



CANADIAN PRIVATE COPYING COLLECTIVE  
SOCIÉTÉ CANADIENNE DE PERCEPTION DE LA COPIE PRIVÉE  
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## Introduction

The Canadian Private Copying Collective (CPCC) is an umbrella organization whose member collectives represent recording artists, composers, songwriters, music publishers and record companies. Under the *Copyright Act*, manufacturers and importers of blank audio recording media pay the CPCC a small levy for each unit imported and sold in Canada, to compensate music creators for unlicensed private copying of their work. Private copying refers to the act of making copies of your music collection for your own personal use, anywhere, anytime.

The CPCC appreciates the opportunity to provide a written submission to the *Consultation on a Modern Copyright Framework for Online Intermediaries*. The CPCC, alongside its member collective organizations and other key music industry stakeholders, were strong advocates during the 2017-2019 *Statutory Review of the Copyright Act* for the legislative changes required to update Canada's private copying regime. Our comments here follow our earlier submissions made to both the Standing Committee on Canadian Heritage (see submission [here](#)) and the Standing Committee on Industry, Science and Technology (see submission [here](#)), as well as our recent pre-budget submission (see submission [here](#)).

The Government's consultation paper is focused primarily on licensing and enforcement issues affecting the online marketplace, but importantly, regardless of how these issues are addressed within the *Copyright Act*, **a modern private copying regime is needed to address the gap between enforcement and licensing**. Technology keeps making it easier for consumers to copy music, but it is not always possible for rights-holders to license or enforce against those copies. This is precisely why Canada's *Copyright Act* was changed in 1997 to allow Canadians to copy music onto audio recording media for private use and, in return, to require remuneration for creators and music companies for that unlicensed use of their work. Now, **Canada's private copying regime must be made technologically-neutral so that remuneration can keep up with the evolving digital marketplace**.

## Background

For many years since its creation in 1997, the private copying regime was an important source of earned income, generating a total of over \$300 million in revenue for over 100,000 music creators and the companies that invest in them. Unfortunately, the regime has been limited since 2010 to a single audio recording medium, now virtually obsolete: recordable CDs. That means **compensation for rights-holders has plummeted from \$38 million in 2004 to \$1.1 million in 2019 – even as annual copying activity more than doubled**.

The reason for that limitation to CDs can be found in the specific wording of Part VIII of the *Copyright Act*, which established the regime for copies of recorded music made on 'audio recording media' for private use. When MP3 players emerged and consumers used them to store an unprecedented number of such copies,

the Copyright Board certified the CPCC's proposed tariff on the non-removable memory permanently embedded in those devices<sup>1</sup>. However, that 2003 decision was appealed, and made its way to the Federal Court of Appeals. The Court actually affirmed the desirability of levying MP3 players (a technology that Parliament could not have envisioned when enacting Part VIII), but stated that Parliament would have to adjust the Act's wording to permit it. From *Canadian Private Copying Collective v. Canadian Storage Media Alliance (F.C.A.)* [2005] 2 F.C. 654:

*[153] One can readily understand why the Board wanted to go as far as it could to bring MP3 players within the ambit of Part VIII. The evidence establishes that these recorders allow for extensive private copying by individuals. Their use can potentially inflict on rightsholders harm beyond any "blank audio recording medium" as this phrase has been understood to date. However, as desirable as bringing such devices within the ambit of part VIII might seem, the authority for doing so still has to be found in the Act. [...]*

*[164] ...it is for Parliament to decide whether digital audio recorders such as MP3 players are to be brought within the class of items that can be levied under Part VIII.<sup>2</sup>*

The harm inflicted on rights-holders by this outdated terminology in the Act, as the Court identified, is real and ongoing: they have **never been paid for the billions of unlicensed private copies Canadians make on MP3 players or any other device** designed to store those copies. Every stream of income from copyrighted music is essential to cobble together a living from music, particularly for Canada's many up-and-coming artists and small music companies. **Private copying levies are payment for a use of music that is different from any other use.** Rights-holders are remunerated when (for example) their music is recorded, streamed, or performed at a festival, but they must also be remunerated when people make copies for their own use. Copies have value or no one would make them. Now this income source is on the verge of disappearing entirely, which is fully and completely at odds with the reality of private copying activity in Canada, and increasingly out of step with international norms.

## Current Situation

Streaming may have taken over from the days of mixed tapes and burning CDs, but Canadians still make billions of private copies for listening offline. Wherever possible, rights-holders license the streaming, downloading and other copying of their music, but the reality is still that not all copying activity can be licensed.

