

Consultation
on
Canadian Content in a Digital World

Submission of Ole Media Management
November 25, 2016



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I. Overview

ole applauds the Minister of Canadian Heritage for initiating this vital and timely consultation on *Canadian Content in a Digital World*.

With the rapid evolution and development of digital technology, there are more opportunities than ever before for creators in Canada to write songs and tell stories that appeal both to their fellow Canadians and to audiences around the world. To realize that potential, however, Canada must come to grips with serious challenges that threaten the ability of Canadian creators to earn a living from their work and make the Canadian cultural industries a risky financial proposition for investors.

As a leading Canadian music publisher, record label, and rights management company, ole believes that new opportunities are needed to enable the Canadian music industry to build on its track record of success and thrive in the new digital economy. Such initiatives are essential to the livelihoods of thousands of Canadians employed in the music industry, including nearly 100 employees in ole's Toronto office alone. ole also strongly supports means that will help Canadian film and television productions find new and larger audiences at home and abroad.

In this submission, ole encourages the Minister to take meaningful steps to level the playing field for the Canadian music industry. It proposes three principal means of doing so:

- Reviewing and amending the *Copyright Act* so that it ensures a fair share for all creators and rightsholders.
- Providing the resources and legal framework necessary for an efficient and effective Copyright Board that facilitates growth in the digital sector while helping music creators realize the true value of their music.
- Expanding existing funding programs, and creating new ones, to reward success and support the creation, dissemination, and exportation of Canadian music.

II. About ole

ole is one of the world's foremost rights management companies, with investments of over \$550 million in music intellectual property (IP). Founded in 2004, with operations in Toronto, Nashville,

New York, Los Angeles and London, ole is a privately-held Canadian company engaged in IP acquisitions, creative development, and worldwide rights management. The ole catalog includes over 55,000 songs and 60,000 hours of TV and film music across all genres. Copyrights under ole's control include songs recorded by artists such as the Backstreet Boys, Beyoncé, Blake Shelton, Britney Spears, Carrie Underwood, Eric Church, Jay Z, Justin Timberlake, Kelly Clarkson, Madonna, Michael Jackson, One Direction, Rihanna, Rush, Taylor Swift, and Timbaland.

ole controls substantial audiovisual music and secondary rights, including catalogs from leading Canadian producers and distributors like Corus Entertainment, Nelvana, DHX Studios/Cookie Jar Entertainment, Boat Rocker Studios (formerly Temple Street Productions), Entertainment One, Arcadia Entertainment, and the National Film Board. It also controls major international catalogs from Sony Pictures Entertainment, MGM, Miramax, and Nu Image/Millennium, as well as an extensive production music library of over 750,000 tracks including Jingle Punks, Cavendish Music, 5 Alarm Music, MusicBox, Nelvana Production Music, Auracle, and Cue.

In September 2016, ole acquired rights management company Compact Media, which manages audiovisual secondary rights for more than 700 clients around the world, in a major deal that furthers ole's commitment to delivering leading-edge rights management services across the globe.

ole is also committed to the creative development of its more than 120 staff songwriters, legacy writers, and composers and adding value to our catalogs and client catalogs. ole writers and catalogs include leading Canadian songwriters and artists like Rush, Max Webster, Coney Hatch, Ian Thomas, Big Wreck, Ian Thornley, George Canyon, and Gord Bamford, as well as international hitmakers Timbaland, Tyler Farr, Josh Dorr, Brett Jones, Jeremy Stover, Phil O'Donnell, and Jordan Davis. ole has ongoing ventures with Last Gang Publishing, Roots Three Music, Jackoby Publishing, and, most recently, ole-Bluestone Publishing, a joint venture with Timbaland.

ole also operates a robust label services arm under the umbrella of ole label services. The division includes Anthem Entertainment Group, the label home of Rush, Big Wreck, Ian Thornley, Steven Page, and The Tea Party. Anthem Legacy includes Max Webster, Ian Thomas, and artist development label red dot, which has developed and up-streamed artists including Charlie Worsham, Haley Reinhart, Josh Dorr, Sam Grow, and Jordan Davis.

ole Digital is a full YouTube multichannel network (MCN) partner for all media, with over five billion views across publishing, masters, and audiovisual to date.

