March 6, 2015

Claude Majeau
Vice Chairman and CEO
Copyright Board of Canada
56 Sparks Street, Suite 800
Ottawa, ON K1A 0C9

Re: Comments of the Canadian Association of Broadcasters on the *Discussion Paper on Two Procedural Issues: Identification and Disclosure of Issues to be Addressed During a Tariff Proceeding and Interrogatory Process*

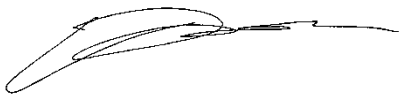
Dear Mr. Majeau:

The Canadian Association of Broadcasters (CAB) welcomes the opportunity to comment on the February 4, 2015 *Discussion Paper on Two Procedural Issues: Identification and Disclosure of Issues to be Addressed During a Tariff Proceeding and Interrogatory Process* (Discussion Paper). The CAB applauds the Copyright Board for undertaking this review of its procedures, and hopes that solutions can be developed to ensure the Board can continue in its role of providing a valuable service to both rightsholders and users.

The CAB understands and appreciates that this Discussion Paper is limited to a subset of issues that were considered by the Committee at this time, but implores the Board to continue to examine other issues that oftentimes lead to barriers to business in Canada.

The following are the submissions of the CAB in response to the Board's Discussion Paper. For ease of consideration, we have adopted the Board's categorization of issues and organized this submission to reflect them. The recommendations of the Board have been reproduced here for ease of reference. We look forward to continuing the conversation.

Sincerely,



Gabriel van Loon

II- IDENTIFICATION AND DISCLOSURE OF ISSUES TO BE ADDRESSED DURING A TARIFF PROCEEDING

A. Publicizing proposed tariffs

Recommendations

1. The Board, with the cooperation of collectives and users' representatives, should develop and implement new ways of notifying current and potential users of the filing of proposed tariffs. Electronic notice should be favoured over other forms of communication; paper notification, including letters and newspaper notices, should be used exceptionally or not at all.

2. New forms of notification should be implemented progressively, on a "best efforts" basis, according to what is technically feasible, financially reasonable and legally permissible. More should be done as technology makes more direct, personal forms of notice easier and more cost effective.

3. Consideration should be given to a variety of options (posting notice of proposed tariffs on a collective's website; notification by a collective to all known users; emailing by a trade association to its members) so as to select the form of communication which is most efficient for each user type in each situation. In this regard, the Board should attempt to identify trusted third parties through whom more loosely organized user groups could be notified that proposed tariffs have been filed.

4. The Board, with the cooperation of collectives and users' representatives, should assess the limits, if any, that anti-spam or other similar legislation may impose on communicating electronically with users about a proposed tariff. These limits should be taken into consideration in selecting additional means of publicizing proposed tariffs.

5. The Board should consider installing an RSS or other form of feed or information syndication (e.g. a Twitter account) allowing anyone to request in advance to be notified of the filing of proposed tariffs; collectives should be asked to consider doing the same or posting on their web sites links to the Board's own notices in this regard.

The CAB generally agrees with the Board's comments and recommendations regarding improvements to the process of publicizing proposed tariffs.

In particular, the CAB agrees with the Board that electronic notice should be favoured over other forms of communication, and that paper notices should be used exceptionally or not at all. However, while electronic means are far more effective than paper notification, they can also get lost in the clutter. It will be important for the Board and the parties involved to consider how best to ensure potential licensees receive the notices in a timely and effective manner. The Board's suggestion to request notification by a collective to all known users is a good idea. As the Board notes, this reflects the reality

that the collectives are the stakeholders who are best positioned to manage this task as they know their licensees. Complementing this approach with publication on the Board's website and accompanying email from the Board to known users, from the CAB's perspective, would help address the need for better publication of proposed tariffs.