Our most recent research shows that there are **5.95 billion tracks of music currently stored on Canadians' phones and tablets**, and that **half of those copies are unlicensed**.<sup>3</sup> Unlicensed, and no levy – that is a lot of revenue out of the pockets of music rights-holders.

**As the country grapples with recovery from a global pandemic, it has never been more important for recording artists, composers, songwriters, music publishers and labels to be able to earn income from their intellectual property.** The pandemic has laid bare just how difficult it is to join the middle class if you work in any part of the music industry. Government emergency relief measures have been essential to minimizing the immediate impacts of COVID-19 on Canada's music industry, but it is imperative to map

<sup>1</sup> [https://decisions.cb-cda.gc.ca/cb-cda/r/en/item/367459/index.do?site\\_preference=normal&iframe=true](https://decisions.cb-cda.gc.ca/cb-cda/r/en/item/367459/index.do?site_preference=normal&iframe=true)

<sup>2</sup> <https://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/32348/index.do>

<sup>3</sup> March 2019 national survey of almost 10,000 Canadians (age 13+)

out now the necessary approaches to recovery and resilience. A functioning copyright framework is a critical building block – rights-holders with predictable, healthy royalty streams produce both cultural riches and employment and investment opportunities for creators, labels, publishers, managers, recording engineers, live music venues, and thousands of other Canadians from coast to coast to coast.

## Solution

**The CPCC asks that the government amend the *Copyright Act* to make the private copying regime technologically-neutral; the focus of these amendments would be to allow the regime to apply to both audio recording media and devices.**

With minimal revisions to the *Copyright Act*, the private copying regime would be restored to what it was originally intended to be – a flexible, technologically-neutral system that monetizes private copying that cannot be controlled by rights-holders.

The CPCC also proposes minor revisions to the *Act* to clarify that this exception to copyright infringement does not extend to offering or obtaining music illegally, whether through an unlicensed online service, stream-ripping, or by stealing an album from a store – such activity remains illegal. **The private copying regime is for copying that cannot be controlled.**

Legislative change was vital for a functioning, world-class music sector in Canada long before the arrival of COVID-19. Now, in conjunction with short-term direct government supports aimed at sustaining the sector, copyright reform will be more essential than ever to a music industry faced with re-building.

**In the medium-to-long term, marketplace solutions like a technologically-neutral private copying regime will be critical to the music sector's recovery.** Updated copyright legislation will put lost revenues back into the system, and back into the pockets of the creators and music companies that earned them, instead of just relying on government-funded support measures.

Passage of these amendments would make it possible for the CPCC to ask the Copyright Board of Canada to approve a levy on the smartphones and tablets where Canadians now make their private copies. For two decades, the CPCC has represented its members before the Copyright Board in trial-like public hearings where experts – representing music rights-holders, consumers, and the businesses that sell leviable media – present evidence and are cross-examined.

The stated goal of this consultation is to “help the Government ensure that Canada’s copyright framework for online intermediaries reflects this evolving digital world.” In the case of private copying, the *Copyright Act* has simply not kept pace with technology, leaving rights-holders uncompensated. When the private copying exception and remuneration were added to the *Copyright Act* in 1997, Parliamentarians could not possibly have imagined the myriad of technologies and services available to consumers today to facilitate the copying of music for personal use. Making the private copying regime technologically-neutral serves this Government’s goal by ensuring that Canada’s *Copyright Act* can keep up with a rapidly and constantly evolving digital marketplace for music.

## Industry-Wide Support

During the Statutory Review of the *Copyright Act*, undertaken in the last Parliament, **private copying reform was among the issues most widely supported – and least opposed** – in submissions from any sector, leading to a recommendation from the Standing Committee on Industry, Science and Technology that the government should ***“extensively assess the opportunity to extend the private copying regime to digital devices”***.

**Private copying reform remains a priority across the music industry.** Appended to this submission is a July 2020 letter addressed to Minister of Canadian Heritage, Steven Guilbeault and former Minister of Innovation, Science and Industry, Navdeep Bains, signed by the CPCC and 19 other music-industry organizations, urging the government to amend the *Copyright Act* to bring technological neutrality to the private copying regime.

**Hear from our Rights-Holders!**

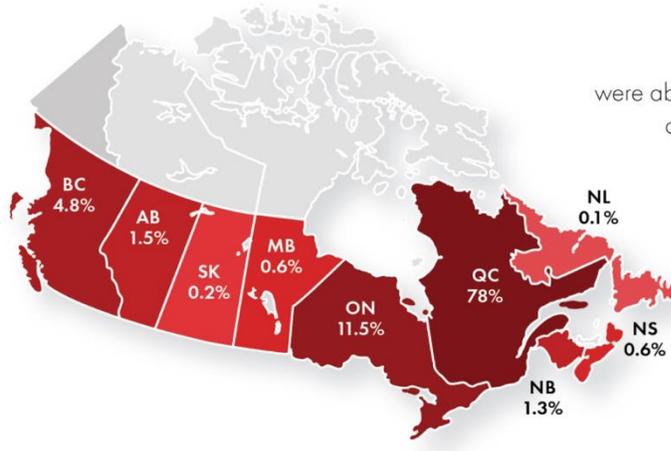
This is about our community and our culture. If we are successful in this fight, our creators, producers, musicians, composers and artists have a fairer shot at success.

