

CLOSING THE VALUE GAP:

HOW TO FIX SAFE HARBOURS AND SAVE THE CREATIVE MIDDLE CLASS

“What we want is a sustainable, working marketplace where we are creating art and we are being remunerated for it properly.”
- Canadian musician and record label owner Miranda Mulholland, at Music Canada’s annual conference, October 2017⁹

TABLE OF CONTENTS

FOREWORD	5
INTRODUCTION	7
GROWING RECOGNITION OF THE VALUE GAP IN CANADA	11
VALUE GAP UPDATE AND THE CURRENT STATE OF THE RECORDING INDUSTRY	23
CLOSING THE VALUE GAP: RECOMMENDATIONS	29
CONCLUSION	35



FOREWORD



Not all people choose music as a vocation in order to make millions of dollars. The achievement of super stardom in the entertainment industry is certainly a “pie in the sky” ideal. However, for me and the majority of my musical colleagues, the concept of making a decent living while working diligently and creating works of art – and employment – in the music business should not be a foreign one. Yet to so many of us artists, it is. This is due mainly to the Value Gap - the result of the marked disparity between the value returned to those artists creating and developing artistic content, and the online sources and telecommunications corporations who benefit greatly from the distribution of said content.

I have seen – both directly and indirectly – the results of an ever-changing music industry. Just yesterday, in a conversation I had with a highly respected and award-winning Canadian musician, he stressed the fact that focus should now be directed at changing copyright laws so that remuneration is fair to artists and content creators in the digital world. That’s the message in a nutshell: Canadian artists and creators are not fighting technology. What we are fighting is the rate at which legislation is keeping up with technology, as it directly affects our ability to make a living, while continuing to contribute to the Canadian cultural landscape.

This report reminds us that the fix is simple and the entire music industry is behind it. Creators deserve to be paid when their work is commercialized by others, especially online platforms. Artists like me cannot continue to subsidize multi-billion dollar technology companies through a broken copyright framework and broad safe harbour laws.

More and more creators are speaking up about this issue. Canadian artists and creators are using both traditional and social media, as well as other sources, to spread their message of concern, and now they’ve stepped up and brought their message directly to policymakers. In several meetings with the Committees charged with considering changes to the *Copyright Act*, dozens of artists told their unique and very personal stories surrounding the Value Gap and how it affects their ability to make a living. As more creators speak up and more stories are shared, legislators and policymakers must listen, take heed, and act upon what they’re hearing. Canada cannot afford to lose the contributions that artists make to our culture. Yet, artists cannot afford to live while making these contributions.

The recommendations in this report, and the findings of the Parliamentary Heritage Committee, give me a sense of optimism for the future.

It is my hope that policymakers will read this report closely and take action to close the Value Gap.

Heather Bambrick

JUNO-nominated jazz vocalist and member of Music Canada’s Advisory Council



INTRODUCTION

In the two years since the 2017 publication of Music Canada’s report, *The Value Gap: Its Origins, Impacts and a Made-in-Canada Approach*, there has been a profound and widespread shift in stakeholder views on this issue. Discussion of the Value Gap in Canada has advanced since then from doubt and uncertainty to acknowledgement that there is a problem in need of a solution. In May 2019, this led to recommendations by Parliament’s Standing Committee on Canadian Heritage (the “Heritage Committee”) that have set the stage for legislative action on the Value Gap.

The Value Gap is the gulf between the revenues derived by online platforms, broadcasters and other third parties from the commercial use of creative content (such as music, books, news, TV shows and movies), and the revenues returned to the artists, journalists and businesses who create it.

This report is intended as another stepping stone to the passage and implementation of reforms to Canada’s *Copyright Act*. To get a clear view of the way forward, let’s first take a look at how we arrived at this point.

Beginning in 1999 with the appearance of the file-sharing application Napster, the music industry entered a period of significant decline. This much was widely accepted. However, the reasons for the decline were hotly disputed. Pundits, technologists and policymakers frequently attributed it to a purported failure by the music industry and even creators themselves to adapt to the new digital economy.

That view was widespread in the lead-up to the 2012 Canadian *Copyright Act* reforms and for several years afterward. It persisted despite the fact that artists and the music industry had embraced the fast-evolving dynamics of the digital economy. In the meantime, industry revenues continued to decline for another two years after the 2012 reforms, and artists struggled more than ever to earn a living from their music in the online marketplace.

The seeds of a better understanding of the decline’s causes were planted in October 2017, when Music Canada unveiled its *Value Gap* report, which shined a light on the impacts and origins of the Value Gap.

Since then, questions and skepticism among Canadian stakeholders and many policymakers about the causes of the Value Gap have been supplanted by general recognition and acknowledgement. Today, the Value Gap is an integral part of discussions on copyright law and creative content. And there is growing sentiment, both domestically and internationally, that the time has come to correct the flaws underlying it.

Music Canada’s report played a key role in this shift, along with subsequent developments that have advanced understanding of the issue over the past two years. This includes the emergence of new economic evidence that has identified the sources and quantified the size and growth of the Value Gap. It also includes expansive Parliamentary hearings at two Committees in 2018-2019.

“As technology has evolved, remuneration models for artists and creative industries have not. Currently, artists are not being paid adequately for the use of their works, particularly online. ... The Committee acknowledges that the continued creation of Canadian content depends on adequate remuneration for those who create it.”¹ - Report of the Standing Committee on Canadian Heritage, May 2019

This broad recognition of the Value Gap was confirmed with the release of the Heritage Committee’s findings in May 2019. That Committee heard testimony from 115 witnesses and received 75 briefs. In its resulting report, *Shifting Paradigms*, the Committee identifies the Value Gap as a major problem, and recognizes that this widening gap is closely linked to the decline in artists’ ability to earn a middle-class income.² The Committee makes specific recommendations on how to fix Canada’s broken copyright framework and create a functioning marketplace for the works of creators. A number of these recommendations, if implemented, would immediately enable creators to collect royalties that are unfairly denied to them under today’s *Copyright Act*. Notably, the Committee’s report calls for a review of the *Act* to ensure that digital services are held accountable for their role in the distribution of creative works.

The Standing Committee on Industry, Science and Technology (the “Industry Committee”) released its own report in June 2019, bringing the review of the *Copyright Act* to a close. While it made some similar recommendations to those found in the Heritage report, such as reviewing safe harbour provisions in the *Copyright Act*, the Industry Committee admitted that at the time of publication, it had not consulted the findings of the Heritage report. It is unfortunate that it did not consult on the very issue that it tasked the Heritage Committee with, namely remuneration models for artists and the creative sectors. As a result, the Industry Committee did not hear crucial testimony from creators, and missed several key recommendations from the *Shifting Paradigms* report that would have answered some of the questions the Industry Committee raised.

“Dozens of creators took the time to speak to the Committees and share their personal accounts of their challenges in the new digital marketplace. Publicly discussing your own financial struggles is a deeply personal and humbling thing to do. But artists did so because sharing those stories matters. Fortunately, the Heritage Committee report heard this creator testimony and crafted strong recommendations to narrow the Value Gap.”

- JUNO-nominated jazz vocalist Heather Bambrick

Artists have played a central role in the dialogue leading up to the Heritage Committee’s report. Through their personal accounts, they have validated the Value Gap and illuminated its harmful effects. One artist in particular, Canadian musician and record label owner Miranda Mulholland, who also serves as Chair of Music Canada’s Advisory Council,³ has persuasively conveyed to decision makers and policymakers how exemptions in out-of-date copyright legislation impair artists’ careers. She has explained how artists like her continue to subsidize major online platforms and telecommunications conglomerates through Canadian copyright exceptions that prevent performers and record labels from being properly compensated when their recordings are used commercially.

A broken copyright framework, ill-adapted to the challenges of the digital age, is now generally recognized as the cause of the Value Gap. Of particular concern are copyright exceptions often referred to as “safe harbours.” These provisions are intended to shield Internet and telecommunication network services from liability when the service is simply acting as a “dumb pipe” — that is, when copyright works such as music are made available through their services without their knowledge or control. However, overly broad and ambiguous safe harbours enable platforms like YouTube, which actively track and control content, to avoid paying adequate royalties to artists and creators for music distributed over their platforms. When large technology companies do this, artists and music creators effectively subsidize them. The Heritage Committee acknowledged this issue in calling for a review of Canada’s safe harbour provisions (see pp. 21-22 for a detailed explanation of safe harbours).

It is now widely recognized that when digital platforms exploit creative works, they should not be able to shelter from their responsibility to pay creators. At the same time, the public and policymakers have recognized that platforms must be more accountable for all of the activities they promote and enable.

Closing The Value Gap: How to Fix Safe Harbours and Save the Creative Middle Class has been produced to support the establishment of a functioning and equitable marketplace for music and other creative content in Canada. The end goal is to secure fair compensation for artists and the businesses they work with when their work is commercialized by others. To that end, we will examine:

- How the concept of the Value Gap came to be understood and accepted in Canada and elsewhere;
- How, in spite of modest recent growth in recorded music revenues, the Value Gap persists, preventing artists from receiving fair compensation and limiting the funds available for labels to invest in artists;
- Recommendations to close the Value Gap; and
- Why policymakers must act with urgency to address it.