The idea of implementing a Twitter feed may make sense but does not help potential licensees that do not have any pre-existing reason to subscribe to such a feed. Outreach would be required to ensure this method of communication was reaching its entire intended audience. Members of the CAB have a relatively sophisticated means of monitoring and assessing new and evolving tariff liability as compared to other industries and entities that do not have as significant exposure to copyright tariffs. The CAB welcomes any initiative that helps publicize the existence of new tariffs to potential licensees and to members of the public who may be interested.

One issue that is not addressed in this section of the Discussion Paper is the need to better describe proposed tariffs and the process required to object to them, if applicable, in terms that can be understood by potential licensees. We will address this in more detail in our comments relating to the next issue.

B. Early explanation by collectives of the content of a proposed tariff

Recommendations

6. A collective should be required to provide, with the proposed tariff, information about the content of a tariff of first impression and of the nature, purpose and ambit of any proposed material change to an existing tariff. Some of the information could be published with the proposed tariff in the Canada Gazette; all of the information should be posted on the Board's web site. This requirement should be enforced through "soft" compliance measures.

7. Information provided with the proposed tariff should not bind the collective. The time at which a collective commits to a course of action should remain when it files its statement of case.

8. Subject to the considerations raised in Part II-A above, collectives should be asked to notify existing users when a collective asks for significant changes to an existing tariff. Any such notice should also indicate how a user may object to the tariff.

The CAB has long considered this to be a significant issue. The Discussion Paper provides recommendations that do not go far enough to limit prejudice on prospective tariff licensees or to provide sufficient information to the public. It is clear from the Board's description of the discussion relating to this issue that there was significant divergence in opinion between collectives and user representatives on the committee. The Board suggests a compromise which clearly favours the collectives and lacks teeth.

We fail to understand the Board's reluctance in implementing stronger disclosure requirements for collectives when tabling tariff proposals. We consider any related burden on the collectives to be necessary given the fact that collectives exist solely to seek and administer tariffs and have years to prepare filings in support of such proposals. In addition, any increased burden on the collectives arising from stronger disclosure requirements is fully justified when considered against the prejudice imposed in the following circumstances which are currently routine experience for prospective licensees:

- Proposed tariff language is unclear and targeted user population is not explicitly delineated.
- Proposed tariff rate is inordinately high, unjustified and has no realistic expectation of being adopted by the Board.
- Targeted uses are not clearly explained leaving users unsure which category of use (if any) they may engage.

Perhaps some specific illustrations will help clarify the CAB's perspective on this issue:

- Canadian online music use tariffs to date have included many different definitions of interactivity, both within different iterations of the same tariff (i.e. over different years) and across different collectives (i.e. how SOCAN defines interactivity is different than Re:Sound which is different than CSI).
- Re:Sound Tariff 8 was initially proposed at a rate of 45% of revenues, which could not have reasonably been expected to be certified by the Board. This extremely high rate was not justified in any way that would have enabled potential objectors to determine the feasibility of entering the Canadian market, and therefore the proposal had a chilling effect on the Canadian webcasting industry.
- Various iterations of SOCAN Tariff 22 proposals have included changes in the name and description of activity in each category, leaving users unsure whether or to what extent their activities were captured under one or more categories of the tariff in which years.

In all cases, if the collectives could be asked by the Board to provide some indication of the types of services (i.e. real examples that they intend to target under a particular definition of use) and some explanation of why a high rate was being proposed, potential objectors would be better positioned to develop clear and rational objections. If more information is provided, the public would be better informed as to the potential impacts of such tariff proposals, which in many cases can impact the public either directly or indirectly.

The tariff proposal process should be viewed as the first step in an adversarial process and should attract a slightly greater degree of formality than it currently bears. We agree that it would be unfair for the additional information provided alongside the proposed tariff to be strictly binding, but it should, at a minimum, meet the following requirements:

- Provide a clear picture of the intended user for the proposed tariff.
- Provide clear delineation of targeted uses and associated rates.
- Provide some broad justification or underlying rationale for the proposed rates to the extent they vary from pre-existing rates.