III. Canadian Content in the Digital World: Pillars of the Approach

The Consultation Paper on *Canadian Content in a Digital World* sets out three key principles that will guide the government's efforts to strengthen the creation, discovery, and export of Canadian content in a digital world: *focusing on citizens and creators; reflecting Canadian identities and promoting sound democracy; and catalyzing economic and social innovation.* The comments and ideas that follow are organized around those important principles.

Principle #1: Focusing on Citizens and Creators

Pillar 1.1: Enabling choice and access to content

How can we reflect the expectations of citizens and enable Canadians to choose the content they want to see, hear, and experience?

Pillar 1.2: Supporting our creators

How can we fairly support creators in the creation and production of content that stands out? What partnerships will be needed to achieve this? How can we help creators have successful and viable careers in a digital world?

For more than 50 years, Canada has been known for producing world-class music. Iconic artists from Leonard Cohen, Joni Mitchell, and Rush to Shawn Mendes, Alessia Cara, and Drake have been responsible for creating songs and recordings that have been embraced both in Canada and internationally. Canadians have come to expect nothing less from their songwriters and recording artists.

But creating great content requires significant investments of time, effort, sacrifice, and money. In order to justify those investments, Canadian artists need to know that they can lead to viable careers. And the companies that support creation need to be able to compete internationally, attract top business talent, and earn meaningful returns.

The advent of digital technology has created more opportunities than ever before for audiences to enjoy music. However, while the consumption of music has been increasing steadily, the average income of Canadian artists from music-related activities has languished. According to a 2013 study conducted for the Canadian Independent Music Association, the average Canadian artist earned only

about \$7,200 from music-related activities in 2011.¹ That's less than half the income they would have needed just to cross the poverty line.

The problems are not hard to diagnose. Canada waited more than a decade longer than its major trading partners to modernize the *Copyright Act*, only to introduce a package of amendments in 2012 that served mainly to deprive creators of important revenue streams. Rather than ensuring that rightsholders could collect fair and reasonable royalties when music is used online, the government introduced dozens of new copyright exceptions that have served mostly to reduce established royalty streams and depress or delay potential new ones. In many cases, the amendments have emboldened commercial users – from start-up operations to multinational corporations – to refuse to pay anything at all for the value they derive from music. They have also reinforced unfair and unrealistic consumer expectations about the price of music to the end user.

In the meantime, the Copyright Board of Canada, a vital part of the economic ecosystem for creators, has been left without the resources necessary to do its job. It now routinely takes five years or more for proposed royalty tariffs to be examined and certified. That creates prolonged legal and economic uncertainty that either deters new services from launching in Canada or, in some cases, allows them to operate for years at a time with no compensation to rightsholders.

Even worse, when tariffs are finally certified, they often fail to reflect the true value of music to the companies who have benefitted, and continue to benefit, from its use. For example, commercial radio stations, who rely on recorded music for about 80% of their programming, currently pay less than 6% of their gross revenue for the right to reproduce and broadcast that music, while the rates payable by commercial webcasters in Canada are less than one-tenth of the corresponding rates payable by the same services in the United States.

The situation must be recognized for what it is: a forced legislative and regulatory subsidy by creators and rightsholders of the business activities of far more powerful commercial users. For Canadian music to survive, this must change.

Under the circumstances, the role of Canadian music publishers and record labels is more important than ever. Without their investment, there would be virtually no financial resources available to support

¹ This number reflects approximately 29 hours spent on music-related activities per week. Extrapolated to reflect a full 40-hour work week, the amount rises to \$9,936, which is still well below the poverty line. Source: *Sound Analysis: An Examination of the Canadian Independent Music Industry*, prepared by Nordicity for the Canadian Independent Music Association, February 2013.

the creative process or create jobs in the music industry. But music publishers and record labels benefit from only a small fraction of the government and regulatory incentives that are available to film and television producers, for example. This seems both inequitable and inefficient, especially given the Canadian music industry's track record of producing content that is embraced worldwide.

