

Canadian Music Funding and Legal Issues

By: Chris Taylor

The views and opinions expressed in this article are not meant to substitute for legal advice which should be sought in each particular instance.

Introduction

Canadian recording artists and Canadian recording companies have access to the greatest support funding in the world. Some of the funding is from the various levels of government while other sources of support is quasi-governmental following from requirements placed on private broadcasters as part of their permissions to operate in the Canadian market. In this article I will briefly discuss the 5 sources of this funding; the eligibility requirements for each and the legal issues to consider for each.

The primary sources for funding in Canada include:

1. The Foundation to Assist Canadian Talent on Record (FACTOR)
2. Radio Starmaker Fund (RSF)
3. MuchFACT
4. The Department of Canadian Heritage and the Music Entrepreneur Component (MEC)
5. The Government of Ontario and the Ontario Music Fund (OMF)¹

The impact of this funding can be significant. Some music companies access in excess of \$1,000,000 per year. The rules and timelines surrounding these funds are subject to change so it is important to have a current understanding of how each fits into the life of your client. This article outlines the state of affairs as of today's date.

1. The Foundation to Assist Canadian Talent on Record (FACTOR) - <https://www.factor.ca/>

a) Purpose

According to the FACTOR website:

As a private non-profit organization, FACTOR is dedicated to providing assistance toward the growth and development of the Canadian music industry. The foundation administers contributions from private radio broadcasters as well as two components of the Department of Canadian Heritage's Canada Music Fund. FACTOR has been managing federal funds since the inception of the Sound Recording Development Program in 1986 (now known as the Canada Music Fund).

¹ Note this funding is only available for Ontario companies and Ontario artists. Other provinces may have their own unique programs and funding.

Support is provided to Canadian recording artists, songwriters, managers, labels, publishers, event producers and distributors through various programs. Whether an artist is looking to record a demo, full length sound recording, market and promote an already existing album or showcase and tour domestically and internationally, funding is available. FACTOR supports many facets of the infrastructure which must be in place in order for artists and music entrepreneurs to progress into the international arena.²

FACTOR was founded in 1982 by a partnership of private radio broadcasters in conjunction with the Canadian Independent Record Producers Association (CIRPA) and the Canadian Music Publishers Association (CMPA). FACTOR began with a modest budget and a single mandate: to fund albums by Canadian artists that had potential for commercial radio success. In 1986, FACTOR began administering federal funds that had been allocated by the then Department of Communication for the Canadian independent music industry. FACTOR would later become a major beneficiary of annual contributions made by private radio broadcasters as a result of licenses and license renewals under the Canadian Radio-television and Telecommunications Commission's (CRTC) Canadian Content Development (CCD) policies. Today, FACTOR commands an impressive program budget and a suite of programs designed to reach every sector of the industry.³

A quick review of the FACTOR website will reveal a plethora of programs and financing options for a variety of players in the music business. Funding is made available in the form of a grant, loan, or a combination of the two (depending on who is applying and for what program). This article is primarily focused on recording artists.

b) Programs

FACTOR's funding structure is broken up into groups (called components) that are based upon the particular activities the applicant is pursuing funding for. Activities eligible for funding can range from tour support to radio marketing. Components are further grouped into collections (called programs) that all relate to a particular project being undertaken by the applicant. The list of programs currently offered by FACTOR include the Demo Recording Program, Live Performance Program, and Comprehensive Artist Program (which is designed to contribute towards the cost of acquiring, producing and marketing a full-length album). Artists can apply to all or individual components of any given program they are eligible for. Specific funding structures and levels are set per individual program. For example, under the Comprehensive Artist program, FACTOR will fund up to \$75,000 of eligible costs plus \$5,000 in radio marketing (of which 25% will be a loan and 75% will be a grant)⁴. Under the Live Performance Program, FACTOR will grant up to \$20,000 annually for level 3 artists, and \$15,000 annually for all other artists (of which \$5,000 can be attributed to showcasing)⁵.

c) Eligibility

² FACTOR: Our Mandate, online: FACTOR website < <https://factor.ca/about-the-foundation/our-mandate/>>.

³ FACTOR, online: Wikipedia < <https://en.wikipedia.org/wiki/FACTOR>>.

⁴ FACTOR, Comprehensive Artist Program Guidelines, online: FACTOR website < https://factor.ca/wp-content/uploads/2015/07/FACTOR_Comprehensive_Artist_Program_Guidelines.pdf>.

⁵ FACTOR, Live Performance Program, online: FACTOR website < https://factor.ca/wp-content/uploads/2015/07/FACTOR_Live_Performance_Program_Guidelines.pdf>.

General eligibility for FACTOR programs is limited to Canadian citizens, permanent residents, and Canadian companies and corporations. FACTOR supports Canadian musicians to record, produce, and distribute primarily English-language, independent sound recordings nationally or internationally (French-language recordings are funded through Music Action)⁶. If more than 50% of a band or organization is Canadian, it will be eligible⁷. Eligibility for each component is tied to FACTOR's internal artist rating system, and other component specific requirements. For instance, in order to qualify for the Comprehensive Artist Program, an artist requires a rating of 3⁸. For the Live Performance Program, all artists are eligible to apply, but only artists rated 2 or 3 are eligible to apply to the tour support component⁹. Last year, the median indicia for level 3 artists included 31,061 album sales in the previous 5 years, and \$305,473.43 in touring revenue over the previous 12 months. The figures for level 2 artists were 9,897 album sales in the previous 5 years, and \$72,354.96 in touring revenue over the previous 12 months¹⁰.

d) Legalities

Only the party that controls the Canadian commercial release rights and exclusive Canadian exploitation rights to the sound recording at the time of application may apply. Typically this will either be: (1) a Canadian artist who has not licensed the sound recording to another party; or (2) a Canadian Record Label that has signed the artist, or has licensed the sound recording, or has an option to license the sound recording. When a record label is the applicant, they are expected to retain control of the title for a minimum of 5 years from the release date. Major record companies (or their Canadian divisions) do not qualify as a "Canadian Record Label" for this purposes of FACTOR.

