ The Writers' Union of Canada, "Canadian Writers Working Harder While Earning Less," May 29, 2015. Available at: <https://www.writersunion.ca/news/canadian-writers-working-harder-while-earning-less>
- ³² *Ibid.*
- ³³ Access Copyright, "Impacts of the education sector's interpretation of 'fair dealing,'" July 30, 2015. Available at: <http://www.accesscopyright.ca/media/bulletins/impacts-of-the-education-sector%E2%80%99s-interpretation-of-fair-dealing>
- ³⁴ Dr. George Barker, "A 'Golden Age' for the Creative Sector? The Effect of Digitisation and the Spread of the Internet on Creative Industries", Aug. 28, 2016, pg. 5. ["Barker 'Golden Age' Paper"] Available at: <https://ssrn.com/abstract=3048349>
- ³⁵ *Ibid.*
- ³⁶ *Ibid.*
- ³⁷ Peter Kafka, "Lyor Cohen, YouTube's music ambassador, makes his case to the big music labels," *Recode*, May 8, 2017. Available at: <https://www.recode.net/2017/5/8/15575938/lyor-cohen-youtube-warner-music-interview>
- ³⁸ IFPI, "How Record Labels Invest". Available at: <http://www.ifpi.org/how-record-labels-invest.php>
- ³⁹ IFPI, "Investing In Music" ["IFPI Investing in Music"], 2016. pg. 10. Available at: <http://investinginmusic.ifpi.org/report/ifpi-iim-report-2016.pdf>
- ⁴⁰ Music Canada Statistics, 2016. Available at: <https://musiccanada.com/wp-content/uploads/2017/05/2016.pdf>
- ⁴¹ IFPI Global Music Report 2017, *supra* note 4, at pg. 71. Additional source data provided by IFPI. Note that the figures cited are reported in CAD.
- ⁴² *Ibid.*, *supra* note 4, at p. 34.
- ⁴³ Comments by Jim Vallance at a Music Industry Technical Roundtable as part of Minister Joly's consultation, "Canadian Content in a Digital World" (Toronto, Ontario) (October 13, 2016).
- ⁴⁴ IFPI Investing In Music, *supra* note 39, at pg. 9.
- ⁴⁵ *Ibid.*, pg. 10.
- ⁴⁶ *Ibid.*, pg. 6.
- ⁴⁷ IFPI, *Connecting With Music: Music Consumer Insight Report*, September 2017. Available at: <http://ifpi.org/downloads/Music-Consumer-Insight-Report-2017.pdf>
- ⁴⁸ IFPI, *Digital Music Study 2017*, September 2017.
- ⁴⁹ *Ibid.*
- ⁵⁰ *Ibid.*
- ⁵¹ Eriq Gardner, "Major Record Labels Sue Over Ripping Audio Tracks from YouTube Videos," *The Hollywood Reporter*, September 26, 2016. Available at: <http://www.hollywoodreporter.com/thr-esq/major-record-labels-sue-ripping-932455>
- ⁵² *Ibid.*
- ⁵³ IFPI, RIAA, and BPI, "World's largest music stream ripping site shuts down after successful international legal action from record industry," September 7, 2017. Available at: <https://www.riaa.com/worlds-largest-music-stream-ripping-site-shuts-successful-international-legal-action-record-industry/>
- ⁵⁴ Simon Morris, "What is YouTube's role in the music industry?," *Google in Europe – Official Blog*, May 11, 2017. Available at: <https://www.blog.google/topics/google-europe/youtube-role-music-industry/>
- ⁵⁵ RBB Economics, "Value of YouTube to the music industry – Paper 1 – Cannibalization," May 2017. Available at: <http://www.rbbecon.com/downloads/2017/05/Value-of-YouTube-to-the-music-industry-Paper-I-Cannibalization1.pdf>
- ⁵⁶ IFPI Global Music Report 2017, *supra* note 4, at pg. 25.