**Sarah Slean**  
4x JUNO Award winning and  
2x Gemini nominated  
artist/musician/composer.

La loi doit protéger rapidement chaque créateur canadien pour l'utilisation de sa musique, qu'importe le média, qu'importe la forme. La création canadienne mérite d'être protégée adéquatement une fois pour toute. Continuons d'être les leaders que nous devons être à l'échelle mondiale.

**Pierre Lapointe**  
auteur-compositeur-interprète,  
gagnant de 13 Prix Félix.

Moreover, a recent national campaign showcases extensive support for private copying reform from individual rights-holders. In December 2020, the CPCC launched the Stand on Guard for Music Campaign, a bilingual grassroots campaign to allow individual music rights-holders to let federal political officials know that it's time to make the private copying regime technologically-neutral, by making the necessary legislative changes to the *Copyright Act*. The campaign generated responses from 1,575 Canadians. Please see some highlights on that campaign's reach in the infographic below.



Within a few short weeks, **well over a thousand Canadians** were able to tell **231 local Members of Parliament**, as well the Minister of Canadian Heritage and the Minister of Innovation, Science and Industry, that that they want to see an amended *Copyright Act* as soon as possible, to ensure that the private copying regime is made technologically neutral, protecting the rights and livelihoods of creators and their partners in Canada’s recorded music industry.

## Myths & Facts About Private Copying

In public consultations like this one, the Government often receives submissions that are not backed up by evidence, or are misleading, even if unintentionally so. The reports from the Standing Committees describing what they heard in the Statutory Review of Copyright include some of the more common myths and misperceptions about private copying that bear correcting with the relevant facts.

### Myth #1: No one is even copying music anymore.

A very common myth about private copying is that, because of the rise of streaming, Canadians simply aren’t making private copies anymore. **This could not be further from the truth.** The reality is that Canadians are still making billions of copies for listening offline – for example, when their data plans are maxed out, or there is no Wi-Fi available.

In 2019, the CPCC collected data from almost 10,000 Canadians aged 13+ through an online survey, to answer this specific question about the extent of private copying activity in the streaming age.<sup>4</sup> The findings:

<sup>4</sup> Results varied from what was included in the CPCC’s 2018 submissions to CHPC and INDU. Our 2018 survey collected data from only 2,500 Canadians aged 18+ through Google Surveys, which limited the number, length, form, language (English-only) and labelling of questions and answers. The 2019 survey gathered 9,833 responses in both official languages via three pre-recruited Internet panels, which permitted much more detailed and extensive questions, leading to much more reliable results.

<b>5.95 BILLION</b>	<b>TRACKS OF MUSIC ARE CURRENTLY STORED ON CANADIANS' PHONES &amp; TABLETS</b>
<b>1/2</b>	OF THE COPIES WERE MADE IN THE PRIOR 12 MONTHS
<b>1/2</b>	OF THE COPIES WERE PAID FOR THROUGH LICENSED DOWNLOADING AND STREAMING SERVICES
<b>1/2</b>	OF THE COPIES WERE <b><u>UNLICENSED</u></b>

When Canada's first levies were certified by the Copyright Board of Canada in 1999, there were 2 million private copies made onto blank CDs that year.<sup>5</sup> Our research demonstrates that the current level of unlicensed private copying onto phones and tablets is exponentially higher per year – over a *billion* in 2018.

Some critics of private copying levies have made the argument that devices like phones and tablets are multi-functional, and not everyone uses them to store music. These discussions are not new – CDs and audio-cassettes were always used for other purposes as well – and the Copyright Board process takes account of this factor already. The CPCC must present **evidence that a specific type of media is ordinarily used to copy music**, and the extent to which it is also used for other purposes. The levies set by the Copyright Board have always been adjusted to account for the fact that media have other uses, such as data storage.