2. Radio Starmaker Fund - <https://www.starmaker.ca/>

a) Purpose

According to its website:

The Radio Starmaker Fund was created in the fall of 2000 on the initiative of the [Canadian Association of Broadcasters](#) and approved by the CRTC. It is a private fund which has as its stated purpose to "make a substantial and discernable difference to the careers of Canadian artists" by providing substantial incremental investment where the

⁶ FACTOR, Pocket Guide 2015, online: FACTOR website < http://factor.ca/wp-content/uploads/2015/07/FACTOR_Pocket_Guide.pdf>.

⁷ *Ibid.*

⁸ *Supra* note 4.

⁹ *Supra* note 5.

¹⁰ FACTOR, Profiles and Ratings for Artists, online: FACTOR website < <http://factor-deploy.azurewebsites.net/application-details/profiles-and-ratings-for-artists/>>.

artist has established a proven track record and his or her label is making a Significant Investment in their future career.¹¹ Starmaker funding is a non-refundable grant.

The funding and purposes for Radio Starmaker overlap from time to time with FACTOR but “double dipping” is not allowed. The organizations share information to ensure it.

b) Programs

Funding can be secured for an artist in 4 main areas:

(1) Domestic Marketing¹²: Domestic Marketing is capped at \$50,000 in funding per release. Website Design is included in this category and is capped at \$25,000 per release.

(2) Domestic Touring¹³: Artists may apply for dates that occur up until 8 months after the application deadline (although priority will be given to dates taking place within 3 to 4 months after the application deadline). Funding for live concert performances will only be considered in venues that have a capacity of 100 or higher. Also, headline appearances where the venue exceeds 1,000 will not be considered. Funds for domestic touring are capped at \$1,500 per appearance, with a maximum of 25 funded dates over a 12 month period. Artists can apply for this type of funding independent of their Canadian label without having to make any significant investment.

(3) International Marketing¹⁴: Applicants for this type of funding must meet Starmaker’s general eligibility requirements (below), although there is no “significant investment” component here. Despite not being required, it should be noted that investment is viewed as an indicator of commitment to that particular territory. The record for which funding is sought must be released in the relevant territory within 6 months of the deadline for the round in which you apply. Major label releases in foreign territories are not eligible for funding in those territories. Specific funding levels are set per territory, with preference given to those labels that own, market and administer their own copyrights in the territory being worked. Generally, funding is capped between \$5,000 and \$20,000 depending on whether the release has been distributed or licensed.

(4) International Touring¹⁵: Funding for international touring works much in the same way as it

¹¹ Radio Starmaker Fund, About the Radio Starmaker Fund, online: Starmaker website < <https://www.starmaker.ca/about>>.

¹² Radio Starmaker Fund, Funding Rules, online: Starmaker website < <https://www.starmaker.ca/about/funding>>.

¹³ Radio Starmaker Fund, Domestic Touring, online: Starmaker website <<https://www.starmaker.ca/about/funding/domestictouring>>.

¹⁴ Radio Starmaker Fund, International Marketing, online: Starmaker website <<https://www.starmaker.ca/about/funding/internationalmarketing>>.

¹⁵ Radio Starmaker Fund, International Touring, online: Starmaker website <<https://www.starmaker.ca/about/funding/internationaltouring>>.

does in the domestic context, except that the dollar amount caps are set per territory. Generally, the maximum subsidy varies between \$1,500 and \$2,500 per appearance and a maximum of between 15 to 35 appearances per year within a given territory. Artists can apply for this type of funding independent of their Canadian label without having to make any significant investment.

c) Eligibility

To be eligible you must be a Canadian citizen or landed immigrant and you must have met a minimum “Track Record”¹⁶ or sales level depending on genre. For Pop/Rock acts on indie labels the artist must have reached a sales level of 7,500 units; for other genres such as Urban, Country or Electronic the sales level is 5,000 for indie labels. Major labels must hit higher thresholds. Folk and Jazz categories, for example, are even lower. In addition to hitting the sales threshold the indie label would have needed to have made a “Significant Investment” in the artist in order to qualify for the additional funding provided by the Fund. For example, for indies in Pop music that Significant Investment must be a minimum of \$15,000. Significant Investment cannot include recording costs.

The Board of Directors for RSF make decisions on funding request quarterly and you can apply up to four (4) times on an album cycle every two (2) years.

d) Legalities

RSF is more oriented toward funding Independent and Major label initiatives although they do fund artist-operated indie labels provided they meet the qualifications. RSF differs from FACTOR in that the master recordings do not need to be owned or controlled by a Canadian artist or an independent label as Canadian Major labels also participate in this fund. However, you do not qualify for funding if the royalties and revenues from the Canadian sales of your records are payable to a corporation outside of Canada.¹⁷ Canadian artists signing to a US or UK major or indie label for the territory of the world, for example, would not be eligible for this funding.

3. MuchFACT - <http://www.muchfact.ca/>

a) Purpose

Created alongside MuchMusic (Canada’s version of MTV) to stimulate the production of new Canadian music videos. The organization now provides funding to produce viral videos, Electronic Press Kits and build websites for Canadian artists, independent labels and management companies. The committee meets six (6) times a year¹⁸. Funding through MuchFACT is a non-refundable grant.

¹⁶ Radio Starmaker Fund, Eligibility Requirements, online: Starmaker website < <https://www.starmaker.ca/about/requirements>>.