A Level Playing Field for Music

To thrive in the digital world, music creators, and the companies who support them, need a *level playing field*. More specifically, they need:

1. A *Copyright Act* that ensures a fair share for all creators and rightsholders.

In 2017, the government will be conducting a mandatory review of the 2012 amendments to the *Copyright Act* in 2017. When it does, it should take steps to ensure that, as audiences enjoy more music than ever before, creators get their fair share of the economic benefits that music generates.

Among other things, ole calls upon the government to:

- Close the many new and expanded loopholes that allow broadcasters, online services, ISPs, and users to make millions of valuable copies of music without paying for them.
- Encourage ISPs to become partners in fighting online piracy by introducing an effective graduated response regime to replace the “notice and notice” system – a “made in Canada” solution that, tellingly, has been rejected throughout the world.
- Strengthen the available enforcement mechanisms against “online enablers” – online services that enable copyright infringement by others – by introducing site-blocking injunctions that prevent Canadians from turning to infringing foreign services for their music.

But the review of Canadian copyright law should not stop with the 2012 amendments. To further support the creation and distribution of quality Canadian content, ole also encourages the government to:

- Extend the term of copyright in musical and other works to the life of the author plus 70 years, consistent with the vast majority of Canada's major trading partners.

- Explore other ways to ensure that rightsholders are able to collect fair and reasonable compensation, and enforce their exclusive rights where necessary, in relation to all valuable uses of their works in both digital and traditional media.

Strengthening Canadian copyright law in these ways would not upset the balance between the rights of creators and the interests of users, as is so often claimed. In fact, it would serve only to *restore* balance by preventing powerful commercial users from profiting unfairly from the exploitation of music without reasonable compensation to those who create it and fund its creation.

2. An efficient and effective Copyright Board that facilitates growth in the digital sector while helping music creators realize the true value of their music.

The Copyright Board takes several years to render decisions that often fail to reflect business realities. Not only do these delays prevent the Board from realizing its potential as an effective regulator, they also create commercial uncertainty that stunts the development of the digital market. At times, the decisions themselves appear not to recognize the true value of music.

This too must change. To promote the fair and efficient dissemination of Canadian music, we call upon the government to ensure that the Copyright Board has sufficient resources, and the right legal and procedural framework, to render decisions quickly, with prospective rather than retroactive effect, and with due regard to the inherent value of music.

3. Fair access to effective funding programs that reward success and support the creation, dissemination, and exportation of Canadian music

Despite the proven track record of Canadian music in the marketplace, federal funding opportunities for the music industry remain relatively modest in relation to those available to the creators of other types of content. The opportunities for music publishers are even more limited, with annual funding from the Canada Music Fund capped at \$75,000 per applicant. By comparison, record labels are eligible for up to \$800,000 annually from the CMF.

Properly targeted, additional funding programs could stimulate further domestic investment in Canadian music. This would help Canadian songs, and the songwriters who create them, find the greatest possible audiences both at home and abroad.

To supercharge the creation, dissemination, and exportation of Canadian music, ole encourages the government to explore:

- Strengthening the Canada Music Fund by increasing funding and eliminating the arbitrary contribution caps on music publishers.
- Encouraging collaboration between Canadian and foreign songwriters by revisiting Canada Music Fund guidelines that in effect discourage those opportunities and introducing direct funding programs to promote further cultural exchange.
- Introducing federal tax credits for significant investment in the creation, distribution, and marketing of musical works and sound recordings.
- Developing dedicated export funds to support the promotion of Canadian music in other countries.²

Encouraging Audiovisual Production

The impact of the music publishing sector on the creation of Canadian content is not limited to songwriting. Music publishers like ole also invest heavily in acquiring rights to the soundtracks of Canadian film and television productions, then help composers and producers realize the value of that music by ensuring that royalties are paid and collected when the audiovisual content is exhibited around the world.