GROWING RECOGNITION
OF THE VALUE GAP
IN CANADA

The publication of Music Canada's 2017 report, *The Value Gap: Its Origins, Impacts and a Made-in-Canada Approach*, came at a time of widespread uncertainty and skepticism about the Value Gap among both stakeholders and policymakers.

For many readers, the report shed light on an issue that was entirely new to them. It's not that the challenges of music artists and record labels weren't well-known at that time. Recorded music sales were down sharply from peak levels in 1999, and Canadian record labels had experienced drastic job losses. Artists' accounts of their struggles to earn a living from music were much-discussed.

But up to the time of publication, debate in Canada focused on the significant marketplace damage caused by piracy websites along with alleged shortcomings in the music industry's adaptation to the digital economy. So it was natural, prior to October 2017, that observers outside the music industry were often unaware of the Value Gap or, if aware of it, sometimes questioned its existence or causes.

An exchange at a 2014 hearing of Parliament's Heritage Committee is emblematic of views at that time. In response to a question from a Member of Parliament about artists' ability to earn a living in the digital economy, a representative of Google Canada responded: "[T]here's no consensus even amongst the artistic community about the impacts of streaming and what they actually think about it." He continued, the "challenge is not the royalty rate [paid to creators] per se. The challenge is that the skills that are required to succeed have radically changed. Some are doing a better job at adapting than others."⁴

Music Canada believed strongly then, as it does now, that this assumption is wrong. Artists and music businesses *have* adapted. And what technology companies have told government decision makers does not match the experience of the industry.

Given the prevailing misconceptions, Music Canada took upon itself the task of defining the issue, identifying its causes in Canada, and proposing remedies. The resulting 2017 Value Gap report demonstrated how artists, who are the bedrock of the creative economy, are specifically affected by the Value Gap. And it outlined the heavy toll exacted on music businesses, industry professionals and others who support artists' work.

The 2017 report identified the sources of the Value Gap – above all, broad safe harbour provisions in the *Copyright Act* that enable ad-supported user-upload services like YouTube to give music away for free while profiting from advertising placements and the commercialization of their users' data. It highlighted the enormous disparity between the revenues such services earn from the music streamed on their websites and what they return to music creators. The report also identified Canada-specific causes of the Value Gap in the *Copyright Act*, including the \$1.25 million Radio Royalty Exemption (which prevents performers and record labels from receiving royalties on the first \$1.25M of advertising revenue of a commercial radio station) and the definition of a "sound recording" (which prevents performers and labels from being compensated when their recordings are commercially exploited in film and television soundtracks) (see p. 20 for more information on these Value Gap causes).

The report exposed how Internet intermediaries and broadcasting conglomerates in Canada have been enriched at the direct expense of music creators,⁵ and how these practices undermine one of the overarching principles

of Canada's *Copyright Act*: to ensure that creators obtain their just reward for the use of their works, or, in the words of the Supreme Court, "to prevent someone other than the creator from appropriating whatever benefits may be generated."⁶

Since the report's 2017 publication, new evidence about the extent and underlying causes of the Value Gap has emerged, and artists and other stakeholders have shared their experiences directly with Parliamentarians and policymakers. These artist experiences and the new economic evidence are outlined below.

Creators Spoke Out and Policymakers Listened

The personal accounts of how the Value Gap has impacted members of Canada's creative community – artists and the businesses who support their work – have played a decisive role in building general consensus on the Value Gap. From speeches, media interviews, meetings, Parliamentary hearings and social media, a growing number of policymakers, politicians, opinion leaders and journalists have learned about the issue. Among the affected stakeholders, the voices of artists have resonated the loudest.

A milestone event on this path was a panel session of artists at Music Canada's annual conference following the release of the 2017 Value Gap report. There, Canadian musicians Andrew Cash, Damhnait Doyle and Miranda Mulholland shed light on how the Value Gap affects their ability to earn a living from music. Cash summarized the artists' motivation for speaking up: "[W]e love music, and we want music to happen. And it can't happen unless artists can make a decent living and be healthy and happy in their lives."⁷

Since that event, Mulholland has gone on to explain how the Value Gap affects artists to audiences at the Economic Club of Canada, Midem, the Banff World Media Festival, the World Trade Organization, the World Intellectual Property Organization and elsewhere. Mulholland has convincingly demonstrated how overly broad safe harbour provisions in the *Copyright Act* constitute a virtually impenetrable barrier to fair compensation for artists. A closer look at her message is provided on pages 14-15.

No single group has been hit harder by the Value Gap than artists. As our collective storytellers, and as the foundation of our creative economy, they have played a decisive role in building consensus on the need to close the gap.

Canadian musician and record label owner Miranda Mulholland has taken her message to numerous forums, meetings, conferences and committees in Canada and overseas. At an April 2019 meeting of the World Intellectual Property Organization's Standing Committee on Copyright and Related Rights in Geneva, Switzerland, she delivered a speech to delegates, performed with her group Harrow Fair, and launched an illustrated version of her "Call to Action" narrative, which is reprinted as a pull-out section to this report.

A condensed version of Mulholland's Geneva speech is provided here.



THE CALL TO ACTION

Remarks by Miranda Mulholland at “An Industry Transformed: Securing Sustainable Growth for Today’s Digital Music Industry”
WIPO Standing Committee on Copyright and Related Rights | April 5, 2019 | Geneva, Switzerland

THE PROBLEM

I'd love to tell you about something that happened at my very first speech.

As I spoke of my professional accomplishments but my personal financial struggles, there were nods around the musician table. I spoke of the amount of updating, marketing and engaging I was doing and how it was limiting my creative time, energy and confidence, and there were more emphatic nods. When I spoke about how the technology companies commercializing our work weren't paying fairly and yet were expecting us musicians to market their product to our fans, there were cheers of agreement.

Technology companies tell musicians if we are not making a living it is because we are not good enough. We are not doing it right. Blame the victim. This was affecting all of us. Indie labels, major labels, artist entrepreneurs, journalists, writers etc. - an entire creative middle class wiped out.

But now I know our work *is* good enough. It's the framework that is unfair and broken.

Now you could say we just have to adapt - that's what the tech companies do say - and that's true. But we have ***adapted*** and we continue to adapt.

BUT there is a real and identifiable adversary who is devaluing all we do and taking away any leverage we have to work within a functioning marketplace. The policies that allow this adversary to get away with this are older than the adversary itself. They must be updated.

Musicians don't create an obsolete product. We aren't buggy whip makers in the 1920s.

In fact, there has never been more music than there is today and it has never been so accessible nor more popular. It has value - but the value is being used by giant technology corporations to mine your data and to line their pockets. While YouTube pays one-twentieth of what the other legitimate streaming services pay because of safe harbour laws, they are also vacuuming up all the data they can about you.

REALIZATION

Learning about the Value Gap and its causes was an affirmation that my hard work and dedication to my craft was not the problem.

It wasn't because of a lack of skill or talent. The framework was broken. This discovery alleviated the huge weight of self-doubt and shame. It encouraged me to search for solutions and unite with others who were also searching for solutions, which is why I'm here today.

AMPLIFICATION

What I'm struck by is the giant sea change from when I first started speaking on this issue. Gone is the cynicism towards creators. Gone is the belief that if artists aren't thriving it is their fault.

Both the public and government are rightly suspicious of the technology corporations' modus operandi, “Move Fast and Break Things.”

UNIFICATION

This is global, and we have had some significant victories.

In Canada during the copyright review we saw publishers, labels, independent artists and independent labels all agree on a number of recommendations. This is virtually unprecedented.

In the US, the bi-partisan Music Modernization Act passed in the House of Representatives without a single dissenting vote.

In the EU, a package of amendments to the Copyright Directive was passed by the European Parliament. This represents a significant step toward rebuilding a functioning marketplace that was almost destroyed by earlier safe harbour legislation.

There is a global realization that free isn't free. There is a global movement to preserve arts and culture. Our global language of music unites us.

CALL TO ACTION

Creators of music, literature and visual arts have always been at the forefront of every revolution in which people fought to make our lives better. Music has provided the soundtrack for human rights movements around the world.

We have been there for you. Now we need your help.

Everyone has a part to play in re-balancing the ledger for the creators – musicians, music consumers and music industry leaders.

And for policymakers, it is very clear. End broad safe harbours. Stop subsidizing billionaires who are commercializing the work of others without fair compensation.

“The origins of the Value Gap can be found more than 20 years ago. It was the dawning of the digital marketplace, and countries around the world struggled to reinterpret copyright laws that were designed for an analog age. They wanted to protect creators, but they also wanted to give a boost to young technological start-ups. Inevitably, perhaps understandably, mistakes were made.”