¹⁷ *Ibid.*

¹⁸ MuchFact Background, online: MuchFact website < <http://www.muchfact.ca/about/background>>.

b) Programs

MuchFACT provides funding in the following 4 categories¹⁹:

Digital Tools: This category allows you to apply for funding within the range of \$1 to \$5,000 for creation of music content related tools for online promotion of the artist including (but not limited to): innovative websites, EPK's, behind the scenes content, and online music content.

Online Music Video / Project: This category allows you to apply for funding within the range of \$1 to \$10,000 for creation of small budget music videos. This category is intended to support projects created primarily for online distribution.

Music Video: This category allows you to apply for funding within the range of \$10,000 to \$30,000 for creation of a music video. This category is intended to support larger-budget productions intended for television and online distribution.

Content Package: This category allows you to apply for funding within the range of \$30,000 to \$50,000. This option is reserved for the creation of digital content packages to build awareness and support for a Music Video. To be eligible for this grant, you must create at least 2 of: (a) music video; and (b) digital support tools.

c) Eligibility

All applicants for MuchFACT funding must be Canadian citizens, landed immigrants, or Canadian owned companies. Additionally, the principal performer(s) / artist(s) must be Canadian citizens or landed immigrants. The objective of MuchFACT is to stimulate the production of new projects. As such, completed projects will not be considered for funding. Further, Classical, Jazz, Country, Children's music, World music and French-language music are all ineligible for funding. French-language projects should be submitted through MaxFACT²⁰.

d) Legalities

In addition to the eligibility criteria listed above, MuchFACT requires that all funded projects meet certain legal standards²¹. Like FACTOR, the rights to both the master sound recording and the master video must be owned by a Canadian company or citizen (or landed immigrant). MuchFACT funded projects must also fit within specific parameters set by the CRTC for: (1) Canadian content (certain

¹⁹ MuchFact Award Options, online MuchFact website < <http://www.muchfact.ca/awards/options>>.

²⁰ MuchFACT Eligibility, online: MuchFact website, < <http://www.muchfact.ca/awards/eligibility>>.

²¹ *Ibid.*

elements of the audio²² and production²³ must be Canadian); (2) Broadcast standards for controversial content²⁴ (as administered by the CBSC); and (3) definition of a music clip (Category 8)²⁵

4. Music Entrepreneurs Component (MEC) - <http://www.pch.gc.ca/eng/1289312416804>

a) Purpose

MEC provides assistance on an annual basis, for the production and promotion of Canadian sound recordings to eligible independent Canadian sound recording firms, using a funding formula based on an applicant's sales in a reference period.²⁶ MEC recipients must repay their funding contributions if the contribution is equal to or greater than \$100,000.00 and a target EBITDA number is reached.²⁷

b) Program

MEC's programs are divided into 3 sub-components²⁸. This article will focus on the following 2 sub-components that are relevant to sound recording firms, and music publishing firms:

1) MEC – Aid to Canadian Sound Recording Firms²⁹: is intended to support the ongoing production and promotion of Canadian sound recordings. To this end, MEC provides funding for

²² CRTC *Radio Regulations* SOR/86-982, s.2.2(2)(a) provide that a Canadian musical selection must meet two (2) of the following four (4) criteria: (i) the music is or lyrics are performed principally by a Canadian; (ii) the music is composed entirely by a Canadian; (iii) the lyrics are composed entirely by a Canadian; and (iv) the musical selection consists of a live performance that is (A) recorded wholly in Canada, or (B) performed wholly in and broadcast live in Canada.

²³ According to the MuchFACT website, one (1) of the following two (2) elements of the production component must be met: (i) Video director or production company is Canadian; or (ii) Video production facilities are located in Canada.

²⁴ A complete list of the CBSC broadcast codes can be found at: < <http://www.cbsc.ca/codes/>>.

²⁵ CRTC *Television Broadcasting Regulations* SOR/87-49, Schedule I, item 6 provides the following definitions: Category 8a) Music and Dance: Programs comprised primarily (more than 50%) of live or pre-recorded performances of music and/or dance, including opera, operetta, ballet and musicals (excluding video clips, voice-overs or musical performances used as background; Category 8b) Music video clips: short film or videotape productions or concert excerpts (clips) not produced primarily for the particular program in which they are presented, which normally contain one musical selection with visual material; and Category 8c) Music video programs: Programs consisting primarily (more than 50%) of music videos and in some cases including a host and other programming elements.

²⁶ Canada Music Fund, online: Government of Canada website <<http://www.pch.gc.ca/eng/1267201611990>>.

²⁷ According to the Canada Music Fund application guide (see note 29), MEC recipients must repay their contributions if the contribution is equal to or greater than \$100,000 and if the recipient's EBITDA margin—excluding MEC funding—is more than 15% for the recipient's financial year in which the contribution was received and its two previous years.

²⁸ Music Entrepreneur Component, online: Government of Canada Canadian Heritage website <<http://www.pch.gc.ca/eng/1289312416804>>.

²⁹ Canada Music Fund Music Entrepreneur Component, Aid to Canadian Sound Recording Firms: Application Guide 2016-2017, online: Government of Canada Heritage website < http://www.pch.gc.ca/DAMAssetPub/DAM-musq-music/STAGING/texte-text/cH2015-01276AnnexA-VEEMEC-SndRcdgs_2016_2017_201509_QC_1442502571955_eng.pdf?WT.contentAuthority=12.5.1>.

the eligible activities of Canadian sound recording firms. Specific funding levels are determined based upon the applicant's eligible unit sales in a reference period (currently the 3 year period between July 1, 2012 to June 30, 2015) in relation to the factored sales of all qualified applicants during the same funding period. The maximum annual contribution under this sub-component is the lesser of \$550,000 or 50% towards eligible expenditures incurred by the recipient.