The last requirement seeks to remedy an ongoing injustice perpetrated by collective participants before the Copyright Board. There have been many instances in the past of collectives seeking what prove to be unjustified increases to existing tariffs or excessive rates in proposed tariffs as a bargaining tactic or as a means to set the starting rate at a maximum level. By seeking early disclosure relating to rate proposals, the Board would be engaging in the equivalent of a leave granting process. Not leave to propose a tariff, but leave to propose increases or high rates. It is entirely reasonable to expect a collective to justify its rates up front in a manner consistent with the economic model upon which such rates were developed.

It may be that this stage of the process would require additional information to be provided by the collectives in the interests of enabling objectors to sufficiently understand the case to be met, and would therefore represent a more onerous burden for the collectives than for the objectors. However, this is balanced against the interrogatory stage of the process which is inherently more onerous for the objectors than for the collectives, both in terms of the number of questions asked and also the type and volume of information required to be provided. By its very nature, the interrogatory process is designed to ensure parties have access to the information required to understand the relevant facts of the other party; however, past practice has shown that the collectives rarely have "factual" information that is relevant to helping an objector understand the case, and virtually all questions relating to how and why a tariff was proposed are shielded by litigation privilege. Requiring the collectives to provide justification and rationale for their rates, terms and tariff models at the outset would introduce some balance to the overall information disclosure requirements of the tariff hearing process, which is currently skewed against the objectors.

The proposed tariff itself is the legally binding and actionable instrument to which users must object. The supplementary information described above forms part of a legitimate disclosure that can allow the collectives and Board to determine who will be impacted and therefore who should be notified. In this way, additional clarification at the proposal stage can assist the Board with the above-noted problem of ensuring proper publication of proposed tariffs to potential licensees and other affected parties.

C. Early explanation by objectors of the purpose of their objection

Recommendations

9. Objectors should be required to state in their objection the reasons therefor, either in their notice of objection or as soon as possible thereafter. They could be encouraged to suggest, to the extent possible, alternatives to the terms they find objectionable. This requirement should be enforced through "soft" compliance measures.

10. Reasons provided pursuant to Recommendation 9 should not be binding on the objector. The time at which an objector commits to a course of action should remain when it files its statement of case.

The CAB generally agrees with the Board's conclusions on this point. In particular, the CAB agrees with the following statement:

> Proposed tariffs are filed at most once a year; a collective can use the intervening time to structure a justification for its next filing. Users must file objections within 60 days of a proposed tariff being published in the Canada Gazette, and may not hear about the proposed tariff until later on. They learn of any changes a collective may propose to a tariff only once it is published; they cannot anticipate them. Given the time available, an objector is much less likely than a collective to obtain significant expert input before filing an objection.

To the extent the Board adopts the CAB's recommendation in respect of the collectives' obligation as raised above, the CAB is willing to provide more detailed objections as described in the Discussion Paper, that is, at a later date and with a lower expectation than that placed on the collectives due to the "fundamental difference in the dynamics of a tariff-setting proceeding as they affect collectives and objectors." We note that a more detailed objection can only be prepared if the above-referenced disclosure requirements are met; without such disclosure and early justification of tariff proposals, the objectors have no basis upon which to develop more detailed objections.

D. The collective's reply

Recommendation

11. A collective should be asked to provide as detailed a reply as possible to the objections it receives, on the same "without prejudice" basis as in Part II-B above. The same or similar "soft" measures outlined in Part II-B above should be used to enforce compliance with this requirement.

The CAB agrees with the Board's conclusions on this point.

E. Sharing tariff explanations, objections and replies amongst participants and with the public

Recommendations

12. As a rule, and subject to any requirement of the Privacy Act, all information filed with the Board pursuant to Parts II-B to D above should be supplied to all participants.