- Graham Henderson, Remarks to the Industry Committee hearings, June 12, 2018⁸

Numerous artists have contributed to the narrative. In a panel session at the Economic Club event, Ari Posner, a music composer for film and television productions, declared, “Potentially, we could lose a whole generation of Canadian talent that is not going to be able to make a go of it. It’s just going to be a hobby.” He added, “I don’t think we want to live in a world where it’s only the Drakes and the Taylor Swifts that are able to rise to the top... [O]ur work needs to be valued more. It’s vital to the consumer that it be valued more, so that the choices are there.”¹⁰

Members of the legal profession have weighed in as well. Barry Sookman, a leading Canadian intellectual property lawyer, stated the following in a January 18, 2018 Globe and Mail op-ed:

“The cultural industries in Canada are facing major challenges. A significant contributing cause is our outdated legal frameworks. They did not contemplate, and have not been updated to address, the new means of stealing content or uses of content by internet platforms and others without permission or paying just compensation ... These issues confronting the cultural industries and the practical proposals to solve them deserve the attention and support of Canadians.”¹¹

As Sookman points out, it’s not just musicians, songwriters and music-related businesses that are affected by the Value Gap: publishing, audio-visual production and journalism are all impacted. The livelihoods of thousands of Canadian creators who work in these industries — authors, writers, journalists, performers, producers, photographers and artists — have been undermined.¹²

Many of those creators, along with their representatives from creative-industry associations, have joined the conversation. Dozens of participants in Canada’s creative economy have delivered the Value Gap message on Parliament Hill. Before the Heritage Committee and the Industry Committee in 2018 and 2019,¹³ witness after witness shared their accounts of the challenges creators face in the modern digital economy.

Exchanges with Committee Members demonstrate that the Value Gap is now understood and acknowledged by Members of Parliament from across the political spectrum.

This understanding resonated in the words of Liberal MP Lloyd Longfield at a September 2018 hearing of the Industry Committee's Statutory Review of the *Copyright Act*.

“The market in Canada isn’t working. We have money being made, but it’s not being made by musicians. It’s not being made by creators. I think we need to look at this really carefully and maybe even accelerate our study to come up with some conclusions so that we can protect the creative class in Canada.”¹⁴

- Liberal MP Lloyd Longfield, September 2018 hearing of the Industry Committee’s Statutory Review of the Copyright Act.

Conservative MP Mike Lake expressed similar sentiments at a June 2018 Industry Committee hearing: “As Members of Parliament, we often don’t agree on things. ... [W]e do agree that we all want to see fantastic content created. We all want to enjoy that content. We want to see our creators properly compensated for the content they create.”¹⁵

At a Heritage Committee hearing the same month, NDP MP Pierre Nantel voiced deep concern for the challenges facing creators. Following testimony from singer-songwriter Damhnait Doyle, he remarked:

“Ms. Doyle is an artist who has come to tell us she can no longer earn a living from her work. Every one of us ... must let that sink in. That’s why we’re here. We are the Standing Committee on Canadian Heritage. We are here to ensure that our heritage stays alive for future generations.”¹⁶

MP Nantel’s comments came in response to Ms. Doyle’s striking words to the Committee:

“I sit here today not getting paid but paying for after-school child care, so I can paint a vivid picture about the hard truths of the poverty affecting creators today. I wish I could use the term “middle class”, but the middle class of creators has been eviscerated at this point. I know only one musician in Toronto who has bought a house in the last 10 years; most cannot pay their rent, let alone go to the dentist.”¹⁷

Sentiments like this are a central theme of the Heritage Committee report. For example, the report notes that, “[w]hile there are many highly successful, well-known Canadian musicians, artists, writers and performers, most artists and creators in Canada struggle to earn a living from their art.”¹⁸

The Heritage Committee report continues, “The reality for some witnesses is that not only are their overall earnings low, they are decreasing annually.... Many creators cannot pursue their artistic endeavours full time and must seek other forms of employment.”¹⁹

The report concludes:

The Committee acknowledges that the continued creation of Canadian content depends on adequate remuneration for those who create it. The Committee shares the view of songwriter and musician Damhnait Doyle, who said, ‘as writers, musicians, and creators, our impact in the culture [of] this country is immeasurable, and we do deserve to get paid for our work.’²⁰

“We’ve gone through the wonder of the web. Now we’re in an era called the ‘tyranny of the technology,’ and it’s putting a lot of our artists at risk. ... My concern is that artists and their work are becoming a utility and that the technological aggregators are literally becoming, or positioning to be, the robber barons of the 21st century.”²¹

- Liberal MP Randy Boissonnault at an October 16, 2018 meeting of the Heritage Committee

These observations are now supported by economic evidence, which is summarized below.

New Economic Analysis

Creators’ accounts of the Value Gap’s impact on their professional careers have been validated by new economic evidence. In a series of studies, Dr. George Barker, Visiting Fellow, London School of Economics, and Honorary Associate Professor, Australian National University, has documented that the Value Gap in Canada is significantly larger than previously understood, and that it continues to widen.

Dr. Barker has distilled his findings to three key measures:

\$19.3 BILLION
the cumulative Canadian recorded music Value Gap over 20 years since 1997

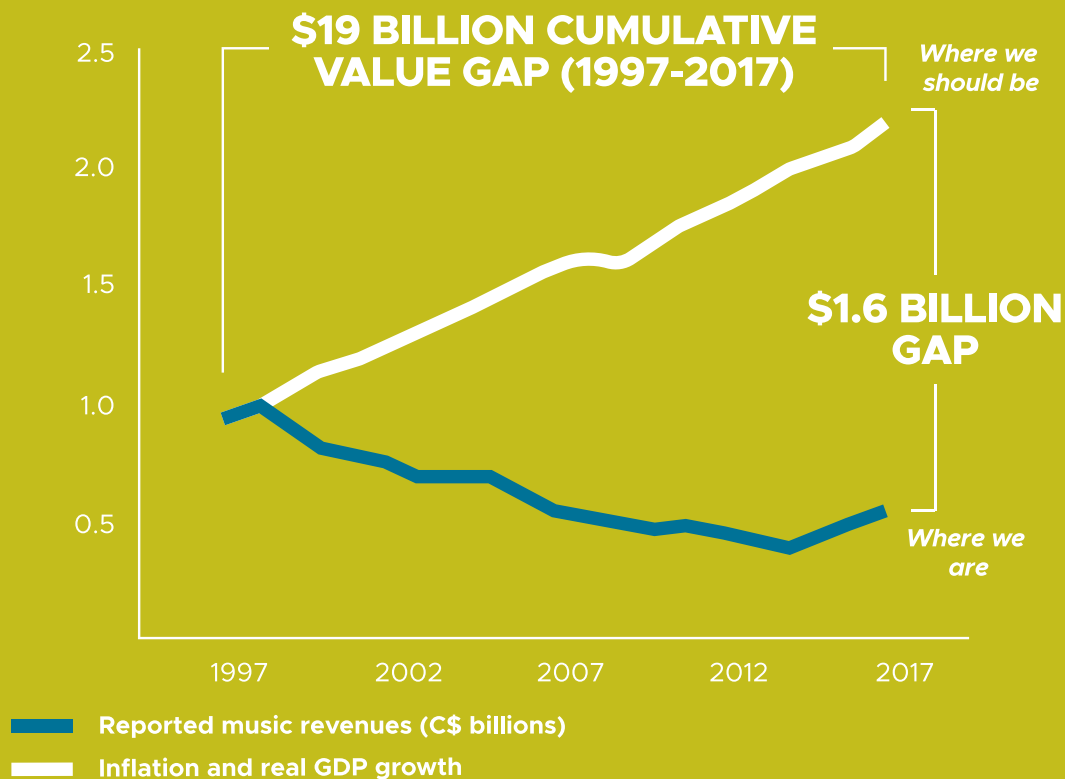
\$1.6 BILLION
the music industry Value Gap in Canada in 2017 alone

\$82 MILLION
the average annual increase in the music industry Value Gap in Canada between 1997 and 2017²²

Dr. Barker’s analysis contributes hard economic data to the 2017 Value Gap report’s conclusions, quantifying for the first time the full extent of the economic costs borne by artists and the music industry. Dr. Barker asserts that assessing the real cost of the Value Gap requires taking inflation and real GDP growth into account. Measuring the Value Gap in this manner provides a more accurate indication of the true extent of the damage to the marketplace. This is illustrated in the following chart.

The Recorded Music Industry Value Gap in Canada, 1997-2017²³

Dr. Barker's research shows what industry revenues would be if creators were not effectively subsidizing technology companies, broadcasting companies and others due to Canada's broken copyright framework.



Dr. Barker identifies three significant sources of the Value Gap in Canada that result directly from provisions in the *Copyright Act*:

1. Safe Harbours for User-Upload Services (such as YouTube)

User-upload services enable consumers to upload and consume virtually any music they want for free. The service then profits from advertising revenues and selling users' data, while not adequately compensating the creators of the music.

There is an enormous discrepancy between the revenues generated by these services from music and their payments to music creators — a discrepancy made possible by overly broad and outdated safe harbours in copyright law (for an explanation of safe harbours, please see page 21).

According to Dr. Barker's calculations, due to YouTube's ability to take advantage of broad safe harbours, the revenues lost to artists and the businesses who create music amounts to about C\$550 million per year.²⁴ This sum, while only a fraction of the revenues earned by a service like YouTube, would have an enormous positive impact on the Canadian music industry, essentially doubling total reported music industry revenues in 2018.²⁵ Without reform to safe harbour laws in Canada and other leading countries, music creators will continue to subsidize massive technology companies like YouTube (see pp. 21-22 for further details).