2) MEC – Aid to Canadian Music Publishing Firms³⁰: is intended to strengthen music publishing firms' ability to develop Canadian songwriters and composers and promote new Canadian musical works in Canada and abroad. MEC provides funding annually for the implementation of project activities that support the objective of the sub-component. All funding is awarded on the basis of merit after an assessment by the department using specific criteria³¹. The maximum total annual contribution per applicant is \$50,000 (however the amount of the contribution can not exceed 50% of eligible expenses for the relevant period). Furthermore, the financial assistance awarded to a recipient can not exceed, under any circumstances, the net revenues derived from eligible Canadian musical works in the firm's reference year.

c) Eligibility

Specific eligibility requirements vary with each sub-component:

1) MEC – Aid to Canadian Sound Recording Firms³²: To be eligible for funding, applicants must be a Canadian-owned and controlled firm³³ with its headquarters in Canada, and be able to demonstrate a minimum level of financial viability (however an applicant will be ineligible if revenues derived from sound recordings are in excess of \$20 million annually in each of the applicant's last three (3) financial years). Further, an eligible firm must have an active roster of at least four (4) Canadian artists³⁴, and have released a minimum of six (6) eligible recordings³⁵ in the reference period (with at least one (1) being in the most recent year of the reference

³⁰ Canada Music Fund Entrepreneur Component, Aid to Canadian Music Publishing Firms, Application Guide 2016 – 2017, online: Government of Canada Heritage website < http://www.pch.gc.ca/DAMAssetPub/DAM-musq-music/STAGING/texte-text/mec-app-guide_1448380796548_eng.pdf?WT.contentAuthority=12.5.1>.

³¹ *Ibid* at section 4.2: funding assessments will be made using the following criteria: (i) relevance of the activities and their contribution towards achieving the objectives of this component; (ii) capacity of the music publishing firm to undertake the activities within the allocated timeframe; and (iii) clear and measurable expected results.

³² *Supra* note 29.

³³ *Supra* note 29 at section 6: Canadian-controlled and controlled firm further defined.

³⁴ *Supra* note 29 at section 6: Canadian artist is defined as a Canadian solo artist or a group or collective comprising either a majority Canadian or whose principal artist is Canadian ("Canadian" is further defined in section 6).

³⁵ *Supra* note 29 at section 2.4.1: Eligible sound recordings are defined as a Canadian sound recording that is a single, full-length album, clearly and publicly attributed to the artist, that has complied with the legal deposit requirements (specific terms in this definition are further defined in section 6). Also, certain sound recordings are deemed ineligible because of specific factors such as inappropriate content (see section 2.4.6 of the guide for a complete list of these factors).

period). These releases are further subject to minimum sales thresholds³⁶ in order for the applicant to receive funding. Key management personnel must be Canadian citizens or permanent residents. In addition, eligible firms must have been in operation for a minimum of three (3) continuous years as a Canadian sound recording firm. Eligible firms may choose whether to apply for funding through MEC or FACTOR but any firm having been in operation for five (5) or more continuous years must apply through MEC.

2) MEC – Aid to Canadian Music Publishing Firms³⁷: To be eligible for funding, applicants must meet the same Canadian ownership and financial viability requirements as above (except that an applicant will be ineligible if total net revenues are in excess of \$5 million in the reference year³⁸). An eligible applicant must have either completed three (3) years of continuous operation as a Canadian music-publishing firm (or one (1) year if it can be demonstrated that one of its key management personnel has at least five (5) years experience in music publishing). Further, an applicant must have published a minimum of ten (10) new eligible Canadian musical works³⁹ in the reference year composed by a minimum of four (4) Canadian songwriters or composers who are not shareholders or principals of the firm. Any work can be deemed ineligible on certain content related factors⁴⁰ (such as content that is offensive or excessively violent). The applicant must also have net revenues of at least \$40,000 in the reference year (the threshold is lower in certain instances)⁴¹.

d) Legalities

Specific legal requirements vary with each sub-component:

1) MEC – Aid to Canadian Sound Recording Firms⁴²: To be eligible for funding, applicants must own the Canadian copyright for the Canadian sound recordings it produces, co-produces and releases or hold an exclusive license assigned to it by the Canadian copyright owner to release in the Canadian market. An applicant must also ensure to have fulfilled all of its contractual obligations with respect to artist royalty payments.

³⁶ *Supra* note 29 at section 2.3.5: In the reference period, applicant must have sales of eligible Canadian sound recordings in excess of 200,000 units. The sales threshold is subject to certain exceptions and limitations further described in the guide.

³⁷ *Supra* note 30.

³⁸ *Supra* note 30 at section 7: The reference year is the applicant's most recently completed fiscal year.

³⁹ *Supra* note 30 at section 7: Eligible Canadian musical work is defined as any work of music or musical composition that has been authored by a Canadian (further defined) and registered to a Collective Rights Management Society. Further detail is provided in the guide.

⁴⁰ *Supra* note 30 at section 2.4 provides a complete listing of disqualification factors for lyrical content.

⁴¹ *Supra* note 30 at section 2.5: \$40,000 minimum threshold is reduced to \$30,000 for Aboriginal or official language minority music publishing firms (further defined). At least \$20,000 of revenues must be derived from eligible Canadian musical works (\$15,000 for those meeting the \$30,000 minimum criteria). Net revenues from eligible songwriters or composers that are also shareholders or owners of the firm cannot exceed 10% total net revenue.

⁴² *Supra* note 29 at section 2.3.2.

2) MEC – Aid to Canadian Music Publishing Firms⁴³: To be eligible for funding, applicants must own or control each of the minimum eligible works and have registered them with SOCAN.

