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Potential areas of improvement to the current trading arrangements with Canada

Open Consultation

We welcome the opportunity to provide recommendations on the new comprehensive trade arrangements with Canada. This provides a good prospect to go beyond the limited provisions on intellectual property which currently apply under the Comprehensive Economic and Trade Agreement (CETA). For the music industry the main interests relate to the inadequate royalties paid for the use of music in Canadian broadcasts and the unduly limited liability of online intermediaries at the expense of composers, performers and other right holders.

UK Music is the collective voice of the UK's world-leading music industry. UK Music represent all sectors of the music industry – bringing them together to collaborate, campaign, and champion music. UK Music promotes the music industry as a key national asset to all levels of Government and publishes research on the economic and social value of music.

I. Summary.

Canada is an important market for the UK music industry given the popularity of our talent; the Canadian music market is growing; in particular music streaming. Canadian recorded music revenues grew by 8.1% in 2020. Streaming was the key to growth and revenues rose by 17.8% with subscription streaming income up by 18.2%. The success of UK music is based on our talent and business expertise operating under existing international and national copyright laws. A strong Canadian copyright and enforcement framework is thus crucial for UK musicians.

Canada introduced many new exceptions in 2012 limiting the scope of copyright protection

- We recommend specifically referring to the Berne Convention three-step test as well as discussing compliance with this test

The copyright regime in Canada includes provisions exempting direct public performance collections from public performance users who use the radio as a source of background music (Section 69(2) of the Canadian Copyright Act).

- We urge Government to push for a commitment regarding the repeal of this exemption.

Canada limits the royalties payable by Canadian broadcasters at the expense of UK record producer and performers

- We urge Government to expressly address such anticompetitive limits

Canada unduly limits the responsibility of online intermediaries

- We urge Government to address such limitations; the current system limiting the responsibility of online intermediaries in various ways aggravate the position of composers, performers and right holders internationally hoping to benefit from the use of their music online. The system is unbalanced which needs to be rectified at national level.

Canada has no provision in the law for website blocking

- We urge Government to include express reference to website blocking orders.

Touring musicians

- The situation for touring musicians in Canada is commendable: there is no requirement for a work permit or visa to perform; the Free Trade Agreement should refer to this.

It is worth noting that many of the recommendations presented in this paper are reflective of positions and information being put forward by the Canadian music industry in various interested parties' formal submissions to Canadian Government (e.g. such as in the context of submissions to the "*House of Commons Standing Committee on Canadian Heritage reviewing Remuneration Models for Artists and Creative Industries in the Context of Copyright*").

II. Market access.

Given the importance of the Canadian market for the UK music industry, we hope that future trade arrangements improve access to the Canadian market.

Touring musicians.

Canada is a key territory for UK artists. They often organise tours covering the whole of North America, i.e. the United States and Canada. We welcome the current approach by the Canadian Government specifically enabling artists to play throughout Canada without work permit or visa requirement. Unfortunately, this is not mirrored by the US process which is long, complex and prohibitively expensive.

It is important that Free Trade Arrangements contain express provisions for a simple and accessible mechanism. We welcomed the Canadian Government's confirmation (in a letter to UK Music in 2013) of the need for artists to cross international borders and maintain the health of the domestic music industries. At the time, the Canadian Government introduced changes to the Canadian temporary foreign workers program but stated that these changes do not extend to artists (nor their crews) who are coming to Canada to play in festivals or similar touring productions.

Recommendation: Express reference to the current regime applicable in Canada in Free Trade Arrangements.

III. Non-discrimination.

1. Record companies and performers

Under the Canadian broadcast licensing regime record companies and performers are faced with various obstacles to earning a living from their talent.

a. Limitation of broadcast royalties.