2. The \$1.25M Radio Royalty Exemption²⁶

Commercial radio stations pay royalties to music creators as a percentage of the station's advertising revenues. However, the *Copyright Act* contains an exemption relieving stations from royalty payments to performers and record labels on the first \$1.25 million of the station's advertising revenues²⁷ for broadcasting their sound recordings.²⁸ The Radio Royalty Exemption applies to all commercial radio stations in Canada, even those with very large revenues, and to each station individually within large, multi-station broadcasting conglomerates. No such exemption exists for songwriters, composers or music publishers.

Because of this exemption, approximately C\$8 million annually is withheld from performers and record labels. This effectively creates an annual \$8 million subsidy from creators to commercial radio stations, most of which are owned by highly profitable broadcasting corporations.²⁹

3. The Definition of “Sound Recording” in the *Copyright Act*³⁰

Another problematic exception in the *Copyright Act* arises from the way it defines a “sound recording.” As a result, when a sound recording forms a part of a soundtrack in a film or television program, labels and performers do not receive royalties. This exemption is not only unique to Canada, but also is inequitable as it does not apply to songwriters, composers or music publishers.

The royalties lost to performers and record labels amount to approximately C\$45 million annually. This effectively constitutes another subsidy to broadcasters and other parties at the expense of creators.³¹

Multiple witnesses at the 2018-2019 Parliamentary Committee hearings identified these same sources of the Value Gap. This led to recommendations by the Heritage Committee, in its May 2019 report, that specifically address these three issues.

The need for action to address the Value Gap is not exclusive to Canada. This is a global issue: recorded music revenues worldwide have declined significantly from peak levels two decades ago. Reported global revenues in 2018, at US\$19.1 billion, were 25% lower than in 1999, even without adjusting for almost 20 years of inflation.³²

The combined body of evidence conclusively validates the existence of a Value Gap — a disparity that persists even as recorded music revenues have recently made modest gains.

Safe Harbours: What They Are and How They Distort the Music Marketplace

Provisions in Canada's *Copyright Act* known as “safe harbours” are intended to shield digital networks such as ISPs from liability for the actions of their users when the service acts solely as a “mere conduit” for material — in other words, when it is simply a “dumb pipe.”

When the first safe harbour was created in 1988, telecommunications companies argued they shouldn't be held responsible for communications over their networks that they don't control and aren't even aware of.³³ The safe harbour effectively codified an 1891 court ruling that telephone companies shouldn't be held liable for messages transmitted over their wires when they “are utterly ignorant of the nature of the message intended to be sent.”³⁴ Additional safe harbours, agreed to internationally in the late 1990s and later adopted in Canada, were intended to clarify “that ISPs and search engines are exempt from liability *when they act strictly as intermediaries* in communication, caching and hosting activities.”³⁵ For example, if a copyright protected song was attached to an email sent by an ISP subscriber, and the ISP had no reason to know what that subscriber was sending, the ISP wouldn't be liable for the infringement.


When the “digital age” safe harbours were drafted in the 1990s, how the Internet might develop was anybody's guess. Users connected via dial-up modems, and the likes of Google, YouTube and Facebook did not exist. The Internet was imagined as a series of “dumb pipes”, where ISPs and other services had no knowledge of the content being distributed through their services.

Today, however, unlike 1890s telephone companies or late 20th century ISPs, a large proportion of the Internet (including the digital services that operate on it) is anything but an assembly of “dumb pipes.” Digital service providers like YouTube, the world's dominant ad-supported, user-upload streaming service, know exactly what, where and when music is being distributed over their platforms. YouTube, for example, tracks its users and curates the content distributed on its platform. It actively recommends the vast majority of songs streamed on its site; in fact, YouTube's Global Head of Music brags that 8 times out of 10, they're the ones *recommending* the music videos that visitors listen to.³⁶ YouTube also monetizes music through advertising placements and the sale of users' data. Such platforms bear no resemblance to the kinds of services that safe harbours were intended to shield. Yet, under the guise of overly broad and ambiguous safe harbours, these platforms claim they are not legally responsible for the music they distribute over their platforms. *(continued on next page)*

The situation is compounded in Canada by a lack of effective and workable ways for rights holders to get hosted infringing material removed. Under the current law, they must: i) sue the person who posted it, ii) obtain a court judgment against them, and iii) present that judgement to the service in order to oblige the service to remove the material.³⁷ After all of this, the content is almost inevitably reposted in short order by someone else. It's a "whack-a-mole" game that no one wants to play, and in which everyone loses.

As a result, these platforms have free rein to underpay for their commercial use of music. Rights holders face a take-it-or-leave-it scenario: accept discounted rates, or receive nothing when their music is streamed on these platforms.

The combination of vague safe harbours and ineffective remedies results in a market distortion where artists and the creative industries effectively subsidize multi-billion dollar technology companies. This outcome was not anticipated when safe harbour provisions were drafted. It's become clear that safe harbour rules that made sense for telephone companies in 1891 are no longer up to the task for today's online music and video platforms, like YouTube. As recommended by the Heritage Committee, today's safe harbour rules must be reviewed to ensure that these online platforms are held accountable for their distribution of music.



VALUE GAP UPDATE AND
THE CURRENT STATE
OF THE RECORDING
INDUSTRY

Signs of Recovery in the Recorded Music Industry

Following almost two decades of precipitous decline, the recorded music market is now starting to show signs of economic recovery, both in Canada and globally. But the Value Gap persists. Why? Because the *causes* of the Value Gap persist. Technology and broadcasting companies who profit off of the use of music are still not paying artists and music creators fairly for it because the broken copyright framework prevents a functioning marketplace for that music. This is made clear by examining how recent increases in recorded music revenues are not keeping pace with soaring music consumption.

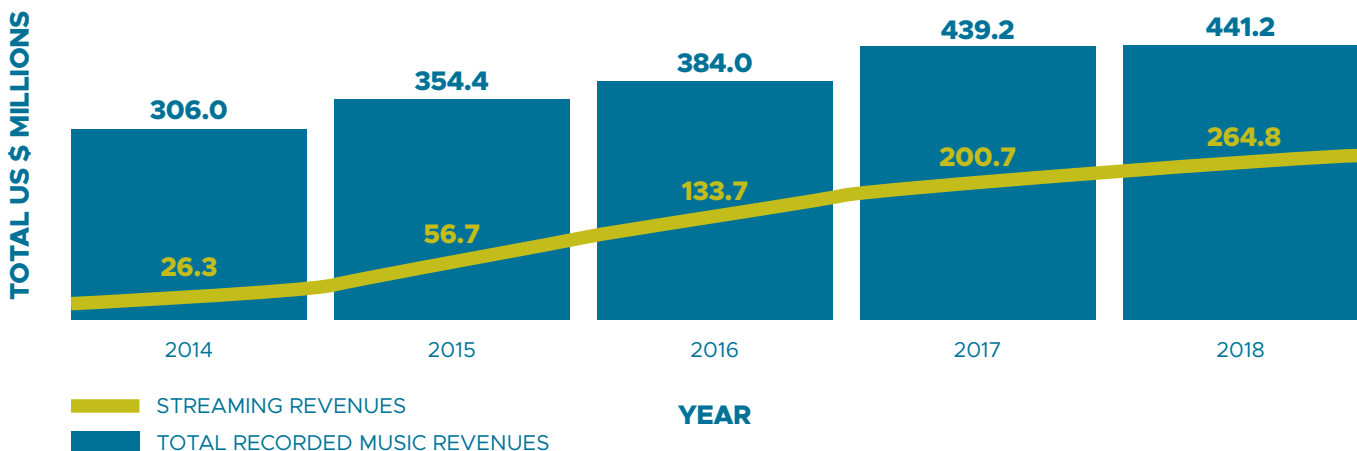
The long stretch of almost unbroken declines of recorded music revenues in Canada bottomed out in 2014.³⁸ The turnaround began in 2015, in step with the surging popularity of paid music streaming subscription services such as Spotify and Apple Music, which provide consumers with access to millions of songs online for a monthly fee without requiring file downloads or purchases. In 2015, this led to a 15.8% jump in recorded music revenues over the previous year in Canada.³⁹

Since then, the revenue growth from subscription music services has continued to outstrip the decline in both digital downloads and physical music sales. By 2018, streaming music services accounted for 60% of the marketplace in Canada - the first year streaming music contributed more than half of the country's total recorded music revenues.⁴⁰

Recent gains in Canada mirror those in most comparable markets worldwide. The global recorded music market grew by 9.7% in 2018, largely on the back of a 32.9% rise in paid subscription streaming, according to IFPI figures.⁴¹

There is optimism that the rapid consumer uptake of subscription music streaming has built a foundation for sustainable growth in recorded music revenues. However, the foundation, undermined by the Value Gap, remains fragile.

RECENT GROWTH IN STREAMING MUSIC REVENUES AND TOTAL RECORDED MUSIC REVENUES IN CANADA



Source: IFPI, "Global Music Report 2019, Full Report: Data and Analysis", 2019, p. 89.

A Music Industry Recovery Fueled by Investing in Artists and Facilitating Innovation

The industry's emerging recovery has been built upon record labels' continued investments in the discovery and development of artists, and their commitment to licensing new and innovative digital music services. A look at record labels' investments makes it clear that they have embraced the digital marketplace and continue to be valued and necessary actors in the music ecosystem.