5. Ontario Music Fund (OMF) – http://www.omdc.on.ca/music/the_ontario_music_fund.htm

a) Purpose

The OMF is aimed at strengthening and stimulating growth in Ontario's music companies. The fund is structured to compliment other public funding programs and aims to address investment gaps at key phases of company and industry development cycles⁴⁴. Applicants are required to fund a minimum percentage of the total eligible costs using non-governmental sources (see below). OMF contributions are subject to maximum contribution limits (see below), and are non-refundable except in the case of recipient default.⁴⁵

b) Program

OMF provides support through 4 program streams. This article will focus on the 2 streams that are relevant to Ontario music companies:

1) Music Company Development⁴⁶: is intended to provide Ontario-based music companies with funding to support new or expanded business activities. Funding is provided in the form of direct grants towards a share of the costs of eligible activities (applicant is required to fund a minimum percentage of the total eligible activity/project costs using non-governmental sources)⁴⁷ but total OMF contribution may not exceed 50% of the total eligible costs of activities, or \$1.5 million to a single company per funding cycle. Business activities eligible for support will vary between Domestic Music Companies and Multi National Record Labels⁴⁸.

2) Music Futures Stream⁴⁹: is aimed at stimulating entrepreneurship and providing support to developing businesses in Ontario's music sector, particularly those that demonstrate the potential to grow if provided with mentoring, skills development and/or working capital to expand their business activities. Funding is provided in the form of direct grants towards a share

⁴³ *Supra* note 28.

⁴⁴ The Ontario Music Fund, online: <http://www.omdc.on.ca/music/the_ontario_music_fund.htm>.

⁴⁵ see note 46.

⁴⁶ OMF – Music Company Development Guidelines 2015-2016, online: OMF website <<http://www.omdc.on.ca/Assets/Industry+Initiatives/English/OMF/Music+Company+Development/MCD+2015/Music+Company+Development+Guidelines.pdf>>.

⁴⁷ *Ibid* at page 14: Eligible Activities are listed and defined.

⁴⁸ *Ibid* at page 8: Defines eligible activities for Category A (Domestic Music Companies) and Category B (Multinational Record Labels).

⁴⁹ OMF Music Futures Guidelines: 2015-2016, online: OMF website <<http://www.omdc.on.ca/Assets/Industry+Initiatives/English/OMF/Futures/Futures+2015/OMF+Music+Futures+Guidelines+2015-16.pdf>>.

of eligible activities (applicant is required to fund a minimum of 25% of the total eligible activity/project costs using non-governmental sources)⁵⁰ but total OMF contribution may not exceed 75% of the total eligible costs of activities, or \$50,000 to a single company per funding cycle.

c) Eligibility

The OMF is accessible to Ontario-based music companies and organizations (including record companies, music promoters, music managers, booking agents, etc...). In order to be eligible, applicants must demonstrate certain Canadian residency and financial criteria⁵¹. Further, certain types of organizations (such as universities or government entities) are ineligible⁵². Exceptions to this criteria may be considered under certain circumstances (see guide for more information).

In addition to the general eligibility requirements, specific criteria must be met for each individual stream:

1) Music Company Development⁵³: Under this stream, applicant classes fall into two categories (A - Domestic or B - Multinational) with specific requirements for each⁵⁴. Generally, these will be: (i) minimum revenue threshold; (ii) specific minimum connections to Ontario and Canada; (iii) specific minimum business activity requirements; etc...

2) Music Futures Stream⁵⁵: To be eligible under this stream, an applicant must be a Canadian-owned Record label, music publisher, music manager, music promoter/presenter, booking agent or artist-entrepreneur with eligible annual revenues⁵⁶ of between \$35,000 and \$100,000.

d) Legalities

In addition to the eligibility criteria listed above, successful applicants in the Music Company Development stream must satisfy the following legal criteria: Category A Domestic Record Labels and Category B Multinational Record Labels must hold the master copyright, or license for a minimum of four (4) Canadian-artist releases or four (4) Canadian releases as defined by CRTC Canadian Content

⁵⁰ *Ibid* at page 11: Eligible Activities are listed and defined.

⁵¹ *Supra* note 45 at page 4: The General Eligibility requirements state that an applicant must: (i) be incorporated in Canada; (ii) have a permanent establishment in Ontario which serves as the head of operations; (iii) have key management personnel who are Canadian citizens or permanent residents and living in Ontario; (iv) be financially solvent and an ongoing entity; (v) be in operation for at least 2 years prior to application; and (vi) be in good standing with OMDC.

⁵² *Supra* note 45 at page 5: Ineligible Applicants are listed and defined.

⁵³ *Supra* note 45.

⁵⁴ *Supra* note 45 at page 8: eligibility requirements are listed for Category A classes: (i) Domestic Record Labels; (ii) Artist-Entrepreneurs; (iii) Music Managers; (iv) and Music Publishers, and Category B class: (i) Multinational Record Labels.

⁵⁵ *Supra* note 46 at page 8.

⁵⁶ *Supra* note 48 at page 8: Definitions and eligible revenue requirements for each type of applicant are listed.

regulations⁵⁷. Category A Music Publishers must own 100 original works (own the copyright or act as administrator of the copyrights on behalf of the copyright owners) in order to be eligible.

General

Canadian funding for music companies and recording artists is unparalleled and the fruits of that funding is apparent in the global success stories this funding has helped produced. Artists such as Drake, The Weeknd, Nickelback, Sarah Mclaughlin, Nelly Furtado, Carly Rae Jepsen and many, many others have all benefited from the helpful kick start these funds provide. It's important for attorneys to have a familiarity with these programs when representing Canadian clients in the industry as they can provide valuable fuel to careers. The rules and procedures for this funding change regularly. New funding pops up while some funding may disappear.