The Canadian Copyright Act provides a radio royalty exemption in Section 68.1 (1)(a)(i); this means except for a nominal fee of Canadian \$100, radio stations are exempted from paying royalties on their first \$1.25 million in advertising revenue. This exception introduced in the early 1990s to support the then struggling but now thriving Canadian broadcasting industry benefits mainly big broadcasting organisations at the expense of international record companies and individual artists.

Recommendation: Remove the royalty rate exception in Section 68 (1) to align the systems in Canada and the United Kingdom.

b. Definition of sound recordings.

Section 2 Canadian Copyright Act defines sound recordings excluding “any soundtrack of a cinematographic work where it accompanies the cinematographic work.” This needs to be amended to reflect that performers can collect royalties when their recorded performances of music on soundtracks of audiovisual works, such as TV programs and movies, are broadcast or streamed. According to evidence provided to the Canadian Industry, Science and Heritage Committee in 2019 the limited definition of sound recordings results in \$45 million in losses for artists every year.

Recommendation. Amend the definition of sound recording to ensure that sound recordings used in television and film are eligible for public performance remuneration.

2. Exceptions - general

We note that the Canadian Government limited copyright by introducing new exceptions in 2012. These new exceptions harmed the carefully established balance between the interests of creators/ performers to earn a livelihood from their work and the public interest; this is in particular the case in the low margin educational market. Whilst these exceptions continue to be subject to national review, at international level they need to be compliant with the three-step test as internationally agreed in the Berne Convention and the TRIPS agreement.

Recommendation: Expressly refer to the three-step test in the Free Trade Agreement.

3. Exceptions - Public performance

The copyright regime in Canada (Section 69(2) of the Canadian Copyright Act) includes an exemption for venues using the radio for public performance purposes. Many public performance venues use the radio to improve their customer or staff experience, they derive a commercial benefit from the use of music and do not currently have to pay for the benefit that music provides. This exemption does not exist for other rightsholders in Canada, such as the controllers of authors rights, and should be repealed.

Recommendation: Push for a commitment regarding the repeal of this exemption in the text of the Free Trade Agreement.

IV. Enforcement.

Piracy continues to be widespread in Canada. This is mainly due to stream ripping activities as well as generally lenient rules on the responsibility of online intermediaries. Users engaged in stream ripping activities use specific software to illegally make copies of music from a music streaming service on their device which can then be either listened to without need for a paid subscription or distributed further without knowledge of the music streaming service or the right holder.

These activities limit the already inadequate remuneration of artists. In our experience, online intermediaries offering stream ripping software argue that they are protected under safe harbour provisions, thus benefiting from the lax Canadian approach towards online intermediaries (see below). Stream ripping has been tackled under the current UK copyright framework. The UK trade Association representing record companies, BPI, successfully challenged online intermediaries offering stream ripping software through website blocking orders (see below).

1. Liability of online intermediaries.

Online intermediaries in Canada benefit from excessive limitations of their responsibilities (safe harbours).

Most of the current safe harbour protections are based on policy decisions in the late 1990s (this is the case in United States, United Kingdom, European Union, Canada). Limitations of liability for online intermediaries were introduced to protect the then nascent digital market; these protections are outdated and inappropriate given the current market situation: Five major online intermediaries dominate the global digital market for everything including music.

Online intermediaries, including user upload platforms such as YouTube benefited exponentially during the pandemic whilst individual artists have suffered from not being able to perform live. The Canadian Government rightly acknowledges this unfairness and is currently consulting on the modernisation of the copyright framework for online intermediaries. The current Canadian approach to responsibility of online intermediaries is deficient; amongst others

- Notice and notice. Canada operates a notice and notice system which requires the music industry to detect and notify unlicensed activities without any real consequences; this has proven to be ineffective for the removal of infringing music from digital services operated by online intermediaries. The United Kingdom, on the other hand, operates a notice and takedown system which forces online intermediaries to take down the infringing music once notified (i.e. if the online intermediaries have knowledge of the infringing material on their services).
- Disproportionate knowledge requirement. Generally the limitations of liability for online intermediaries only apply as long as they have no knowledge about the infringing material available on their services. Canada imposes excessive conditions to establish such knowledge.