^{US}
\$5.8
BILLION

**AMOUNT INVESTED
WORLDWIDE IN A&R AND
MARKETING BY RECORD
LABELS ANNUALLY,
REPRESENTING 26% OF
INDUSTRY REVENUES⁴²**

300+
+

number of diverse
digital music services
licensed by record
labels worldwide⁴³

\$40+
MILLION

**NUMBER OF TRACKS
LICENSED TO DIGITAL
SERVICES WORLDWIDE
BY RECORD LABELS AND
THEIR DISTRIBUTION
PARTNERS⁴⁴**

Larry Miller, the Director of New York University Steinhardt's Music Business Program,⁴⁵ explains that in the world of digital music consumption, record labels remain vitally important. Speaking at the April 2019 meeting of WIPO's Standing Committee on Copyright and Related Rights, he said that the shift to music streaming has made it more difficult than ever for artists to break through, particularly on the global stage. Labels have sought to address this by increasing their investments in artists and by building the expertise and infrastructure to embrace new streaming models. As well, labels have invested in the human capital required to help fans discover new artists and music online, and to optimize their listening experience, Miller noted.⁴⁶

While these investments are critical to sustaining industry growth, the full effect of the industry's efforts continues to be hindered in Canada by a lack of adequate protection for music creators in the *Copyright Act*.

Overly Broad Safe Harbours Impede the Music Sector's Recovery

While the recent upturn in recorded music revenues provides a measure of relief to an industry that has endured a lengthy period of decline, the revenue growth has not kept pace with increasing music consumption and the value-added, interactive ways that it can be curated and consumed today. Thus, the Value Gap persists.

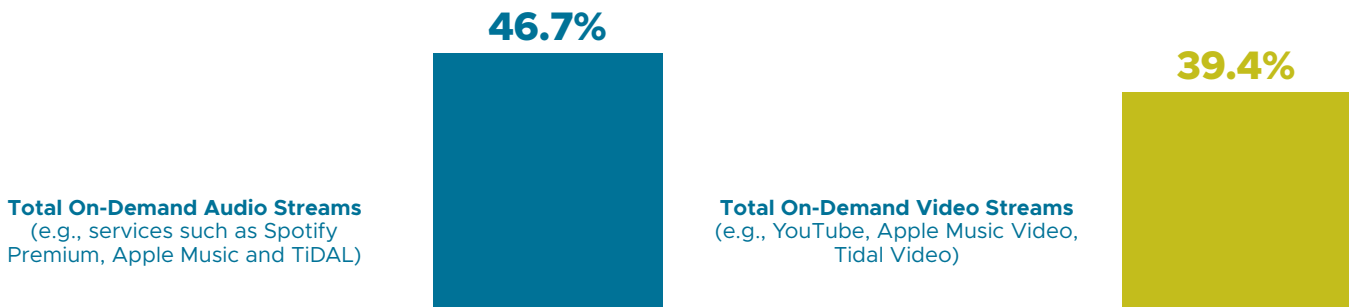
The main reason for this is the broad safe harbour provisions (see explanation on pp. 21-22) that ad-supported user-upload services like YouTube claim as shelter from liability of responsibility for illegal activity.

Dr. Barker notes that where these services are potentially sheltered from liability, they can leverage the resulting legal uncertainty to drive down royalties owed to rights holders; often far below fair market rates. The ability of rights holders to enforce their rights is undermined, reducing their bargaining power.⁴⁷ As a consequence, such services pay significantly lower music royalties per stream than paid subscription audio streaming services like Spotify and Apple Music.

The impact of broad safe harbours is illustrated by comparing the massive recent growth in music streaming against the relatively slower growth in recorded music revenues over the same time period.

Canadians streamed more music than ever before in 2018. Total music streams increased 45.2% over the previous year, driven by 46.7% growth in on-demand audio streaming (e.g., services such as Spotify Premium, Apple Music and TIDAL) and a 39.4% increase in on-demand video streaming (e.g., YouTube, Apple Music Video, TIDAL Video), according to Nielsen Music figures.⁴⁸

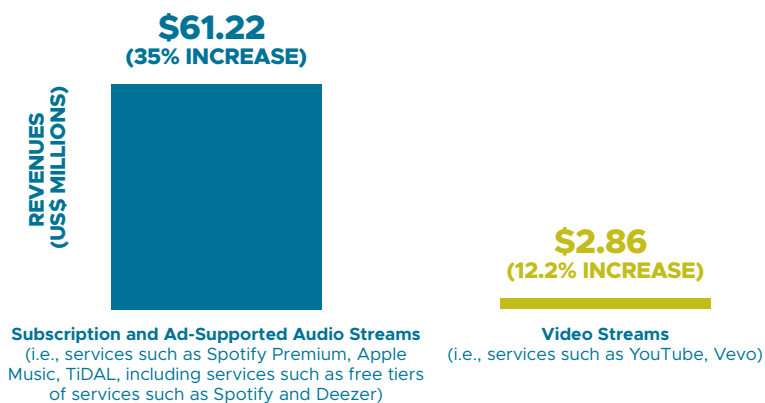
STREAMING MUSIC CONSUMPTION GROWTH IN CANADA BY MUSIC SERVICE MODEL, 2017-2018



Source: Nielsen Music - Canada Year-End Music Report 2018⁴⁹

While the amount of music listened to through both streaming formats is sharply on the rise, revenue growth from on-demand *audio* streaming (such as Spotify) vastly outpaces revenue growth from on-demand music *video* streaming (such as YouTube).

STREAMING MUSIC REVENUE GROWTH IN CANADA, 2017-2018



Source: IFPI, "Global Music Report 2019, Full Report: Data and Analysis", 2019⁵¹

Revenues from subscription and ad-supported audio streaming services in Canada increased by 35% in 2018 to US\$238.58 million. Meanwhile, revenues from video streaming services, of which YouTube is the dominant player, increased by just 12.2% over the previous year to US\$26.21 million - an increase that is clearly out of step with the rapid growth in consumption.⁵⁰

The reason for the disconnect between growth rates in video streaming consumption and revenues is that user-upload services like YouTube pay significantly lower royalty rates compared with

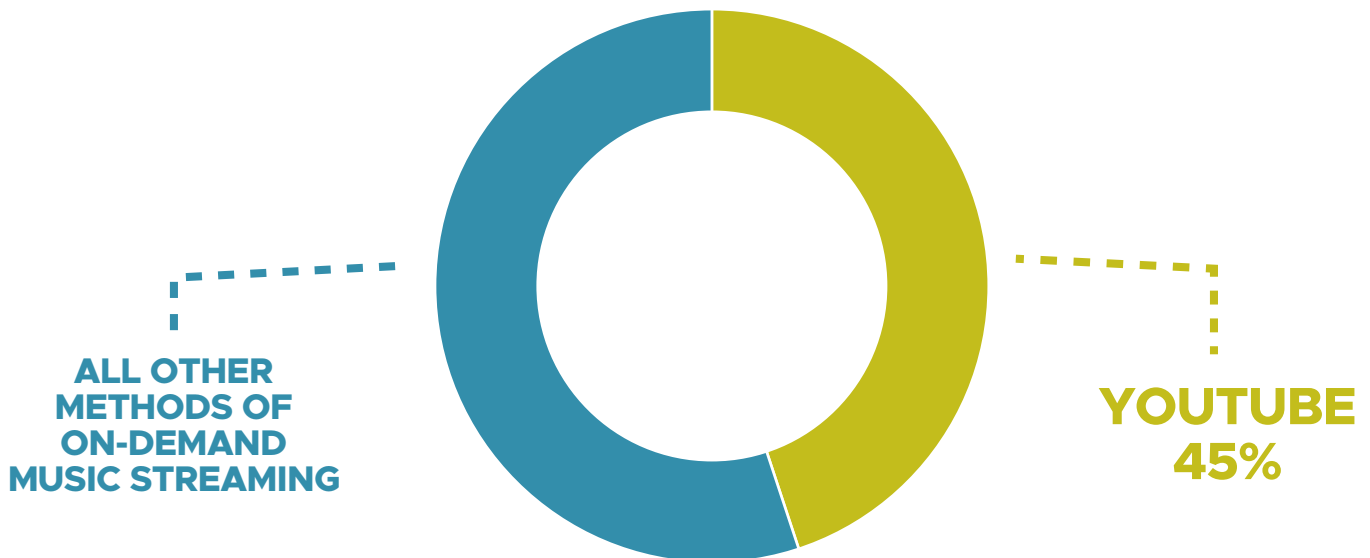
other music streaming services. This has a significant impact on artists' and other rights holders' incomes: plays on Spotify or Apple Music put dramatically more money in their pockets than the same number of plays on YouTube. The average annual revenue to rights holders per user is estimated by IFPI at **under US\$1** on YouTube, while on Spotify the comparative figure is **US\$20**.⁵²

AVERAGE ANNUAL REVENUE TO RIGHTS HOLDERS PER USER



Even with the surging popularity of subscription audio services, YouTube remains a go-to music destination for many consumers. According to a 2018 IFPI study of online consumers, 79% of respondents in Canada said they used YouTube for music.⁵³ The same study found that almost half (45%) of respondents' time spent listening to on-demand music is on YouTube.