In these ways, music publishers make a significant contribution to the financing of Canadian audiovisual content. They also have a real stake in the success of that content: the more often a film is exhibited, a television program is broadcast, or a webisode is streamed, the more royalties its soundtrack should generate.

As a leader in the audiovisual music sector, ole strongly supports any initiatives that will help Canadian audiovisual content reach as many markets as possible, whether through traditional means or through emerging technologies. Greater opportunities for audiovisual producers will be sure to lead to increased investment in their music publishing.

² In this regard, ole supports the recommendations of the Canadian Independent Music Association (CIMA) and the Canadian Music Publishers Association (CMPA) that the government establish a dedicated fund of \$10 million annually for Canadian music sector exports and urges that the program be structured in a way that recognizes the specific needs of music publishers and their songwriter partners.

At the same time, it is important to recognize that the use of music in audiovisual productions represents a vital source of income for music creators. The exploitation of audiovisual content generally triggers multiple rights under the *Copyright Act* at various stages of the process, all of which are valuable to users. ole urges the government, when reviewing the *Copyright Act* in 2017, to take steps to ensure that this value translates into fair and reasonable royalties for music creators.

Principle #2: Reflecting Canadian Identities and Promoting Sound Democracy

Pillar 2.1: Redefine Canadian content for contemporary Canada

With so much online content available today and given Canada's diverse and multicultural makeup, does the concept of "Canadian content" resonate? Do we need to be flexible in how we support the production of content by Canadians?

In an ultra-competitive global market, how can the private sector support the production of content made by Canadians?

To ole, the concept of Canadian content has both cultural and economic resonance.

Before Canadian content rules were introduced, it was virtually impossible for a Canadian musician or songwriter to attract a following at home without first scoring a hit in the United States or overseas. By requiring radio stations to devote a significant percentage of airplay to Canadian music, the rules created badly-needed opportunities for Canadian musicians virtually overnight.

Without the initial boost provided by Canadian content rules, many great Canadian artists might never have found audiences either at home or abroad. The prospects would have been even dimmer for Canadian record labels and music publishers, whose marketing budgets pale by comparison to those of their much larger U.S. competitors. There would have been little incentive for Canadians to create or disseminate their own music. And yet, the economic benefits generated by that music are clear: by some estimates, the Canadian music industry contributes more than \$500 million in GDP each year.

Of course, the same is true for film and television production. In a market that is inevitably dominated by big-budget U.S. productions, there would be very little opportunity for Canadians to tell their stories without the financial support of tax credit programs and direct incentives like the Canada Media Fund, nor would many of those stories find audiences without rules that require broadcasters to devote meaningful portions of their programming schedules to Canadian content. The existence of these incentives is what has permitted the Canadian production industry to flourish, with untold economic benefits across the country. And, as explained above, music publishers both contribute to that success

through direct investment in film and television music and share in it through the music royalties that are generated when a production succeeds.

Changes in the way content is created and disseminated have created new and exciting opportunities for Canadian content to find new audiences. To capitalize on those opportunities, however, it is important for the government to be flexible in the way it supports Canadian content. For example, the government should:

- Revisit the MAPL system, which determines which songs and recordings qualify as Canadian content, so that it better reflects the reality of creating internationally viable music and supports international collaboration, both creative and commercial. Collaboration with non-Canadians is often a prerequisite to the successful exportation of Canadian music and its acceptance in international markets. It should be promoted, not discouraged.
- Work with the music publishing industry to develop programs that encourage collaboration between Canadian and non-Canadian songwriters – another important part of the modern songwriting and publishing process – just as treaties and other incentives exist to encourage international film and television co-productions.
- Expand existing audiovisual tax credit programs to include content created not only for traditional platforms but also for digital services like YouTube, Netflix, and others, while taking steps to ensure that those services return sufficient value to rightsholders, including music creators.
- Require foreign digital services that operate and sell advertising in Canada to collect and remit HST just like their Canadian counterparts. Not only would this help level the playing field between Canadian and non-Canadian services, the additional tax revenue that a balanced system would generate could also go a long way to funding new programs designed to support the creation and distribution of Canadian content, including those proposed in this submission.