### **Myth #2: A private copying levy would be harmful to consumers.**

The truth is that, while the Copyright Board would ultimately determine the value of any approved levy on devices, the CPCC has been transparent that its proposed levies would be a minute fraction of the cost of a smartphone or tablet, comparable to the average levy payable on a smartphone in Europe: **around CDN\$3, or the price of a cup of coffee.**<sup>6</sup> As always, the levy would be payable by manufacturers and importers of the device, and in the case of many smartphones and tablets, that cost is amortized over the life of consumers' multi-year contracts with intermediary companies that provide these devices in a bundle with other mobile network services. **It is not certain that a levy on these devices would be passed on to consumers at all, and if it were, it would be barely noticeable.**

**Canada's private copying regime was *supposed* to work to the benefit of *all* players in the system.** As demonstrated by the graphic below, in a functioning private copying system, consumers, tech companies *and* music creators and their business partners all benefit from the levy system. For many years now, Canada's system has been out of balance: tech companies' profits have grown from sales of music-enabled devices, and consumers make more and more private copies on these devices without authorization from rights-holders, but music creators and their business partners are not being compensated for these unlicensed copies.

<sup>5</sup> Decision of the Copyright Board of Canada, December 17, 1999, p.32.

<sup>6</sup> CPCC analysis of data from BIEM, CISAC and Stichting de ThuisKopie's joint 2020 study, *Private Copying Global Study*, [www.cisac.org/services/reports-and-research/private-copying-global-study](http://www.cisac.org/services/reports-and-research/private-copying-global-study)



It was always understood that balance is an essential component of a private copying regime, and that compensation to rights-holders is essential if we want them to be able to continue making the music Canadians love. From the Copyright Board decision on the inaugural 1999-2000 CPCC Private Copying Tariff:<sup>7</sup>

*The scheme is also meant to affect behaviour. Knowing that copying musical works for their own use is now allowed may well encourage individual consumers to do so. This would result in the wider dissemination of musical works, in an increase in the sale of audio recording media, and in increased creative efforts on the part of creators, artists and producers as a result of the possibility of equitable compensation.*

*Finally, those who are most directly concerned with the scheme benefit from it and caused the need for it. By selling and actively marketing blank audio recording media, manufacturers and importers encouraged the now legalized activity and directly profited from it. They contributed to the need for the regulation. They now stand to benefit from the scheme if, as just stated, the legalization of the activity leads to an increase in the sale of their products.*

In the *Statutory Review of the Copyright Act: Report of the Standing Committee on Industry, Science and Technology* report, the Committee Observations and Recommendation section highlights that the Government should “*extensively assess the opportunity to extend the private copying regime to digital devices...*” This lens of opportunity is important – an updated, technologically-neutral private copying regime is an opportunity to restore balance by ensuring that music rights-holders are compensated for a valuable use of their work that cannot be licensed or prevented.

<sup>7</sup> <https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/366578/index.do>

### **Myth #3: Private copying levies are of diminishing importance globally.**

The *Private Copying Global Study*, produced jointly by CISAC, BIEM and Dutch society Stichting de ThuisKopie in 2020, provides the most current and comprehensive analysis of the state of private copying globally across 194 countries and 5 continents. **Canada's private copying regime is highlighted in several places in the report as one of a small handful of outliers around the world**, because our regime remains limited to recordable CDs.<sup>8</sup>

In contrast to the situation in Canada, the 2020 study reports that global collections for private copying rose from €669 million in 2015 to €1.046 million in 2018. Moreover, most of the countries around the world with functioning private copying regimes – including Austria, Belgium, Croatia, France, Germany, Hungary, Italy, Morocco, Netherlands, Paraguay, Portugal and Switzerland – extend levies to a wide variety of devices.

Private copying levies continue to be recognized internationally as the best solution to provide compensation to rights-holders for this ongoing and valuable use of their work that cannot be controlled.

#### **Canada: an international outlier**

The European Parliament took a leadership role internationally in looking for solutions for private copying in the digital age. Their resulting 2014 resolution asserted the need to preserve and update private copying levy regimes so that the system could take greater account of technological progress because “there is currently no alternative approach in this area that would ensure appropriate remuneration for the rightholder and at the same time make private copying possible.” Private copying regimes are described as “a virtuous system that balances the exception for copying for private use with the right to fair remuneration for rightholders” and “worth preserving, especially in cases where rightholders are not in a position to license directly the right of reproduction...”

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0114+0+DOC+XML+V0//EN#title1>

In its 2017 global study of private copying regimes, the International Confederation of Societies of Authors and Composers (CISAC) called out Canada on the need for our private copying regime to be “updated and adapted to new uses with levies on digital devices.”