SHARE OF 'ON-DEMAND' MUSIC STREAMING IN CANADA BY METHOD



Source: IFPI, "Music Consumer Study 2018: Canada", November 2018⁵⁴

Despite the wide availability of subscription music services, many consumers still turn to user-upload services like YouTube to listen to music: 35% of respondents to a 2018 IFPI survey cited the availability on YouTube of the music they want as a major reason for not using paid audio subscription services.⁵⁵ Moreover, the survey of Canadian consumers found that if YouTube provided access to music only through paid subscriptions, "89% would use licensed alternatives."⁵⁶

As noted by Dr. Barker, the prevalence of “free” services such as YouTube depresses not only consumer demand for paid subscription services (that better compensate artists and other rights holders by orders of magnitude) but also royalties paid by those services. These effects are the result of “substitution possibilities,”⁵⁷ such as when a service like YouTube, which profits enormously through the subsidy enabled by overly broad safe harbours, provides a free alternative to paid services.

The combined effect is that rights holders don’t receive fair compensation for their music from user-upload services like YouTube. And when so much music is consumed through YouTube as a substitute for other streaming services, artists remain squeezed out of the middle class, unable to make working as a professional musician a viable career.

“When we look at our numbers we have to laugh because it’s so challenging for us to see our life, our blood, our work consumed for very little. It’s basically for free. We’ve grown up in that context so that’s our normal, but there was a time when artists would be getting paid fairly and properly for that same consumption, and so I think some inequalities are happening. I know it from my own experience”⁵⁸

- Vocalist/guitarist Andrew Morrison of The Jerry Cans



CLOSING THE
VALUE GAP:
RECOMMENDATIONS

Music Canada and the Heritage Committee are aligned on the need to close the Value Gap and on the key legislative solutions to achieve it. This conviction — and these solutions — are supported by virtually the entire Canadian music industry, including artists, copyright collectives, independent and major record labels, performing rights organizations and others alike.

Vocalist and guitarist Andrew Morrison of The Jerry Cans captured the sentiment shared by many of his fellow artists, when he remarked at Parliament’s 2018 Heritage Committee hearings:

“[W]hen Graham [Henderson] was talking about middle-class artists, I was like, ‘I want to be one of those’ because of the situation we find ourselves in. If we pie-chart out our revenue, what comes from copyright is so little now. I’m a young artist, and the older generation is telling me about the glory days of getting royalty cheques. I say, ‘Sweet. What’s that? I’ll buy you a coffee with mine.’”⁵⁹

How then to replace the 21st century artist’s cup of coffee with a livelihood, and more broadly, to build a strong and sustainable creative sector?

“The inability of policy to evolve with technology has prevented artists from receiving fair market value for their work.”⁶⁰

- *Shifting Paradigms, Report of the Standing Committee on Canadian Heritage*

“Witnesses overwhelmingly asked for concrete changes that would address the decline in the artistic middle class. As such, the Committee’s recommendations focus on modernizing remuneration models and levelling the playing field for artists and creative industries.”⁶¹

- *Shifting Paradigms, Report of the Standing Committee on Canadian Heritage*

Music Canada joins with the Heritage Committee in proposing solutions; specifically, in calling for a review of Canada’s broad safe harbours and for legislative revisions to fix the \$1.25 million Radio Royalty Exemption and the definition of a “sound recording” in the *Copyright Act*.

Details of Music Canada’s proposals to address safe harbours are outlined in Recommendations 1 and 2, below. Recommendations 3-5 are specific measures that will immediately stop the growth of the Value Gap by addressing the Radio Royalty Exemption, the Definition of a Sound Recording and the creation of a temporary Private Copying Fund.

“Many witnesses [before the Heritage Committee] ... asked for modifications to the safe harbour provisions related to digital intermediaries and ISPs. The Committee heard that these provisions ought to be reviewed to ensure that these online services are held accountable for their role in diffusing content.”⁶²

- Shifting Paradigms, Report of the Standing Committee on Canadian Heritage

MEASURES TO ADDRESS BROAD SAFE HARBOURS

Recommendation 1: Limit and Clarify Safe Harbours

Safe harbours should:

- Be limited to true “innocent intermediaries” that are genuinely technical, automated and passive, with no knowledge of alleged infringement and unaware of circumstances to put them on notice of infringement;
- Not apply to online user-upload services that optimize and profit from user-uploaded content;
- Be limited to intermediaries that have a policy to address repeat infringers and comply with all requirements on them; and
- Not shield service providers (including search engines) where they have actual or constructive knowledge of infringement (without requiring rights holders to sue end users), and require that where they do, they must take reasonable steps to prevent infringement and to ensure that infringing works stay down.

The *Copyright Act* should also confirm that non-passive intermediaries (including user-upload services) engaged in interactive communications perform an act of communication to the public and of making available to the public. Without a clear basis for liability, service providers lack incentives to operate responsibly and comply with safe harbour requirements.⁶³

The Heritage and Industry Committee reports both recommend reviewing safe harbour laws. In the words of the Heritage Committee report, the review should be undertaken to ensure that digital providers “are accountable for their role in the distribution of content.”⁶⁴

Recommendation 2: Address the Role of User-Upload Services in Creating the Value Gap

The *Copyright Act* should include measures to guarantee that user-upload platforms such as YouTube:

- Negotiate fair and appropriate licensing agreements with rights holders, and
- Ensure that unauthorized protected works or other subject matter are not available on their services, and are not uploaded in the future.⁶⁵

Global Action on Safe Harbours and User-Upload Services is Underway

Global action is needed on safe harbours and other measures involving Internet intermediaries and user-upload services.

In April 2019, the European Union approved a new Copyright Directive, signalling the EU's recognition of the urgent need to address the Value Gap. The EU Directive expressly recognizes the Value Gap as a threat requiring concerted action.⁶⁶ The Directive is consistent with recent legal developments both in Europe and internationally. It follows: i) a European high court finding that user-upload sites that curate or recommend posted material are liable for hosting infringing content;⁶⁷ ii) EU member state action to ensure that infringing material removed from websites stays down;⁶⁸ and iii) global interest in updating the accountability of digital platforms for infringing content that they host or disseminate.⁶⁹

The Directive confirms that user-upload services perform copyright-protected acts of communicating and making available to the public when content is posted on their platforms, and that they do not qualify for existing EU safe harbours.⁷⁰ It requires platforms to use best efforts to obtain authorizations (such as licenses) from rights holders, to remove infringing content when they are notified of it, and to keep infringing content off of their platforms ("stay down").⁷¹

The European Union's formal recognition of the Value Gap and its direct link to safe harbours represents an important milestone in the global effort to address the damage wrought by the Value Gap. Whether the Directive accomplishes its goals will be determined by the ability of the 28 EU member states to implement domestic laws consistent with the goal of ensuring that creators are paid when their work is commercialized by others.

As Canada considers its own actions on safe harbours, it has the advantage of learning from measures adopted in the European Union and elsewhere to implement international best practices in addressing the Value Gap in any future amendments to the *Copyright Act*.

IMMEDIATE MEASURES TO STEM THE GROWTH OF THE VALUE GAP

Recommendation 3: Eliminate the Radio Royalty Exemption

Eliminating the \$1.25 million Radio Royalty Exemption would end the approximately \$8 million a year subsidy to major telecommunications conglomerates by artists and record labels - money that instead would support music creators and the creation of new music.⁷²

The Heritage and Industry Committee reports recommend revising the Radio Royalty Exemption so that it is only available to (small) independent stations.

Recommendation 4: Amend the Definition of a “Sound Recording” in the *Copyright Act*

Amending the definition of a “sound recording” in the *Copyright Act* would end the \$45 million a year subsidy of broadcasters by performers and record labels and provide more money for creators to invest in making music.⁷³

The Heritage Committee report recommends amending the definition of a “sound recording” so that performers and record labels receive remuneration when their recordings form a part of a TV or film soundtrack.

Recommendation 5: Create a Temporary Fund for Private Copying

In 1997, the *Copyright Act* was amended to allow Canadians to copy sound recordings on audio recording media such as blank CDs for their private use. At the same time, the private copying regime was established so that music creators would receive remuneration for those copies.

Over time, revenues generated by the private copying regime have plummeted even as the number of tracks copied has soared. In 2004, music creators earned \$38 million from more than a billion copies of tracks made on blank recordable CDs. In 2018, Canadians earned less than \$3 million under the same regime from more than 2 billion copies.⁷⁴ The revenue drop results from the private copying regime not keeping pace with modern methods of copying music.

To address this anomaly, the government should introduce a temporary private copying fund which would provide revenues of \$40 million annually to artists and their recording industry partners. This fund would not be a grant, but rather a proxy for the marketplace value of private copies to creators. The funds would be distributed to the applicable rights holders by the copyright collective. This measure would not only restore fair compensation to rights holders for the private copying of their works, but also would align Canada with the global standard for private copying.



C O N C L U S I O N

Parliamentarians' calls for action on the Value Gap have been inspired above all by the personal stories of artists. They have been moved by the often heart-wrenching accounts of how a few seemingly innocuous words in the *Copyright Act* have caused immense harm to artist's livelihoods and their ability to create.

During the 2018-2019 Parliamentary Committee hearings, MPs met face-to-face with artists at the receiving end of those words. They sat directly opposite Andrew Morrison when he pleaded for changes to rules that allow global technology giants to earn massive profits from "our blood, our work" in exchange for royalties equal to a cup of coffee. They heard from Damnhait Doyle about the inability of today's artists to afford basic healthcare. And they heard from Miranda Mulholland on how the ladder to the musician middle class has disappeared.

