

April 16, 2015

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

Re: Reply 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 following are the reply comments of the Canadian Association of Broadcasters (CAB) in respect of the March 6 submissions filed on the *Discussion Paper on Two Procedural Issues: Identification and Disclosure of Issues to be Addressed During a Tariff Proceeding and Interrogatory Process* (Discussion Paper).

The following are strictly reply comments to several of the submissions filed and are not meant to replace comments already filed by the CAB in its March 6 submission. Specifically, the CAB replies to the comments of CCC, CMRRA, Music Canada, Re:Sound and SOCAN with respect to the following issues:

1. the objection to a requirement that collectives file justifications for tariff proposals up front; and
2. the suggestion that a fairness standard slows down the process and should be replaced by the application of a marketplace framework for certifying tariffs; and
3. the idea that the Board should not “interfere” in the interrogatory process because doing so would be unduly restrictive for the collectives; and
4. the suggestion that objections to interrogatories be handled via conference call.

The CAB thanks the Copyright Board for the opportunity to make reply comments.

Sincerely,



Gabriel van Loon

I. Objection to up front justification

Each of CCC, CMRRA, Re:Sound and SOCAN (and indirectly, Connect Music Licensing and Music Canada) objects to the recommendation that the collectives be required to provide a justification for their tariff proposals up front. There are several reasons identified by the collectives in objection to this requirement, none of which carries sufficient weight to negate the reason for the requirement in the first place, which is to ensure fairness and transparency, and to introduce some balance to the overall information disclosure requirements of the tariff hearing process, which is currently skewed against prospective objectors.

The primary objection identified by several collectives is that the introduction of such a requirement would impinge on their right to litigation privilege. The CAB's recommendations would not have that effect. Litigation privilege protects the right to withhold litigation strategy from one's opponents. A requirement that a collective explain which activities are being targeted by a proposed tariff, who the intended user is, which rates are tied to which services/activities/users as well as some broad justification or underlying rationale for the proposed rates to the extent they vary from pre-existing rates would not reveal the litigation strategy of the collective. All it would do is ensure the targeted user groups understand the extent to which the proposed tariffs would impact them. The CAB is not asking that the collectives be required to identify strategic considerations or arguments they will make to justify their rate proposals; it is simply asking that sufficient information be provided for a potential user group to understand how and why a tariff applies to their business before they make the decision about whether to object.

In its submission, Re:Sound says that "the only information a potential objector should need in order to decide whether to file an objection is whether the tariff applies to them, what the proposed rates are, and in the case of a renewal of an existing tariff, how the new proposed tariff differs from the certified tariff". The CAB agrees that the first point is crucial – objectors need to know whether a tariff applies to them. In some cases, particularly with respect to online uses, the description of targeted activities in a tariff is not clear and an upfront explanation would provide this information. To Re:Sound's second point – what the proposed rates are – it is insufficient to simply say a tariff is worth 45% of revenue without any justification for where that number comes from. A basic justification that provides some indication of how that number was determined would be helpful. To Re:Sound's third point – how a proposed tariff differs from the certified tariff – again, the CAB agrees this is crucial. However, a simple blackline of the tariff is often insufficient to explain proposed changes in a tariff. In many cases, an explanation upfront could lead to resolution by agreement in advance of a hearing, particularly if proposed changes are minor or administrative in nature. If changes are substantial, an explanation is justified for the same reasons it is justified in an inaugural tariff. A potential user deserves to understand the scope of the case to meet before it decides whether to get involved.

The collectives know who they are targeting and why they are asking for the proposed rate before they propose a tariff. The CAB is asking that the Board require the collectives to shed some light earlier in the process to enable potential objectors to determine their own stake before engaging in a tariff hearing.

II. Fairness standard should be replaced with marketplace framework

Music Canada submits that greater efficiencies could be achieved if the Board abandoned the requirement to set fair tariffs and instead set tariffs based on “market-rate based benchmarks.” This equates to simply asking the Board to accept at the outset the arguments of one side of the case without any regard to the arguments of the other side or any inclination toward ensuring the rates it sets are fair. This argument is also a matter of substantive law and argument and is not a matter of procedure and consequently the CAB objects to any consideration of this issue at this time. Furthermore this suggestion is inconsistent with the mandate of the Copyright Board as set out in the *Copyright Act* which requires the Board to set royalties that are fair and reasonable.¹

III. Board should not interfere in interrogatory process

The collectives argue that the Board should not “interfere” in the interrogatory process by limiting questions or issuing restrictive rulings on relevance, as this may prejudice the evidence “before the parties are afforded the opportunity to properly advocate and present them in context.” The CAB notes that if its suggestions relating to early justification of tariff proposals were adopted, the Board and the parties would be better situated to determine relevance at the interrogatory stage, and the Board would be able to make rulings relating to relevance in context, without having to prejudice anything. The current practice of allowing the collectives to ask an unlimited amount of questions related to every possible aspect of a user’s business cannot be allowed to continue, for the reasons articulated in the CAB’s March 6 submission.

IV. Objections to interrogatories should be handled via conference call

Re:Sound suggests that oral submissions to deal with objections to interrogatories and responses to interrogatories, could be made via conference call with mediation from the Board. The CAB is of the view that while preliminary calls between counsel, as is currently the practice, can be helpful in addressing some objections, a formalized call in the nature of proceedings that the CAB has been involved with would be difficult to carry out in practice and could result in more inefficiencies. This is particularly true for an organization like the CAB which is responding to interrogatories by coordinating with multiple different member companies. A call of the nature described by Re:Sound could take days to complete when dealing with literally thousands of objections. This would be cumbersome and problematic.

¹ *Copyright Act*, R.S.C. 1985 c. C-42 at ss. 66.91, 83(9)