- ⁵⁷ Graham Henderson, "The Broken Promise of a Golden Age," Economic Club of Canada, November 1, 2016, Hilton Toronto, Toronto, ON. Keynote Address. Available at: <https://musiccanada.com/news/graham-henderson-the-broken-promise-of-a-golden-age/>
- ⁵⁸ Peter Kafka, "Lyor Cohen, YouTube's music ambassador, makes his case to the big music labels," Recode, May 8, 2017. Available at: <https://www.recode.net/2017/5/8/15575938/lyor-cohen-youtube-warner-music-interview>
- ⁵⁹ IFPI, "Response to Google's blog post on YouTube's role in the music industry," May 11, 2017. Available at: <http://www.ifpi.org/news/Response-to-Google's-post-today-on-YouTube's-role-in-the-music-industry>
- ⁶⁰ Information Is Beautiful, "What Streaming Music Services Pay," June 2017. Available at: <http://www.informationisbeautiful.net/visualizations/spotify-apple-music-tidal-music-streaming-services-royalty-rates-compared/>
- ⁶¹ Nelly Furtado, "YouTube pays more than nothing. That doesn't make it fair," The Guardian, May 2, 2016. Available at: <https://www.theguardian.com/music/musicblog/2016/may/02/nelly-furtado-youtube-artist-royalties-fair-pay>
- ⁶² Nordicity, "Sound Analysis, An Examination of the Canadian Independent Music Industry," February 2013. Available at: http://66.209.187.167/wp-content/uploads/2013/07/Sound_Analysis.CIMA_FINAL_2013.pdf
- ⁶³ Todd C. Frankel, "Why musicians are so angry at the world's most popular music streaming service," The Washington Post, July 14, 2017. Available at: https://www.washingtonpost.com/business/economy/why-musicians-are-so-angry-at-the-worlds-most-popular-music-streaming-service/2017/07/14/bf1a6db0-67ee-11e7-8eb5-cbccc2e7bfbf_story.html
- ⁶⁴ Stuart Dredge, "Musician Zoe Keating reveals iTunes, Spotify and YouTube payouts for 2013," The Guardian, February 2014. Available at: <https://www.theguardian.com/technology/2014/feb/24/zoe-keating-itunes-spotify-youtube-payouts>
- ⁶⁵ Information Is Beautiful, "What Streaming Music Services Pay," June 2017. Available at: <http://www.informationisbeautiful.net/visualizations/spotify-apple-music-tidal-music-streaming-services-royalty-rates-compared/>
- ⁶⁶ Mulholland ECOC Keynote, *supra* note 24.
- ⁶⁷ Hon. Mélanie Joly, Standing Committee on Canadian Heritage (2017), Evidence, 42nd Parliament, 1st Session, Meeting No. 63. Available at: <http://www.ourcommons.ca/DocumentViewer/en/42-1/CHPC/meeting-63/evidence#Int-9558313>
- ⁶⁸ Barker 'Golden Age' Paper, *supra* note 34.
- ⁶⁹ *Ibid.*, pg. 6. Note that the figures cited by Dr. Barker are based on 2016 data from IFPI, and reported in USD. All other figures cited in this report are in CAD, unless otherwise specified.
- ⁷⁰ *Ibid.* According to Dr. Barker's study:
On investment in the creative sector, recent UK research suggests the 10-year growth rate in copyright investment between 1990 and 2000 was 79%, but between 2000 and 2010, after content digitisation and the Internet, this growth rate fell to only 8%, which is a fall of 90%; and
On employment in creative industries, the United States Department of Commerce has shown that after content digitisation and the Internet, copyright employment fell by around 5% between 2000 and 2010 -- which is a 110% fall off the earlier 49% growth rate for 1990-2000.
- ⁷¹ *Ibid.*, pg. 6.
- ⁷² *Ibid.*, pg. 7.
- ⁷³ Focus On Creators, "Stars United: New Cultural Policies Must Reflect Creative Class Concerns," FYI Music News, November 30, 2016. Available at: <http://www.fyimusicnews.ca/articles/2016/11/30/stars-united-new-cultural-policies-must-reflect-creative-class-concerns>
- ⁷⁴ John Law, "Emily Haines and the moxy of Metric," Niagara Falls Review, March 20, 2016. Available at: <http://www.niagarafallsreview.ca/2016/03/18/emily-haines-and-the-moxy-of-metric>
- ⁷⁵ Focus On Creators, "A growing list of nearly 1,100 artists and creators urge the Government of Canada to put creators at the heart of cultural policy," November 28, 2016. Available at: <https://focusoncreators.ca/2016/11/28/release/>
- ⁷⁶ Focus On Creators Letter, *supra* note 6.
- ⁷⁷ Hon. Mélanie Joly, Interview by Ryan Maloney and Amanda De Souza, "Heritage Minister Mélanie Joly Answers Your Questions", HuffPost Canada, June 9, 2017. Available at: <http://on.aol.ca/video/heritage-minister-m-laine-joly-answers-your-questions-593affa492fdde3f18dfc93d>
- ⁷⁸ Focus On Creators Letter, *supra* note 6.
- ⁷⁹ Save for a nominal \$100 fee. Copyright Act, s. 68.1(1). Available at: <http://laws-lois.justice.gc.ca/PDF/C-42.pdf>
- ⁸⁰ Mulholland ECOC Keynote, *supra* note 24.
- ⁸¹ *Ibid.*
- ⁸² *Ibid.*
- ⁸³ Zoë Keating, "Biography." Available at: <http://www.zoekeating.com/bio.html>
- ⁸⁴ *Ibid.*
- ⁸⁵ Todd C. Frankel, "Why musicians are so angry at the world's most popular music streaming service," The Washington Post, July 14, 2017. Available at: https://www.washingtonpost.com/business/economy/why-musicians-are-so-angry-at-the-worlds-most-popular-music-streaming-service/2017/07/14/bf1a6db0-67ee-11e7-8eb5-cbccc2e7bfbf_story.html
- ⁸⁶ *Ibid.*