The economic evidence of the Value Gap and the steep decline in music revenues over the last two decades may seem like mere numbers on a page. But as Parliamentarians learned, the numbers have real consequences to real people.

They also now understand that the numbers didn't just "happen." They recognize that there's a reason for the decline in revenues: shortcomings in copyright legislation.

The shortcomings add up to a big number in Canada: the \$1.6 billion Value Gap. This is not hypothetical money that has somehow mysteriously disappeared. It's real money that goes directly into the bank accounts of tech giants and broadcasting conglomerates. And it's real money that comes directly out of the pockets of creators. It belongs to the countless artists who despite hundreds of thousands of views on YouTube struggle to earn a decent living. It belongs to record labels who invest in artists' careers, innovate and create jobs.

A few relatively simple changes to the *Copyright Act* will rebalance the ledger and restore fairness to the marketplace. Artists will get paid properly for the market value of their work. The music industry will return to health and have more money to invest in artists and the music they create.

It is now clear from the personal accounts of creators and the economic evidence that the Value Gap must be addressed, and that there is urgency to this task. Measures to address last-century problems like the \$1.25 million Radio Royalty Exemption are straightforward and can therefore be implemented without delay.

Action on the biggest single source of the Value Gap – overly broad and improperly defined safe harbours – should proceed in parallel, in concert with Canada's international partners. The passage of the EU's Copyright Directive signals that global reforms are readily achievable. It is time that lawmakers in nations outside the EU, including Canada, take action as well.

The May 2019 release of the Heritage Committee's report is a watershed moment for creators and Canada's creative industries. Many of the report's recommendations echo the recommendations of this report. If implemented, these solutions would, virtually overnight, improve Canada's copyright framework to better ensure that creators are paid when their work is commercialized by others.

We need to recognize that, after many years of creators' appeals for fairness, the technology giants at the heart of the Value Gap have not taken sufficient steps to balance the ledger between the creators who fuel their platforms, and their own corporate interests. These are the same tech giants who beat a path to windfall profits by pursuing a digital age maxim famously coined by Facebook founder and CEO Mark Zuckerberg: "*Move fast and break things.*"

If the Value Gap is to be closed, it is the law that must be changed. So now we are asking governments to respond in kind, to "*move faster and fix things.*"

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⁶³Music Canada, brief to Statutory Review of the *Copyright Act*, Standing Committee on Industry, Science and Technology, Parliament of Canada, Dec. 10, 2018, pp. 3-4.

<https://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10274273/br-external/MusicCanada-e.pdf>

⁶⁴Heritage Report, *supra* note 1, p. 19; Standing Committee on Industry, Science and Technology, Parliament of Canada, “Statutory Review of the Copyright Act”, June 2019 [the “Industry Report”] at p. 83; available at

<https://www.ourcommons.ca/Content/Committee/421/INDU/Reports/RP10537003/indurp16/indurp16-e.pdf>

⁶⁵See Music Canada, brief to Statutory Review of the *Copyright Act*, Standing Committee on Industry, Science and Technology, Parliament of Canada, Dec. 10, 2018, p. 4. Available at

<https://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10274273/br-external/MusicCanada-e.pdf>

⁶⁶European Union, “Directive on Copyright in the Digital Single Market” (approved April 15, 2019), Recitals 61, 64, 66, 68-69; Art. 17.

⁶⁷*Reti Televisive Italiane SpA v Yahoo! Inc.*, (“*RTI v. Yahoo!*”) (Italian Supreme Court Mar. 2019) (user upload service liable for hosting infringing content if it filters, selects, indexes, organizes, classifies, aggregates, or promotes content, or uses tools aimed at retaining users by evaluating their behavior).

⁶⁸Italian AGCOM Regulation (amendments 2018); see also *RTI v. Yahoo!* (confirming that a take down notice imposes an obligation to prevent further infringements of the same content, i.e., “stay down”).

⁶⁹See, e.g., the Australian Competition and Consumer Commission, Digital Platforms Inquiry: Preliminary Report (Dec. 2018) (recommending measures to encourage the development of timely and effective procedures for the take-down of infringing content on digital platforms and increase the enforceability of copyright protections online); New Zealand Ministry of Business, Innovation & Employment, Issues Paper: Review of the *Copyright Act* 1994 (Nov. 2018) (noting that ISP safe harbour provisions pre-date user-upload services such as YouTube and “ISP liability provision may need to be reviewed in light of the developing role of online platforms as content distributors.” “We have also heard that the ISP liability provisions reduce the incentive on ISPs to help right holders stop piracy.” “We have also heard that it distorts the commercial relationship between online platforms and copyright owners, allowing platforms to pay low rates of remuneration for content because they can rely on the backstop of the safe harbour.”). The US Copyright Office is undertaking a review of the safe harbour provisions under the US 1998 Digital Millennium *Copyright Act* (“DMCA”), and whether they require modernization to address changes in the internet over the past two decades (the Section 512 Study).

⁷⁰European Union, “Directive on Copyright in the Digital Single Market”, Art. 17(1) & (3).

⁷¹*Ibid.*, Art. 17(4).

⁷²Music Canada 2017 Report, *supra* note 5, p. 32.

⁷³*Ibid.*, p. 7.

⁷⁴Canadian Private Copying Collective, “Written Submissions for the Pre-Budget Consultations in Advance of the 2019 Budget,” August 3, 2018, p. 3.



MusicCanada.com

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#1

THE CALL TO ACTION

FEATURING:
**MIRANDA
MULHOLLAND**
AND ARTIST
ADVOCATES
EVERYWHERE



RISE UP AGAINST THE VALUE GAP!

THE PROBLEM:

THINGS ARE TERRIBLE FOR CREATORS. REMUNERATION IS AT AN ALL TIME LOW.

SOME ARE QUITTING MUSIC.

EVERYONE IS THINKING: MAYBE I'M NOT GOOD ENOUGH.

MUSIC IS AVAILABLE EVERYWHERE, AND WE HAVE ADAPTED TO THE NEW DIGITAL PROMOTIONS WORLD OF SOCIAL MEDIA BUT WE DON'T HAVE TIME TO DO ACTUAL CREATING ...

PEOPLE LOVE OUR MUSIC, AND WE JUST GOT A GREAT REVIEW. BUT IT JUST IS NOT PAYING OUR BILLS.

THE MUSICIAN MIDDLE CLASS IS GONE

MY ROYALTY CHECKUE BOUGHT A COFFEE

EVERYONE SAYS TOURING IS THE ANSWER BUT EVERYONE IS ON THE ROAD
I HAVE TO QUIT MUSIC

I'VE WON AWARDS AND CAN'T PAY MY RENT

WHY AM I SUBSIDIZING BIG TECH?

I'M A SINGLE PARENT AND CAN'T TOUR

YOUTUBE PAYS ONE-TWENTIETH OF THE OTHER STREAMING SERVICES

THE RESEARCH:

- THE MASK OF ANARCHY P.B. SHELLEY
- THE FIVE ROBERT LEVINE
- CULTURE CRASH SCOTT TIMBERG
- RULING THE WAVES DEBORA SPAR
- MOVE FAST AND BREAK THINGS TAPLIN

REALIZATION:

THE FRAMEWORK IS **BROKEN!**

THE **VALUE GAP** IS THE DISPARITY BETWEEN THE VALUE OF CREATIVE CONTENT BEING CONSUMED AND THE REVENUES RETURNED TO THE CREATORS.

THIS IS AFFECTING EVERYONE ACROSS THE CREATIVE COMMUNITY.

AMPLIFICATION:

RECOGNIZING THE **VALUE GAP** AS THE SOURCE OF THE PROBLEM,

MIRANDA BEGINS TALKING TO FELLOW CREATORS FROM AROUND THE WORLD,

SPEAKING AT MIDEM, THE WTO, AND THE ECONOMIC CLUB OF CANADA

THE FRAMEWORK IS UNFAIR

...COPYRIGHT EXCEPTIONS

WE ARE GOOD ENOUGH

BUT WE ARE SUBSIDIZING BILLIONAIRES!

THE VALUE GAP IS AFFECTING ALL TYPES OF CREATORS



UNIFICATION:

WE NEED TO UNITE AS A COMMUNITY TO SPEAK TRUTH TO POWER

WHO ARE THESE LAWS REALLY PROTECTING?