Principle #3: Catalyzing Economic and Social Innovation

Pillar 3.1: Positioning Canada

Canadians make great content: how can we build our exceptional cultural industries and support the growth of new creative enterprises as part of Canada's innovation agenda? What tools do the government and the private sector already have at their disposal? What new tools could we consider?

How do we incent more risk-taking from creators and cultural entrepreneurs?

Over its 11-year history, ole has never been afraid to take risks on Canadian content. In fact, it has invested tens of millions of dollars in acquiring rights to Canadian music and developing Canadian songwriters. It has also invested heavily in infrastructure and technology, including its pioneering *Conductor* technology. *Conductor* is a sophisticated suite of custom-built software tools that has revolutionized the collection and distribution of royalties to rightsholders while also helping to create new opportunities for their music to be heard.

But it can be hard to justify serious investment without the potential for legitimate returns. And gaps in Canadian copyright protection are diminishing or eliminating existing revenue streams while impairing the development of new ones. Unless these revenues are restored and set at reasonable levels, many creators and entrepreneurs will be unable to survive, much less follow ole's lead by increasing their levels of investment and risk. Even proudly Canadian companies like ole might be forced to look increasingly to other markets.

ole reiterates its call for effective copyright protection in order to restore Canada's reputation as a leader in the creation of great creative content. We look forward to an ongoing dialogue with the government as it considers how best to achieve this goal.

At the same time, the government should consider programs to assist companies like ole in the development and exportation of technological tools like *Conductor*, which can help rightsholders realize increased financial returns from digital content through increased data acuity. It's important to recognize that innovative companies in the creative sector can contribute to the economy through a variety of means, not just through the creation of content, and to support all forms of innovation in appropriate ways.

Pillar 3.3: Promoting Canadian content globally

What is needed to best equip Canadian creators and cultural industries to thrive in a global market and exploit the country's creative advantages? In a global market, what conditions need to be in place to encourage foreign investment in Canada's cultural industries? How can we better brand Canadian content internationally?

While it remains proudly Canadian, ole has developed a worldwide footprint. It has become the only Canadian multinational music company.

Recently, ole secured a \$500 million USD credit facility from a syndicate of 10 U.S. and two Canadian banks, led by Los Angeles-based City National Bank. The facility was actually increased by 25% over ole's initial expectations as a result of strong demand from both new and existing lenders. The result is the largest credit facility in the history of the Canadian music industry. ole intends to use it to fund the acquisition and development of both content and technology.

Unfortunately, this sort of international success has been relatively uncommon in the Canadian cultural industries. It will become even more difficult to achieve unless the tools available to the government are deployed with an eye to legal and business realities.

So long as Canada remains conspicuous for the weakness of its copyright laws – a fixture on the USTR Special 301 Watch List and an appealing target for unauthorized music and video streaming sites – it will be difficult to attract meaningful foreign investment in the cultural industries. On the other hand, limiting copyright exceptions and strengthening the government's commitment to addressing online piracy, including by enlisting ISPs in the fight, would make Canada a much more attractive investment destination.

At the same time, expanding federal support for the creation and export of Canadian music would help build on the industry's long track record of success. Making tax credits available to the Canadian music industry, especially if combined with a more flexible definition of Canadian content in music, would encourage companies to invest more in creating Canadian music and promoting it around the world. This, in turn, would make those companies more appealing to foreign investors.

IV. Conclusion

ole takes great pride in its commitment to Canada, and to the creation and promotion of Canadian content. By levelling the playing field as described in this submission – through amendments to the *Copyright Act*, assistance to the Copyright Board, and programs to fund the development of great

Canadian content and companies – the government can help position Canadian music to thrive in the digital world.

ole thanks the Minister for the opportunity to participate in this important and timely consultation. It looks forward to continuing the discussion.