<https://www.cisac.org/CISAC-University/Library/Studies-Guides/PrivateCopying-Global-Study>

Their Director of Legal Affairs, in charge of the study, told *Le Devoir* (translation): “It’s unavoidable: if you exclude digital supports, you can frame your compensation system and hang it on the wall; it won’t be much good for anything else. Any compensation system of this kind needs to evolve and adapt to the marketplace and users’ habits.” [“Sans lecteurs numériques, point de salut,” October 25, 2017, Guillaume Côté, Cultural News]

Included in the Appendix to this submission, please find a letter from CISAC’s Director General, and testimonials from international creators underscoring the importance of a modern private copying regime.

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<sup>8</sup> <https://www.cisac.org/Newsroom/news-releases/new-private-copying-global-study-shows-potential-better-remuneration>

## Conclusion

Canada's private copying regime is a **proven tool** to facilitate compensation of rights-holders for private copies that cannot otherwise be licensed or prevented. However, **only a technologically-neutral private copying regime can ensure that rights-holders are *actually* compensated regardless of how technology changes**. This simple update to the *Copyright Act* will allow the regime to live up to its original promise for creators and their partners in the recorded music industry.

For years now, consumers and technology companies have been enjoying the benefits of making unlicensed copies of music on devices while rights-holders go unpaid for this valuable use of their intellectual property. We urge the Government to right this imbalance, to ensure that its copyright framework can keep up with a rapidly evolving digital marketplace so that rights-holders are not left behind.

# Appendix



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The Honourable Steven Guilbeault, P.C., M.P.  
Minister of Canadian Heritage  
25 Eddy Street, 12<sup>th</sup> Floor  
Gatineau, Quebec K1A 0M5

The Honourable Navdeep Bains, P.C., M.P.  
Minister of Innovation, Science and Industry  
C.D. Howe Building, 235 Queen Street  
Ottawa, Ontario K1A 0H5

July 7, 2020

**Market-driven private copying regime an important part of the path forward  
for the Canadian music industry**

Dear Minister Guilbeault and Minister Bains,

On behalf of the Canadian Private Copying Collective (CPCC), we would like to take an opportunity to thank the federal government for its support of the Canadian music industry ecosystem during these times. As the sector deals with the disruption and impact of COVID-19 across the country, we are encouraged by your government's efforts in rolling out a series of emergency measures to address the sector's immediate needs.

As you know, the CPCC is an umbrella organization whose member collectives represent recording artists, composers, songwriters, music publishers and labels. The private copying levy is collected by CPCC in order to compensate these music creators and the businesses that invest in them for unlicensed private copying of their work. Since its enactment in 1997 by the Liberal government of the day, the private copying regime has generated over \$300 million for over 100,000 rights-holders – a significant source of earned income that helped them to continue creating and commercializing important cultural content.

As the private copying regime has been limited to recordable CDs since 2008, the music rights-holders we represent have watched this critical source of revenue decline **from a high of \$38-million per year down to just \$1.5 million in 2018**. It is now on the verge of disappearing entirely. This is fully and completely at odds with the reality of private copying activity in Canada: our most recent research shows that there are **5.95 billion tracks of music currently stored on Canadians' phones and tablets**, and that **half of those copies are unlicensed**. Technology keeps making it easier to copy more and more music, and unfortunately, the *Copyright Act* has not kept pace, **leaving rights-holders unpaid**.

Legislative change was vital for a functioning, world-class music sector in Canada long before the arrival of COVID-19. Now, in conjunction with short-term direct government supports aimed at sustaining the sector, copyright reform will be more essential than ever to a music industry faced with re-building.

**In the medium-to-long term, marketplace solutions like a technologically-neutral private copying regime will be critical to that recovery.** Technologically neutral legislation will put lost revenues back into the system, and back into the pockets of the creators and music companies that earned them.

We wish to highlight that in the recent Statutory Review of the *Copyright Act*, private copying reform was among the issues most widely supported – and least opposed – in submissions from any sector, leading to a recommendation from the Standing Committee on Industry, Science and Technology that the government should “extensively assess the opportunity to extend the private copying regime to digital devices”. CPCC is also aware and supportive of our industry’s efforts to secure other key copyright reforms, including: immediate implementation of CUSMA’s term extension provisions; amendment of the definition of ‘sound recording’; and repeal of the \$1.25 million exemption for commercial radio stations.

We would welcome any opportunity to meet with you and your senior staff to continue the dialogue on updating the private copying regime.

Thank you for your continued work for the sector. I can be contacted any time at [lfreeman@cpcc.ca](mailto:lfreeman@cpcc.ca).