Access to much of the funding is reliant somewhat on how/where contracts are held and how IP is owned, licensed and/or distributed so lawyers should be mindful of such factors when assisting their Canadian clients with various agreements.

A mini-industry has developed to help artists and Canadian companies apply and administer some of these funds. Advisors would be well advised to consult with such companies prior to executing agreements to access a working knowledge of how these various programs work in practice. Full access to these programs requires detailed advance planning and an intimate understanding of the various administrative requirements of the various funds.

Historically, Canadian independent record companies have been the largest beneficiary of these programs; providing the foundational support for indie powerhouses like Nettwerk, 604, Dine Alone, Arts & Crafts and Last Gang Records but in some circumstances major labels in Canada have also been able to access these monies as well. Artist managers, music publishers and live promoters also tap into some of the programs outlined above building one of the strongest music communities on the planet.

Canadian recording artists and their counsel would be most well-served to familiarize themselves with all that is on offer.

About the author: Chris Taylor is an entertainment lawyer and the founder of Canada's leading entertainment law firm, Taylor Klein Oballa LLP (www.tkolawyers.com). The firm has played a pivotal role in introducing Canadian talent to the world representing Grammy Award winners (Drake, Nelly Furtado, Avril Lavigne), Hall of Fame talent (Gordon Lightfoot, Triumph, Tom Cochrane) and world-class songwriters and producers (Cirkut, DVBBS, Jenson Vaughan). Assistance with this article provided by law student, Adrian Barnardo.

⁵⁷ see note 22.

Canadian Government Funding and Legal Issues



Main Sources of Funding:

(1) FACTOR – Foundation to Assist Canadian Talent On Record

(2) Radio Starmaker

(3) MuchFACT

(4) MEC – Music Entrepreneurs Component

(5) OMF – Ontario Music Fund

(1) FACTOR – Foundation to Assist Canadian Talent on Record

a. PURPOSE:

For artists looking to record a demo, full length sound recording, market and promote an already existing album or showcase and tour domestically and internationally.

b. PROGRAMS:

Include – Demo Recording Program, Live Performance Program, and Comprehensive Artist Program (which is designed to contribute towards the cost of acquiring, producing and marketing a full-length album).

c. ELIGIBILITY:

Limited to Canadian citizens, permanent residents, and Canadian companies and corporations.

d. LEGALITIES:

- (1) a Canadian artist who has not licensed the sound recording to another party; or
- (2) a Canadian Record Label that has signed the artist, or has licensed the sound recording, or has an option to license the sound recording. NOT International Major labels.

(2) Radio Starmaker

a. PURPOSE:

Canadian Association of Broadcasters initiative to make a difference to the careers of Canadian artists by providing investment where the artist has established a proven track record and Artist's label is making a Significant Investment in their future career.

b. PROGRAMS:

Funding for domestic and international marketing and touring.

c. ELIGIBILITY:

A minimum track record and expenditure verified. The fund is to “pour gas on the fire” – not get the fire started.

d. LEGALITIES:

Artist does not qualify for funding if the royalties and revenues from the Canadian sales of your records are payable to a corporation outside of Canada.

(3) MuchFACT

a. PURPOSE:

Provides funding to produce viral videos, music videos, Electronic Press Kits and build websites for Canadian artists, independent labels and management companies.

b. PROGRAMS:

Digital Tools (\$5000); Online Music Video (\$10,000); Music Video (\$30,000); Content Package (\$50,000).

c. ELIGIBILITY:

Mainstream genres (Pop, alternative, urban) not Classical, Jazz, Country, Children's music, World music or French-language. Adjudicated by a jury 6 times a year. Marketing plan.

d. LEGALITIES:

Ownership/control of the master by Canadian citizens, landed immigrants, or Canadian owned companies. Use Canadian production companies.

(4) MEC – Music Entrepreneurs Component

a. PURPOSE:

Assist Canadian sound recording firms providing up to \$550,000 annually based on track record of success.

b. PROGRAMS:

For recording companies mainly but publishers and managers also have access to smaller funds. Allows company flexibility on how/where expended.

c. ELIGIBILITY:

Stringent eligibility requirements with minimum sales thresholds and 5 years history. MEC Labels are some of the strongest Canadian independent labels.

d. LEGALITIES:

Oriented to independent record labels. Artist benefit indirectly. Recipients published annually.

(5) OMF – Ontario Music Fund

a. PURPOSE:

Strengthen and stimulate growth in Ontario's music companies.

b. PROGRAMS:

Covers many sectors: recording, publishing, management, live promoters, booking agents.

c. ELIGIBILITY:

Ontario-based music companies and organizations. Must show a plan and confirm wherewithal to provide some of the funding.

d. LEGALITIES:

Many Ontario artists take advantage of OMF programs directly. No double-dipping though with other programs (i.e. other OMF recipients, FACTOR, MEC, etc.).

General

a. Third party assistance:

- Filling out applications – adherence to the rules and timelines;
- Familiarity with the players