THE VALUE GAP

WHAT IS THE VALUE GAP?

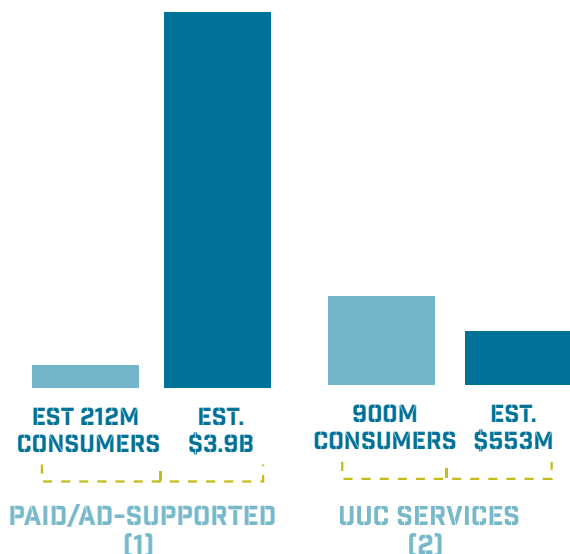


MUSIC IS BEING UNDERVALUED ON A MASSIVE SCALE BY ITS BIGGEST ONLINE PLATFORM: AD-SUPPORTED STREAMING SERVICES BUILT ON USER-UPLOADED CONTENT SUCH AS YOUTUBE. While music consumption has never been higher, those who create it are not being fairly compensated for its use. This is the Value Gap. It is due largely to how some online digital service providers (i.e. YouTube) take advantage of safe harbour laws around the world. Some of these services are siphoning billions of dollars out of the system, paying out royalties that are only fractional compared to the massive consumption levels these services enjoy. Ultimately, this means that creators of music have their work consumed without being compensated fairly, making it harder and harder to be an artist today.

THE VALUE GAP

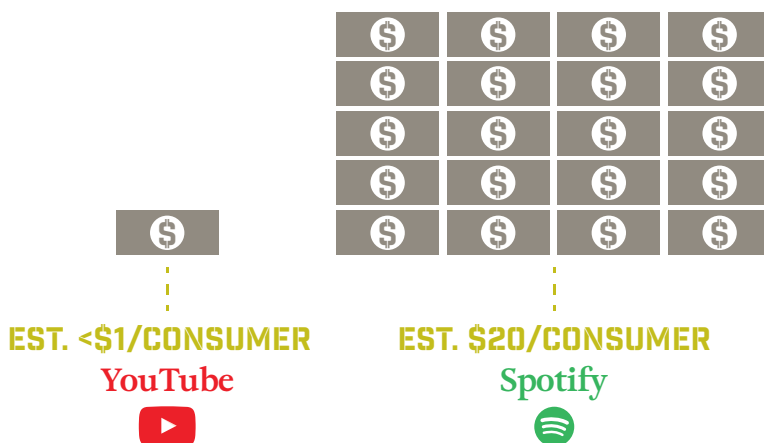
Difference in revenue between

- (1) Paid/Ad-Supported audio streaming, and
- (2) Ad-Supported/UCC video streaming (2016)



Compared to YouTube/UUC revenues, rights holders received \$3.35 billion **more** revenue with 688 million less users from the paid/ad-supported audio streaming services in 2016.