Sincerely,



Lisa Freeman  
Executive Director



Lyette Bouchard  
President

The following music industry organizations have signed on in support of this letter:



**David Sparrow**  
National President



**Solange Drouin**  
Executive Director



**France D'Amour**  
Chair



**Jérôme Payette**  
Executive Director



**Sean McManus**  
Chair



**Alan Willaert**  
Vice-President from  
Canada, AFM



**Stuart Johnston**  
President



**Paul Shaver**  
President



**Luc Fortin**  
President



**Meg Symyk**  
President



**Margaret McGuffin**  
Executive Director



**David Jandrisch**  
Chair



**Lou Ragagnin**  
President and Chief  
Executive Officer



**Greg Johnston**  
President



**SCGC**  
SCREEN COMPOSERS  
GUILD OF CANADA

**John Welsman**  
President



**Jennifer Brown**  
Interim Chief Executive  
Officer



**Lyette Bouchard**  
Executive Director



**Edgar Bori**  
President



**Sophie Prigent**  
President



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## COU21-0479

The Honourable Steven Guilbeault  
Minister of Canadian Heritage  
House of Commons  
Ottawa, Ontario K1A 0A6  
Canada

The Honourable François-Philippe Champagne  
Minister of Innovation, Science and Industry  
House of Commons  
Ottawa, Ontario K1A0A6  
Canada

Neuilly sur Seine, May 31, 2021

Dear Mr. Guilbeault and Mr. Champagne,

### **Public consultation on online platforms liabilities**

We hereby respectfully write to you on behalf of the International Confederation of Authors and Composers (CISAC). CISAC is a non-profit, non-governmental organisation with 231 member organisations in 121 countries and is the leading network of authors' organisations in the world. Through its members, CISAC represents more than 4 million authors from all over the world including all artistic repertoires: music, audiovisual arts, dramatic arts, literature, and visual arts. In Canada, we are supporting the activities of SOCAN (Musical, Visual Arts), CARCC (Visual Arts), CSCS (Audiovisual), DRCC (Audiovisual) and SARTEC (Audiovisual).

We have learned that the Canadian Government has recently launched a Consultation on Modern Copyright Framework for Online Intermediaries and thus, joined the global movement of reconsidering and updating the safe harbours regime. CISAC supports any initiative aiming at implementing a more effective, efficient and adaptable copyright system reflecting the evolving digital world. Therefore, CISAC welcomes this public consultation as it is a first step towards addressing the failings in the online market (referred to as "transfer of value" or "value gap"), which acts against the best interests of creators and the economy as a whole.

In order to help the Canadian Government achieve its policy objectives, CISAC would like to take this opportunity to highlight certain key improvements to the current safe harbour regime which will help secure a better future for creators while creating a modern and balanced legal framework for all stakeholders. Also, CISAC would like to take the advantage of the review of the Canadian Copyright Act to encourage the Government to promote a technologically-neutral private copying regime.

## 1/ Clarifying Intermediaries' Safe Harbour protection against liability for copyright infringement

As rightly pointed out in the Consultation paper, the way creative works are accessed by users has seen a huge transformation in the last ten years. Unlike in the past, creative content is no longer exclusively available from digital service providers that obtain a licence and pay for the content they provide (e.g., Spotify, Deezer, etc.). Such content is now widely available and shared through platform-based services (such as YouTube, Soundcloud, TikTok, etc.) which are competing with authorized digital service providers. Some of these services, which actively promote and provide access to cultural content, are wrongly claiming they are not liable, or at least not fully liable, for giving access to copyright protected works. Instead, they claim to be mere hosts, despite their very active role, and as such allege to be eligible to claim the protection of safe harbour provisions.

The economic weight of these platform-based services is significant. Some of them are owned and operated by the world's largest corporations, yet according to CISAC's 2020 Global Collections Report<sup>1</sup>, royalty collections by CISAC societies for the use of creative content online represented only 20.5% of overall collections. This low level of royalties is testament to the difficulties that authors' societies have in licensing and enforcing the rights of creators. User uploaded content platforms routinely leverage the current legal framework to avoid obtaining licenses or extract below market rates for exploiting creative content. This has resulted in a plummeting share of revenues for authors while the online use of copyright content soars and online intermediaries generate huge revenues. This transfer of value from creators to these services is the most challenging issue in today's digital environment.

The EU has been a pioneer in tackling the transfer of value issue with the adoption of the Directive 2019/790 on Copyright and Related Rights in the Digital Single Market in 2019 ("DSM Directive"), where European institutions approved the much-needed Article 17, which ends the safe harbour regime for "Online Content-Sharing Service Providers" (OCCSPs) such as YouTube or Soundcloud. This provision has been long sought after by creators and having it now recognised by the EU sets an important precedent, thereby paving the way for countries outside of the EU to follow.

The DSM Directive defines platform-based services, such as OCSSPs as information society services whose principal purpose, or one of its principal purposes, is to store and give the public access to a large amount of copyright-protected works or other protected subject-matters, uploaded by its users. The principle is that UGC platforms and similar Internet service providers such as OCSSPs are clearly not passive online intermediaries since they are actively organizing and promoting the content for profit-making purposes (art 2.6).