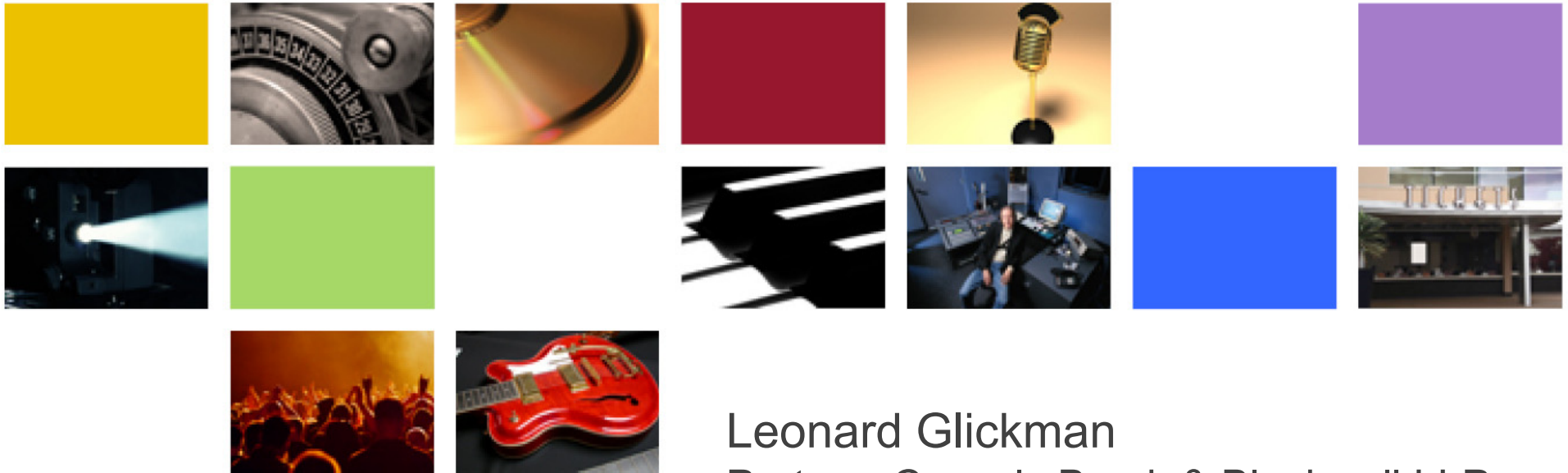
b. Independent label and artist success stories:

- Nettwerk Music Group – Sarah McLachlan
- 604 Records – Carly Rae Jepsen
- Last Gang Records – Metric

Canadian Government Funding and Legal Issues



Canada v. US: Differences in Copyright Law



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Things Have Changed



- In 2012, the Canadian Copyright Act was amended by Bill C-11, the Copyright Modernization Act. Among other things, the *Act as amended includes a new “making available” right for works, performances, and sound recordings, along with new exceptions for private copying, time shifting, educational uses, backup copies, and user-generated content. It also includes legal protection for digital rights management systems and new opportunities for enforcement against sites and services that enable online copyright infringement.*



Compliance, At Long Last

- *The Copyright Modernization Act* was designed to bring Canada's *Copyright Act* into compliance with the WIPO Copyright Treaty and the *WIPO Performances and Phonograms Treaty*.
- Canada ratified the WIPO treaties in May 2014; they came into force in August 2014.

Works Made in the Course of Employment

- The Canadian Copyright Act provides that, where a work is made by an employee in the course of his or her employment, the employer is the first owner of copyright in that work, absent any agreement to the contrary. This is narrower than the US “work made for hire” doctrine: it doesn’t deem the employer to be the author and doesn’t apply to works commissioned from freelancers. Securing ownership of a commissioned work requires a written assignment.

A Two-Step Test for Fair Dealing

- To qualify as fair dealing - the Canadian equivalent of fair use - a use must satisfy a two-step test.
- First, it must be for one of the specific allowable purposes set out in the Copyright Act: research, private study, parody, satire, education, criticism, review, or news reporting. Second, it must be qualitatively “fair” - a case-by-case inquiry that depends on the purpose of the dealing, the character of the dealing, the amount of the dealing, alternatives to the dealing, the nature of the work, and the effect of the dealing on the market for the work.

Works Available Through the Internet

- Another new exception in the Copyright Act allows educational institutions to reproduce, communicate, or perform, for educational or training purposes, any work or other subject matter that is “available through the Internet.” Although appropriate credit must be given, no licence or compensation is required. However, the exception does not apply if the material is protected by a technological protection measure, or if a clearly visible notice (not merely the © symbol) is displayed on the material or the website on which it is posted, or if the user knows or should have known that the material was made available without the consent of the copyright owner.

A Notice-and-Notice Requirement for ISPs, Hosting Services, and Search Engines

- The Copyright Modernization Act also introduced a “notice and notice” regime that came into force in January 2015 and requires an ISP, hosting service, or search engine that receives a notice of claimed infringement from a rightsholder to forward that notice to the alleged infringer and retain records that allow the identity of that person to be determined. Unlike many other jurisdictions, Canada has no takedown requirement or “graduated response” system.

A Notice-and-Notice Requirement for ISPs, Hosting Services, and Search Engines – Cont'd.

- However, copyright owners can send notices to information location tools, requiring that any cached copies of infringing materials be removed within 30 days of notice, so long as the infringing material has actually been removed from the website at issue.



Canadians Can Copy

- Under a new exception added to the Copyright Act in 2012, an individual may make a copy of legally-acquired material, to be used for the individual's own private purposes, as long as the source copy is non-infringing, the user owns or is authorized to use the medium or device on which the copy is made, and no TPM is circumvented to make the copy.

Canadians Can Copy – Cont'd

- Another new exception confirms that an individual is also free to make a single copy of a legally-received program at the time it is broadcast, as long as the program is not received from an on-demand service, the individual keeps the copy no longer than reasonably necessary to watch or listen to it later, the individual does not give the copy away and uses it only for his or her own private purposes, and no TPM is circumvented to make the copy.

It's a Matter of Time.

- Generally, the term of copyright in Canada is currently the life of the author plus 50 years. In the case of a work of joint authorship, the 50 years begins to run after the death of the last surviving author. However, if the author was the first owner of copyright, any assignment or interest granted during the author's lifetime expires 25 years after his or her death and the remaining 25 years of copyright revert automatically to the author's estate.
- As part of the Trans Pacific Partnership, Canada committed to extend the term of copyright to life of the author plus 70 years.