A STRIKING DISPARITY BETWEEN REVENUES RETURNED TO RIGHTS HOLDERS BY TWO LEADING ONLINE MUSIC SERVICES – ESTIMATED REVENUE (USD) PER CONSUMER (2015):



WHAT HARM DOES THE VALUE GAP CAUSE?



Music rights owners aren't seeing a fair return for the use of their music: as consumption reaches record levels, revenues are falling far behind.

Not all online music services are playing by the same rules: fully-licensed services like Spotify face unfair competition from services like YouTube, which get access to music at below market rates.



WHAT IS THE SCALE OF HARM BEING CAUSED BY THE "VALUE GAP"?

In North America, the UUC ad-supported video streaming services (i.e. YouTube) produce only marginally more revenue for music rights holders than the retail sale of vinyl records. Here is a comparison of North American revenues (2016):



In North America, it is surprising that nearly 1 billion users of ad-supported, UUC-built services (like YouTube) generate comparable revenue for the music industry as the niche vinyl record market.



THE MUSIC INDUSTRY IS SPEAKING UP - IN CANADA, AND AROUND THE WORLD

The European Commission has now acknowledged that the market isn't functioning properly, has identified the problem as the Value Gap, and agreed that a legislative fix is needed. In the Fall of 2016, the European Commission published its proposed Copyright Directive, which largely clarified EU law to lessen the impact of the Value Gap.



In November 2016, the Focus On Creators campaign was launched. More than 2,500 Canadian musicians, authors, songwriters, poets, music producers, visual artists and other members of the creative class, have urged Minister Joly to put creators at the heart of future policy. For the music industry, the campaign is intended to highlight that music is increasingly used to monetize technology without adequately remunerating its creators – and that we need the help of Canada's government right now.



Hundreds of thousands of U.S. songwriters, composers, music publishers, recording artists, record labels, studio professionals, and others who rely on copyright protection for their livelihood, came together and filed a joint submission as part of the ongoing review of the Digital Millennium Copyright Act. The message is clear: U.S. safe harbour provisions are wholly out of date, and need to be changed.



ARTISTS ARE WORSE OFF TODAY THAN THEY WERE IN THE 1990S HERE'S HOW THE GOVERNMENT CAN HELP

The Value Gap is caused by laws that are wrongly applied. It cannot be fixed by the music industry alone – nor can it be completely resolved within Canada. The problem is international in scale, but will require specific attention from U.S. and European legislators. Nevertheless, legislation everywhere should be clarified to ensure that services that are active in distributing content online are required to agree on a license with rights holders before they launch.

In Canada, there are actions the government can take today to help the music industry while the underlying causes of the Value Gap are being addressed outside of our borders:



TIME FOR CHANGE: FOCUS ON THE EFFECTS OF SAFE HARBOUR LAWS AND EXCEPTIONS

The Value Gap is the result of safe harbour laws and exceptions and their subsequent misapplication by some technology companies – as well as the cross-subsidies that have been added to the Copyright Act. The government must review safe harbour laws and exceptions, and join the international trend to review and modernized these laws.



CANADA'S CREATIVE INDUSTRIES ARE ASKING FOR MEANINGFUL REFORMS

The mandated five-year review of the Copyright Act slated to begin in late 2017 creates an opportunity: creators need the government's help, and that help must result in concrete change. The government should review the Act for instances that allow others to commercialize creative works without properly remunerating artists, and it should respond with amendments in favour of Canada's creative class.



REMOVE THE \$1.25 MILLION RADIO ROYALTY EXEMPTION

Since 1997, commercial radio stations have only been required to pay \$100 in performance royalties on their first \$1.25 million advertising revenue.

Section 68.1(1)(a)(i) of the Copyright Act should be eliminated. It amounts to a subsidy being paid by artists to large vertically-integrated media companies, and represents nearly \$8 million per year that should be in the pockets of artists and record labels.



AMEND THE DEFINITION OF "SOUND RECORDING"

The current definition is worded in such a way that recorded music is actually not considered a 'sound recording' (and thus not entitled to royalties) when it is included in a TV or film soundtrack. The definition should be changed to allow performers and creators of recorded music to collect royalties when music is part of a TV/film soundtrack. If left unchanged, artists and record labels will continue to lose approximately \$45 million per year.

Creators have been squeezed out in the digital era. As music is gaining in value to those who use it, the value returned to the creator is declining. It is time to address the inequities caused by the Value Gap.

For more information, please visit:

WWW.MUSICCANADA.COM