13. All information filed with the Board pursuant to Parts II-B to D above by anyone other than individuals acting on their own behalf also should be posted on the Internet.

14. The Board should identify the ways in which it can deal with privacy issues before making available to the public, on the Internet or otherwise, objections filed by individuals acting on their own behalf, with a view to providing the widest possible public access to information filed with the Board.

The CAB agrees with the Board's conclusions on this point, with one important suggestion. In cases where it is not blatantly obvious that no prejudice could arise due to inappropriate disclosure of a particular submission via dissemination on the Internet, the Board should contact participants and confirm their acceptance of publication.

F. Requiring further explanations for a proposed tariff or an objection thereto

Recommendation

15. Any request for information in addition to the information filed pursuant to Part II-B, II-C or II-D above should be dealt with on a case-by-case basis.

The CAB agrees with the Board's conclusions on this point.

III- INTERROGATORY PROCESS

The CAB is of the view that ensuring fairness and maximizing efficiency should be the two primary drivers for reform of the interrogatory process. To date, the interrogatory process has proved to be disproportionately burdensome for objectors, to the point of acting as a complete bar to participation for some parties. Potential objectors to a tariff proceeding, no matter the size and scale of their operations, must always weigh the potential benefit of participating in a Board proceeding against the inevitable burden associated with, and the highly invasive nature of the interrogatory process.

From the CAB's perspective, in addition to the points raised by the Board in the Discussion Paper, there is at least one fundamental problem with the process that should be addressed, and that is the requirement for parties to solicit and produce responses from their underlying constituents. Trade associations like the CAB are currently required to provide answers from their underlying constituents, where collectives generally are not. If the CAB were to respond to all the interrogatory questions

without seeking information from its underlying membership, the responses would be significantly less informative for the collectives. Similarly, when the collectives are not required to seek information from the underlying rightsholders, the responses provided are generally not helpful for the objectors. Both parties should be treated the same way, in that both sides should be required to produce information from their underlying constituents, in order to ensure full disclosure.

A. Is there a need for any discovery before the Board?

Recommendation

16. Parties should continue to be allowed to seek information from each other in advance of hearings.

The CAB agrees with the Board's conclusions on this point.

B. Are interrogatories the appropriate form of discovery before the Board?

Recommendation

17. Interrogatories should remain the preferred form of discovery before the Board.

The CAB agrees with the Board's conclusions on this point.

C. Should interrogatories be exchanged and answered before or after issues are identified?

Recommendation

18. As a rule, interrogatories should be exchanged, and the responses thereto provided, after a collective has replied to objections pursuant to s. 68(1)(a) of the Act but before any party is required to file its statement of case.

The CAB mostly agrees with the Board's conclusions on this point. We request that the Board allow for some flexibility, subject to fair procedure, when requiring preliminary statements of issue. In such cases, preliminary statements are highly useful as means of focusing parties but should be adaptable if unexpected issues arise or assumed facts change as the case evolves.

D. Should the Board participate in the interrogatory process before the date set to file objections to interrogatories and if so, how? How early should the Board provide case-specific guidance?

Recommendations

19. Parties should remain free to pursue the interrogatories they wish.

20. The Board should convene a preparatory meeting between the parties and the Board after the collective has replied to objections and before interrogatories are exchanged. The purpose of the meeting would be to identify tentatively what the relevant issues appear to be and to discuss what information may be required in order to address those issues, with a view to helping the parties exchange interrogatories that are better focused and more relevant. Minutes of the meeting should be prepared and circulated.

The CAB agrees with the Board's conclusions on this point.

E. When should the Board rule on the relevance of a question? When, if at all, should it rule that a question, while relevant, concerns an issue that is either uninteresting or unhelpful?

Recommendations

21. As a rule, the Board should rule on the relevance of an interrogatory only when it deals with objections to interrogatories.

22. The Board should exercise caution before advising parties that it does not wish to hear relevant evidence that the Board considers uninteresting or unhelpful. Greater caution should be exercised if a ruling is being contemplated early in the process.