Online intermediaries benefit from safe harbour protection even for music that they know is unlicensed unless they “know of a decision of a court of competent jurisdiction” that the person who stored the work in the host’s memory infringes copyright. This de facto obliges the music industry to start proceedings against individual users of digital services; which is neither in the interest of courts, policymakers, rightholders, or users. In the UK it suffices that online intermediaries have knowledge of the infringing content on their services/ platforms, i.e. when they are notified.

Recommendation: Generally, a Free Trade Agreement is not the right forum to provide detailed rules on the responsibility of online intermediaries. Nevertheless, negotiations in the context of free trade arrangements provide an opportunity for UK policymakers to discuss global standards on the liability of online intermediaries. In any case, the UK Government should reject the low standards of responsibility which currently apply in Canada.

4. Website blocking orders

Website blocking orders are a success story in the United Kingdom. These court orders require ISPs to block access to certain websites. Despite considerable costs it constitutes an efficient way for internet access service providers to lawfully prevent their customers from accessing copyright infringing services (Section 97A CPDA 1988). Such orders are routinely issued in the UK; they contribute to the health of the UK online music market and the lower prevalence of piracy, and such orders should be made available in other countries in line with UK and international best practice.

Both real-world experience and research demonstrate that website blocking is an effective strategy in controlling these challenges. It has already been tested in 30 countries. Globally, more than 2600 URLs have been blocked with low implementation costs.

Some Canadian courts already issued website blocking orders within the existing framework noting that site blocking order would be effective and dissuasive, could be reasonably implemented by ISPs, and would not impose upon freedom of speech or net neutrality. In order to provide legal certainty for all stakeholders however, express legislation would be required along the lines of Section 97A CDPA.

Recommendation: Expressly refer to website blocking orders within the Free Trade Agreement.

Annex

UK Music's membership comprises: -

- AIM – The Association of Independent Music – AIM – The Association of Independent Music – the trade body for the independent music community, representing 1000+ independent record labels and associated businesses, from globally recognised brands to the next generation of British music entrepreneurs.
- BPI - the trade body of the recorded music industry representing 3 major record labels and over 400 independent record labels.
- FAC – The Featured Artists Coalition is the UK trade body representing the specific rights and interests of music artists. A not-for-profit organisation, they represent a diverse, global membership of creators at all stages of their careers and provide a strong, collective voice for artists.
- The Ivors Academy - The Ivors Academy is an independent association representing professional songwriters and composers. As champions of music creators for over 70 years, the organisation works to support, protect and celebrate music creators including its internationally respected Ivors Awards.
- MMF – Music Managers Forum - representing over 1000 UK managers of artists, songwriters and producers across the music industry with global businesses.
- MPG - Music Producers Guild - representing and promoting the interests of all those involved in the production of recorded music – including music studios, producers, engineers, mixers, remixers, programmers and mastering engineers.
- MPA - Music Publishers Association - with 260 major and independent music publishers in membership, representing close to 4,000 catalogues across all genres of music.
- Musicians' Union - Representing over 32,000 musicians from all genres, both featured and non-featured.
- PPL is the music licensing company which works on behalf of over 110,000 record companies and performers to license recorded music played in public (at pubs, nightclubs, restaurants, shops, offices and many other business types) and broadcast (TV and radio) in the UK. PPL also collects royalties for members when their recorded music is played around the world through a network of international agreements with other collective management organisations (CMOs).
- PRS for Music is responsible for the collective licensing of rights in the musical works of 150,000 composers, songwriters and publishers and an international repertoire of 28 million songs.
- UK Music also has an informal association with LIVE (Live music Industry Venues & Entertainment), the voice of the UK's live music and entertainment business. LIVE members are a federation of 13 live music industry associations representing 3,150 businesses, over 4,000 artists and 2,000 backstage workers.