Consequently, the DSM Directive clarifies that this type of service providers

- undertake an act of communication to the public or an act of making available to the public and therefore should obtain an authorisation from rights holders (article 17.1);
- cannot benefit from the protection of the hosting services safe harbour under Art 14 of the E-Commerce Directive, with respect to their copyright-relevant acts (article 17.3);
- shall provide rightsholders with adequate information on the functioning of their practices both for licensing and enforcement (article 17.8), although no general monitoring obligation is established.

CISAC therefore, strongly urges the Canadian Government to update and clarify the liability of internet platforms, such as OCCSPs, by adopting a similar approach as in Europe so that the balance can be redressed for the benefit, not only of Canadian creators, but of creators of all nationalities whose works are massively used by Canadian service providers.

Also, CISAC suggests the following improvements to update the current safe harbour provisions of the Canadian law:

- The language in the current safe harbour exclusions is too broad. Only neutral online intermediaries who act in a passive, technical and automated manner with respect to copyright-protected content should be protected.
- The knowledge standard that applies to the "hosting" safe harbour should be lowered from the knowledge of a court order to an actual or constructive knowledge of infringement, such that once a host receives a notice of infringement from a rights holder or is aware of facts or circumstances where infringement would be apparent, that the "hosting" safe harbour no longer applies in case the hosting providers do not act expeditiously to remove the content.

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<sup>1</sup> <https://www.cisac.org/Newsroom/global-collections/global-collections-report-2020>

- Require online intermediaries to comply with minimum standards to implement policies dealing with reporting of infringements and corresponding mechanisms to address such reports.

## **2/ Increase transparency in rights holders' remuneration and online uses of their content**

CISAC welcomes any initiative intending to improve transparency throughout the value chain. Indeed, some online intermediaries not only decline any type of copyright liability for the contents they transmit, they also refuse to comply with accurate and transparent reporting obligations on the usages that take place on their platform and the diverse ways they monetize or financially benefit from such contents.

Therefore, strengthening the obligations of online intermediaries with regards to the transparency and accuracy of information, is of utmost importance. Such transparency obligations should be clearly established in the law to help rights holders licence their rights, including for the calculation of the amounts to be paid as licensing fee, and also for monitoring the use of their works online for prevention and enforcement through adequate recognition tools. The recently adopted EU DSM Directive has taken steps in this regard by introducing in its article 17 (8) an obligation for OCSSPs to provide adequate information to rights holders on the functioning of their tools to ensure the unavailability of unauthorized content as well as on the use of rights holders' content covered by a licensing agreement.

Cooperation between rights holders and platforms is key in this regard to ensure proper and effective tools are deployed. The use of automated content recognition technologies is absolutely crucial for licensing purposes and these technologies are essential to accurately identify which works are used, how much revenue needs to be distributed and to which creator. Introducing similar provisions in the Canadian Law will be instrumental in increasing royalties for creators by receiving all exploitation data in a timely manner and agreed format, and in monitoring the availability of their contents online.

Collective management organizations who are members of CISAC already operate in full transparency pursuant to CISAC's Professional Rules. These Rules (publicly available on [CISAC website](#)) establish various mandatory reporting obligations which are monitored annually.

## **3/ Strengthen rights holders' enforcement tools against intermediaries**

CISAC stresses the need to provide rights holders with enforcement tools enabling them to ask online intermediaries to disable access to or remove unauthorized content from their platform. To date, these remedies are only available through Courts. They should however, be included in the law to create a streamlined process and an effective and expeditious enforcement tool to combat online infringement.

Also, online intermediaries should deploy technical tools in accordance with high industry standards of professional diligence to avoid the availability, on their services, of unauthorized works as identified by the relevant rights holders. The EU DSM Directive provides clear legal basis for the "notice-and-takedown" and "notice-and-stay down" systems, which could serve as reference for the Canadian law.

These enforcement tools are especially necessary in the case of Canada due to the amount of pirated content available. According to the European Commission Report<sup>2</sup> on the protection and enforcement of intellectual property rights in third countries published April 27, 2021, "(...) Canada remains a host to websites providing access to pirated content. In cases where the identity of the operator of the pirate site is unknown due to the use of services enabling anonymous registration of website domains, the problem seems to persist because right holders are not able to apply for an injunction against the intermediary aimed at preventing a continuation of a copyright infringement (e.g., website blocking)."