The CAB agrees with the Board's conclusions on this point.

F. In instances involving more than one collective or objector, should interrogatories be consolidated? By whom?

Recommendations

23. The Directive on Procedure should encourage, but not require, parties to consolidate their interrogatories in a single set, irrespective of the number of parties to whom the questions are being addressed.

24. A person being asked similar questions from two or more other parties should be allowed to apply to the Board for an order requiring these parties to consolidate their interrogatories.

25. As a rule, the Board should not consolidate interrogatories.

The CAB disagrees with the Board's recommendations on this point. For an entity such as the CAB and its member broadcasters, any measures that could streamline the interrogatory process are essential to the conduct of an efficient hearing process. Recall that in the last Commercial Radio Tariff Proceeding, the collectives asked a total of over 700 questions and sub-questions of each of the 100 radio broadcasters that were required to respond to interrogatories. This was a gigantic burden for each station requiring the participation of anywhere from 2 to 10 people per station and many days of work for each station.

Without the Board participating to consolidate interrogatories a number of negative consequences occur:

- The number of questions increases;
- Confusion ensues when multiple questions are asked with similar language;
- The response process for individuals working at targeted entities becomes more onerous. Recall that answering interrogatories is not part of the job description for a broadcast employee who may be required to participate in the process;
- Deadlines are less likely to be met;
- Counsel expenses increase due to the additional management associated with a more complex process.

To ensure efficiency and reduce the burden on responding parties, the Board should require that multiple parties asking interrogatories to a given opposite party coordinate and consolidate their interrogatories, as is currently the practice for objectors. In addition, the Board should entitle the recipient to seek relief from the Board for non-compliance.

G. Who should receive a copy of the interrogatories?

Recommendation

26. Subject to the comments about consolidation in Part III-F, above, interrogatories should continue to be exchanged only between the party who asks the question and the party who answers it.

The CAB sees no reason to prevent all parties from receiving a copy of all interrogatories. Doing so would help coordinate the objection and answering process.

H. Objecting to interrogatories

Recommendations

27. A party who is asked a question should continue to be allowed to object to it. The requirement that parties first attempt to resolve the issue should be maintained. The party proposing the interrogatory should continue to be required to explain the relevance of the question. The party being asked the question should be allowed to reply to the explanation.

28. The party who objects to an interrogatory should file with the Board, at the time it files its reply, the information required to deal with the objection.

29. The information required to deal with an objection should be filed in the form of a table that includes a column in which the Board will enter its ruling. Rulings on objections to interrogatories should be issued in that form; as all other rulings of the Board, they should be part of the public record and put on the Board's web site.

The CAB agrees with the Board's conclusions on this point.

I. Who should receive responses to interrogatories?

Recommendation

30. Only the party who asked an interrogatory should receive the response to it, as is currently the case.

The CAB agrees with the Board's conclusions on this point.

J. Dealing with deficient responses to interrogatories

Recommendations

31. A party who asked a question should continue to be allowed to challenge the sufficiency of the response to that question. The requirement that parties first attempt to resolve the issue should be maintained. The party who provided the answer should continue to be required to explain why it considers the response sufficient. The party asking the question should be allowed to reply to these explanations.

32. The person who claims a response is deficient should be the person who files with the Board, at the time it files its reply, the information required to deal with the deficiency claim.

33. The information should be filed in the form of a table that includes a column in which the Board can enter its ruling. Rulings on deficiency claims should be issued in that form; as all other rulings of the Board, they should be part of the public record and put on the Board's web site.

The CAB agrees with the Board's conclusions on this point.

K. Are the principles the Board uses to deal with interrogatories sufficiently clear? Should they be organized and communicated in the form of guidelines? In another form?

Recommendations

34. The Board should pursue the creation of a database of orders of precedential value, including rulings that deal with interrogatories.