Moral Rights



- In Canada, authors and performers enjoy the moral rights of integrity, association, and attribution in their works and performances. These rights entitle them to prevent their work product from being distorted, mutilated, or otherwise modified to the prejudice of their honour or reputation; to be associated with it by name or by a pseudonym (or to remain anonymous if they prefer); and to control the use of it in association with a product, service, cause, or institution. While moral rights may not be assigned, they may be waived either in whole or in part, but the waiver must be express – it will not be implied by assigning or licensing the copyright itself.

Registration Not Required — But It Helps.

- Copyright registration is not mandatory, nor is it a precondition for any remedy in case of infringement. However, registration does confer an important procedural advantage: a presumption that copyright subsists in the work and is owned by the certificate holder. Assignments and licences may also be registered, creating similar evidentiary presumptions.

Copyright and the Government



- The Crown is granted copyright in any work that has been “prepared or published by or under the direction or control” of the government — a broad grant that extends well beyond works created by government employees. However, this right comes with responsibilities; the Federal Court of Appeal has confirmed that the government is not exempt from the Copyright Act and therefore can also be liable for copyright infringement.



Canada Takes Care of its Orphans

- The Copyright Board of Canada is authorized to issue licences for the use of published works and other subject matter where the copyright owner cannot be located. The applicant must have first made “reasonable efforts” to locate the copyright owner. Copyright owners have five years from the expiry of a licence to claim royalties, which are often paid to a collective society designated by the Board.

ISP User Data: To Disclose or Not to Disclose?

- In a recent case, the Federal Court ordered a non-party ISP to provide data about its subscribers to the plaintiff, who had established a bona fide claim that the subscribers had illegally shared its films on the Internet. However, the court imposed safeguards to protect the interests of the ISP and its subscribers, including a requirement that any demand letter issued by the plaintiff be approved by the court and state clearly that no recipient has yet been found liable for copyright infringement. The plaintiff was also required to pay the reasonable costs of the ISP before the subscriber information was provided.

Holistic, Unfiltered Substantial Copying

- *In Cinar Corporation v. Robinson*, the Supreme Court of Canada adopted a qualitative, “holistic approach to determine whether a substantial part of a work has been copied. The approach focuses on the cumulative effect of the copied features as a whole. The court rejected the “abstraction-filtration-comparison” framework sometimes used by US courts, finding that “many types of works do not lend themselves to a reductive analysis.”

Infringers, Prepare to Disgorge



- A person who infringes copyright may be liable to disgorge part of its profits to the copyright owner. According to the Supreme Court of Canada, this may include the profits generated by non-infringing components of an infringing work. In *Cinar v. Robinson*, the appellant production companies were required to disgorge profits generated not only by an infringing television show but also by its musical soundtrack, which did not itself infringe copyright. The soundtrack had no standalone value; it earned profits only as an accessory to the infringing series.

Originality is No Sweat (of the Brow):

- *In CCH Canadian Ltd. v Law Society of Upper Canada*, the Supreme Court of Canada held that in order for a work to be “original” for copyright purposes it must originate from an author, must not simply be a copy, and must be the product of the author’s skill and judgment. The skill and judgment required to produce the work cannot be so trivial that it is a purely mechanical exercise – it requires more than mere “sweat of the brow.”

New Limits on Statutory Damages:

- *The Copyright Act* allows copyright owners to elect to recover statutory damages instead of general damages and/or an accounting of profits. However, since its amendment in November 2012, the Act distinguishes between commercial infringement and non-commercial infringement. If the infringement is for commercial purposes, statutory damages may be anywhere from \$500 to \$20,000 per work infringed. If they are for non-commercial purposes, however, statutory damages are limited to between \$100 and \$5,000 for all works at issue in the proceeding.



New Limits on Statutory Damages: Cont'd.

- In practice, Canadian courts sometimes use their discretion to award statutory damages below the applicable minimum in order to arrive at a result that seems proportionate to the infringement.

Concurrent Protection for Qualifying Works:

- Canadian copyright law does not exist in an intellectual property law vacuum. In *Euro-Excellence Inc. v Kraft Canada Inc.*, the majority of the Supreme Court of Canada affirmed the existence of concurrent copyright and trademark rights. So long as a trademarked work satisfies all the requirements for copyright protection, it may also benefit from copyright protection. Consequently, when bringing an action for trademark infringement, plaintiffs often plead copyright infringement as well.

No Common Law Copyright:

- The Supreme Court of Canada has long acknowledged that Canadian copyright law is purely a creature of federal statute. Unlike some other jurisdictions, copyright protection stems exclusively from the Copyright Act. Therefore, there is no common law claim for copyright infringement — unlike trademark law, for example, where some common law rights do exist alongside the available statutory protection.

The Famous Copyright Pentalogy



- On July 12, 2012, the Supreme Court of Canada simultaneously released five copyright decisions
- *Entertainment Software Assoc v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34. Issue: Is the download of a file containing a musical work a “communication of the work to the public by telecommunication”?
- *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35. Issue: Are downloads and streams provided by online music services a communication “to the public”?

The Famous Copyright Pentalogy – Cont'd.

- Society of Composers, Authors and Music Publishers of Canada v. Bell Canada, 2012 SCC 36. Issue: Does providing consumers with short musical previews constitute fair dealing for the purpose of research?
- Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright), 2012 SCC 37. Issue: Does photocopying of materials by teachers constitute fair dealing for the purpose of research or private study?

The Famous Copyright Pentalogy – Cont'd.

- Re:Sound v. Motion Picture Theatre Associations of Canada, 2012 SCC 38. Issue: Are performers or makers of published sound recordings entitled to remuneration when their sound recordings are used in movie and TV soundtracks?

Canada v. US: Differences in Copyright Law

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