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<sup>2</sup> [https://trade.ec.europa.eu/doclib/docs/2021/april/tradoc\\_159553.pdf](https://trade.ec.europa.eu/doclib/docs/2021/april/tradoc_159553.pdf)

#### 4/ Private copying

CISAC published in 2020 the *Private Copying Global Study*<sup>3</sup>, a detailed and comprehensive analysis of the state of private copying globally across 194 countries and 5 continents. Canada's private copying regime is highlighted in the report as one of the most outdated around the world, being that its scope is limited to recordable CDs. As an effect of the widespread use of digital copies, this important source of income has declined dramatically over the past years, from a high of \$38 million per year down to just \$1.5 million in 2018<sup>4</sup>. It is now on the verge of disappearing entirely.

In contrast to the situation in Canada, the 2020 study reports that most of the countries with functioning private copying regimes – including Algeria, Austria, Belgium, Croatia, France, Germany, Hungary, Italy, Morocco, Netherlands, Paraguay, Portugal and Switzerland – extend levies to a wide variety of devices. In these countries, levy systems are constantly updated to keep them up with the pace of technological developments and new user behaviours. Worldwide, global collections for private copying rose from €669 million in 2015 to €1.046 million in 2018, with a relevant portion of these revenues originating from digital copies.

Private copying remuneration is an invaluable source of income for right holders. When correctly implemented, it is the only efficient mechanism that allows creators to be compensated for the widespread copying of their works for domestic use.

Private copying remuneration entails no significant extra costs for the technology and ICT industry that markets copy-enabling equipment or media and makes high profits from these sales. Indeed, the ability to make private copies of protected works is one of the reasons Canadians purchase these devices in the first place.

Therefore, we encourage the Canadian authorities to adopt a “technologically neutral” private copying regime, so that it could apply for all types of devices without requiring the law to be amended whenever a new device is created. Technologically neutral legislation will put lost revenues back into the pockets of the creators and music companies that earned them. With minimal revisions to the Copyright Act, the private copying regime would be restored to what it was originally intended to be – a flexible, technologically neutral system that monetizes copies not controlled by rights-holders and keeps up with changes in how Canadians consume music now and in the future.

We remain at your disposal for any information on private copying regimes in place in other countries.

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CISAC would appreciate the opportunity to continue a dialogue with you in the coming weeks in order to work towards achieving a meaningful copyright framework for the creative community in Canada and we remain at your disposal for any additional information you may require or question(s) that you may have.

Yours sincerely,



Gadi Oron  
Director General

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<sup>3</sup> <https://www.cisac.org/Newsroom/news-releases/new-private-copying-global-study-shows-potential-better-remuneration>

<sup>4</sup> Source: Canadian Private Copying Collective.



# INTERNATIONAL CREATOR SUPPORT FOR PRIVATE COPYING

**"The law on private copying is a fundamental instrument in the fight against the digital piracy that emerged in the 21st century, unpredictable for a fair reward for authors and artists, whose works are copied on a daily basis, without authorization, in the most different devices such as cell phones, computers, tablets, pen drives, and the internet itself.**

**The approval of the private copying law in Cabo Verde was undoubtedly a great gain for the authors and the artists of our country."**

**SOLANGE CESAROVNA  
SONGWRITER AND PRESIDENT OF THE CABO-VERDEAN  
MUSIC SOCIETY - SCM**

**"Private copying amounts to quite a lot of money in the Netherlands (€30 million each year), and provides us creators with a way of compensation for the use of technological devices that somehow make use of the works we've created. In the Netherlands, private copying levies are being paid for a wide variety of devices, from smartphones to laptops and hard drives."**

**ARRIËN MOLEMA  
SONGWRITER / MUSICIAN  
BAM! CHAIR A.I.  
BUMA/STEMRA VICE-CHAIR  
CIAM VICE-PRESIDENT  
ECSA BOARDMEMBER**

**"Conceived as an exception to the author's right, private copy levy is undeniably one of the most modern and flexible way to remunerate creation, and will remain so in any foreseeable future, at least for as long as recorded material will require making copies in order to reach the consumers, which is why we eagerly made it technology-neutral here in France."**

**WALLY BADAROU  
COMPOSER  
BOARD MEMBER OF SACEM  
BOARD MEMBER OF EUROPEAN COMPOSER AND SONGWRITER  
ALLIANCE  
AMBASSADOR OF PAN-AFRICAN COMPOSER AND SONGWRITER  
ALLIANCE**

**"Private Copy in Italy is an exception to author's right, and applies to all devices that enable users to copy content for private use (including phones, tablet and computer hard disks). It has been demonstrated (in a trial started by a couple of phone manufacturers), that the effect of the levy is smaller than the average differences in market prices."**

**LORENZO FERRERO  
COMPOSER**