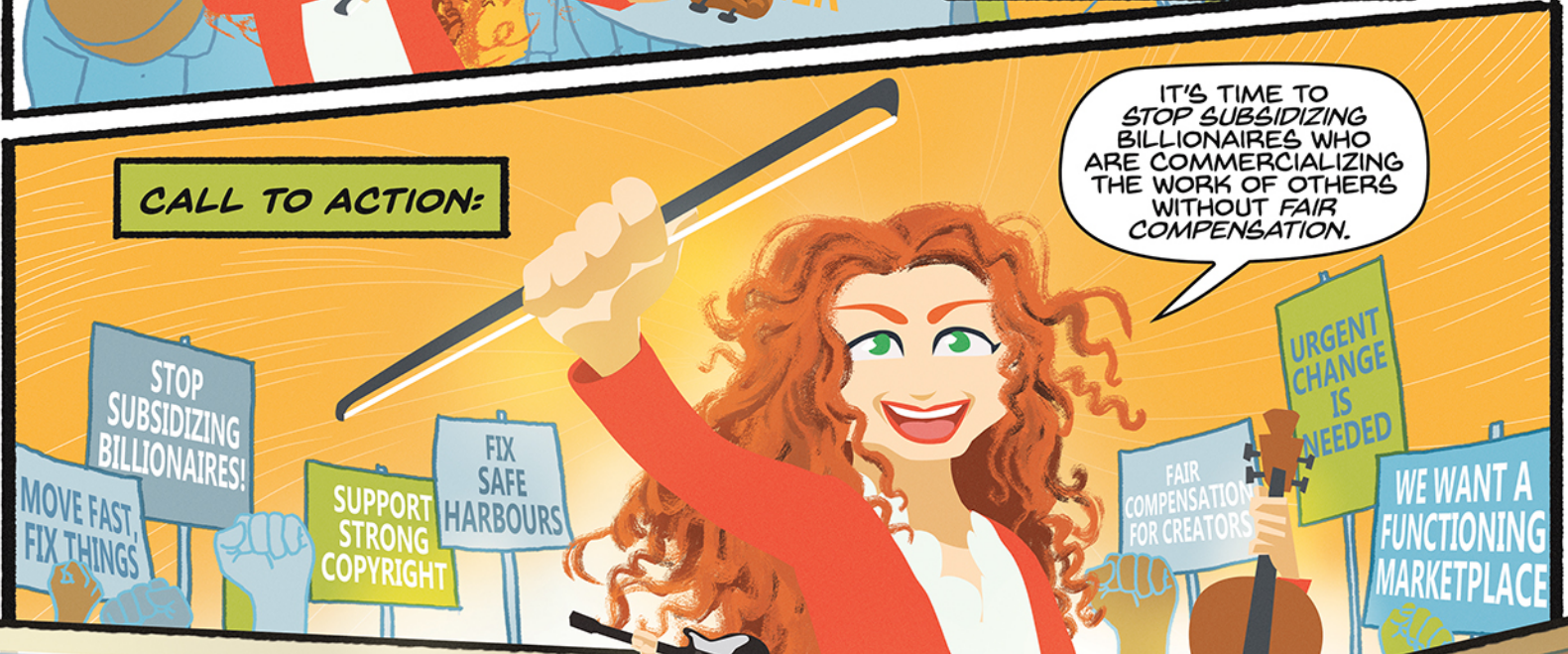
SPEAK UP

SUPPORT COPYRIGHT REFORM

RISE LIKE LIONS AFTER SLUMBER

WE ARE STRONGER TOGETHER

AS CREATORS COME TOGETHER TO SPEAK OUT AGAINST THE VALUE GAP, THEIR MESSAGE GROWS STRONGER.



CALL TO ACTION:

IT'S TIME TO STOP SUBSIDIZING BILLIONAIRES WHO ARE COMMERCIALIZING THE WORK OF OTHERS WITHOUT FAIR COMPENSATION.

STOP SUBSIDIZING BILLIONAIRES!

MOVE FAST, FIX THINGS

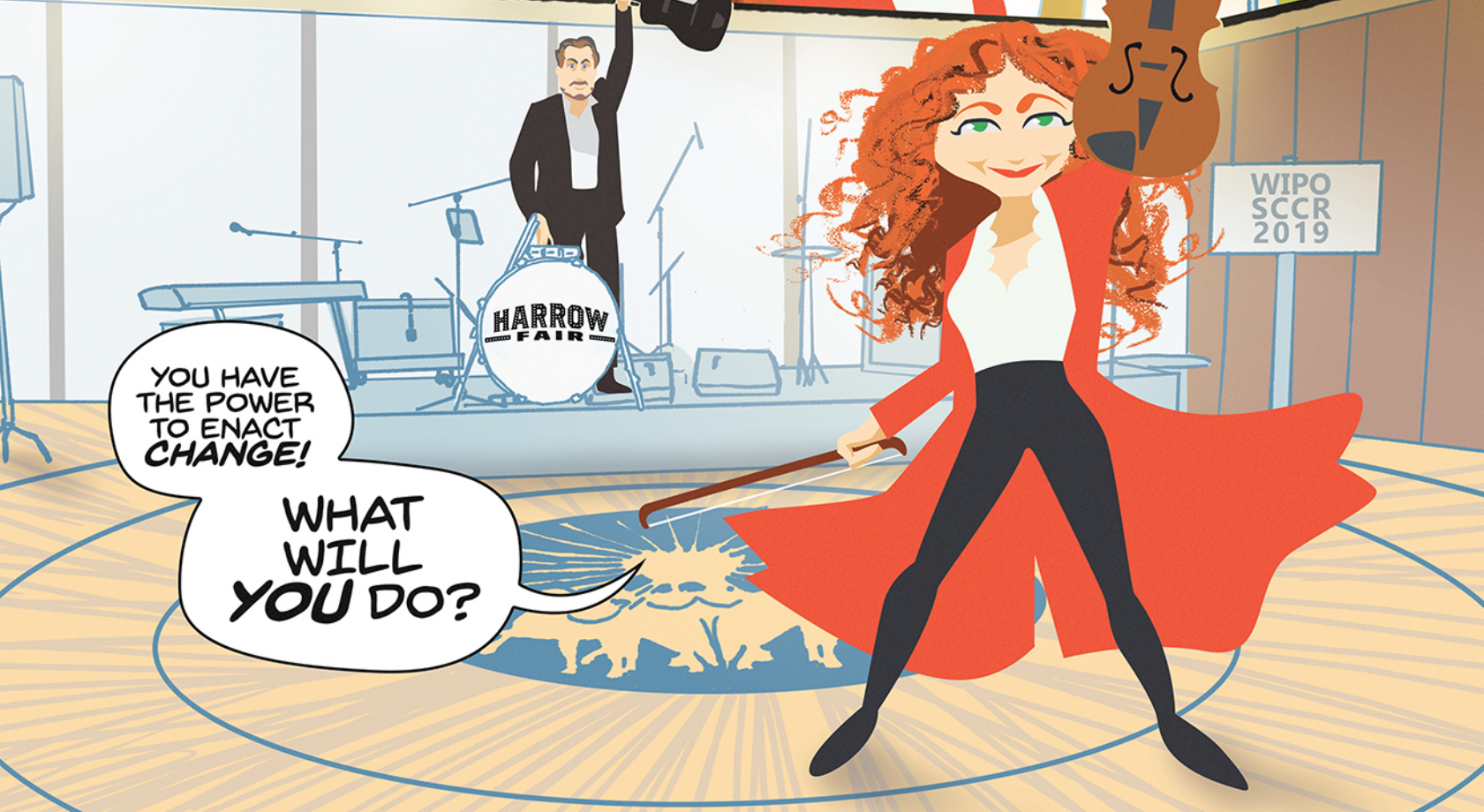
SUPPORT STRONG COPYRIGHT

FIX SAFE HARBOURS

FAIR COMPENSATION FOR CREATORS

URGENT CHANGE IS NEEDED

WE WANT A FUNCTIONING MARKETPLACE



YOU HAVE THE POWER TO ENACT CHANGE!

WHAT WILL YOU DO?

**WIPO
SCCR
2019**

CLOSING THE VALUE GAP

POLICYMAKERS HAVE THE OPPORTUNITY TO PROTECT THE FUTURE OF CREATIVITY BY ADDRESSING THE VALUE GAP.

CLOSING THE VALUE GAP REQUIRES ADDRESSING ITS ROOT CAUSE: OVERLY BROAD SAFE HARBOUR PROVISIONS.

BROAD SAFE HARBOURS HAVE VASTLY LOWERED ROYALTY PAYMENTS TO COPYRIGHT HOLDERS, LEADING TO THE MASSIVE SUBSIDIZATION OF MULTI-BILLION DOLLAR TECH COMPANIES BY ARTISTS AND CREATIVE INDUSTRIES.

THE VALUE GAP IS AN UNINTENDED CONSEQUENCE OF THE OUTDATED LANGUAGE OF THESE SAFE HARBOUR PROVISIONS. IT IS ALSO A DIRECT RESULT OF BIG TECH'S MODUS OPERANDI - TO MOVE FAST AND BREAK THINGS. CREATORS NOW NEED THE GOVERNMENT TO MOVE FAST AND FIX THINGS.

BROAD SAFE HARBOURS MUST BE CLARIFIED AND NARROWED. SAFE HARBOURS SHOULD NOT BE AVAILABLE TO USER-UPLOAD SERVICES WHEN THEY ACT LIKE COMMERCIAL ONLINE MUSIC SERVICES. THOSE PLATFORMS SHOULD BE REQUIRED TO OBTAIN AUTHORIZATIONS FROM CREATORS BEFORE STREAMING MUSIC TO USERS. AND THEY SHOULD BE REQUIRED TO REMOVE INFRINGING CONTENT FROM THEIR SERVICES, AND KEEP IT DOWN.

WWW.MIRANDAMULHOLLAND.CA/ADVOCACY

 **@MIRAMULHOLLAND**

**CONCEIVED & WRITTEN BY MIRANDA MULHOLLAND AND GRAHAM HENDERSON
ART BY RODRIGO BRAVO**