35. The Board should consider developing more specific guidelines dealing with the interrogatory process.

The CAB welcomes the creation of an interrogatory decision database and more detailed guidelines relating to the interrogatory process. In addition to providing a searchable list of Board rulings on matters relating to interrogatories, this or a similar database could track the instances of interrogatory questions that are repeatedly asked and not used by the collectives as part of their case. A systematic mechanism by which the Board and the parties can review interrogatories asked/used in proceedings relating to the same or similar tariffs will invariably provide parties with information that can be used to streamline the process.

L. Generating new documents in response to an interrogatory

Recommendation

36. The current principle according to which a responding party provides what it has, in the form it exists, should continue to apply.

The CAB agrees with the Board's conclusions on this point.

M. Should discovery extend to all that may be relevant? Should the Board limit discovery to what it expects to be necessary to arrive at a fair tariff?

Recommendation

37. Where appropriate, the Board should continue to limit what a party must provide in response to an interrogatory to only as much relevant information as is necessary for the Board to arrive at a fair tariff.

The CAB agrees with the Board's conclusions on this point.

N. Should the interrogatory burden vary according to the importance of the amounts at issue? The importance of an objector's stake? The significance of a party's resources?

Recommendation

38. Consideration should be given to how and to what extent the interrogatory process should be tailored to the importance of the amounts at stake as well as the resources of the parties involved.

39. In appropriate instances, the Board may wish to recommend to objectors with limited means that they use the comments provision of the Directive on Procedure to communicate their point of view to the Board.

40. The Board should ensure that the interrogatory burden of any party, including a collective, is not out of proportion with the amounts at stake.

The CAB agrees with the concept of proportionality. The CAB asks that in adopting the principle of proportionality, the Board considers the CAB both as a single point of contact and as a sum of its parts, consisting of a range of different members, including many small broadcasters with only a few employees each. With the type of organizational structure that the CAB necessarily has, it is virtually impossible to adapt to the information overload of a large interrogatory process as compared to the day-to-day requirements of providing support to CAB members on copyright and related legal and

regulatory issues. In theory, it may seem like the CAB would have significant resources to address an industry-wide issue such as responding to interrogatories. However, in reality, the CAB does not have access to a pool of untapped specialized human resources waiting every 2 or 3 years to participate for a short period in a massive interrogatory undertaking for a couple of months.

Thus, applying the principles of proportionality and fairness to the CAB and its members would lead to a few logical outcomes for the Board in any attempt to manage an interrogatory process in a hypothetical forthcoming proceeding:

1. Using the proposed Board interrogatory database, consider which interrogatory questions have been asked in the past and not utilized by the requester of such information. Apply a stricter threshold in determining whether to allow such questions.

2. Take into account all the following factors in determining the "burden" associated with responding to prospective interrogatory questions:

    a. The number of individuals at the targeted entities that would have to participate in the process.
    b. The amount of time required at each targeted entity to respond to some or all questions.
    c. Treating sub-questions as individual questions in assessing total volume of information to be processed.
    d. Viewing the process through the lens of the targeted entity. Are definitions clear? Are questions answerable by a person that is not a copyright lawyer?
    e. The additional time required for counsel to collate and process responses.

3. Afford more time to respond to and process interrogatories in more complex cases. As noted at page 23 of the Discussion Paper, "fairness requires that there must be sufficient evidence before the Board to allow it to arrive at a fair tariff."

O. How should the Board deal with excessive filings of responses to interrogatories with statements of case?

Recommendations

41. Parties should file with their statement of case all the responses to interrogatories on which they expect to rely, and only those responses.

42. Parties should fully correlate the responses they file with their statement of case.

43. The Directive on Procedure should clarify that the extent to which a party is authorized to rely on a response that was not filed with its statement of case during the course of a hearing. However, the Committee was unable to agree on what that extent ought to be.

The CAB agrees with the Board's conclusions on this point.