

**Regulations Establishing the Periods Within Which Eligible Authors,  
Eligible Performers and Eligible Makers not Represented by Collective  
Societies Can Claim Private Copying Remuneration**

SOR/2013-143

**REGULATORY IMPACT ANALYSIS STATEMENT<sup>1</sup>**

*(This statement is not part of the Regulations.)*

***Description***

Under the *Copyright Act* (the “Act”), eligible authors, performers and makers (the “eligible rights owners”) have a right to receive remuneration from manufacturers and importers of blank audio recording media in respect of the reproduction for private use of a musical work or a performer’s performance of a musical work embodied in a sound recording, or a sound recording in which a musical work, or a performer’s performance of a musical work, is embodied. This remuneration is collected by a collecting body designated by the Copyright Board (the “Board”) in accordance with a tariff certified by the Board; currently that collecting body is the Canadian Private Copying Collective (“CPC”). The collecting body remits royalties to its member collective societies acting on behalf of eligible rights owners. The collective societies in turn distribute to eligible rights owners their share of the royalties.

Subsection 83(11) of the Act provides that eligible rights owners who do not authorize a collective society to act on their behalf (so-called “orphans”) are entitled to seek payment of the remuneration from the collective society that is designated by the Board.

Subsection 83(13) provides that the Board may establish by regulation the periods, which shall not be less than 12 months, beginning when the applicable tariff ceases to be effective, within which this entitlement must be exercised by orphans. No regulations pursuant to that subsection have ever been made.

***Alternatives***

There are no alternatives. According to the Act, the periods for the exercise of the entitlement can only be set in regulations.

Without such regulations, uncertainty exists as to when an orphan rights owner can no longer seek remuneration from a collective society. As a result, the collecting body must maintain reserves for undetermined periods of time in order to cover the risk of possible claims. This delays the distribution of levies from the collecting body to the member collective societies and, ultimately, to eligible rights owners and even prevents that a final distribution ever be made.

***Benefits and costs***

Once the Regulations are made, the period within which the orphan rights owner can make a claim becomes clear. Once the period within which the entitlement can be exercised has expired, the collecting body will be able to allocate the reserves amongst its member collective societies, who in turn will distribute them to eligible rights owners without having to fear prosecutions from orphans.

Making these Regulations entails no costs for the Board, for the federal public administration or for the eligible rights owners. It may cause a temporary increase in costs for the collecting body and for the collective societies. However, it is anticipated that, in the future, this will reduce

the collecting body's and the collective societies' operating costs as they will be able to proceed to the final allocation of the reserve funds.

The Regulations have no impact on the environment.

The Regulations do not increase the regulatory burden. Instead, they clarify a situation which, absent regulations, remains uncertain and therefore creates difficulties for eligible rights owners as well as for the collecting body and the collective societies.

### **Consultation**

Following the publication of the proposed Regulations in the *Canada Gazette* on January 19, 2013, CPCC submitted a formal letter of comment. Its main concern is with respect to the period within which eligible rights owners must claim their share of royalties in the case of multi-year tariffs. It argues that this period should be linked to the end of any given calendar year in a tariff, and not when it ceases to be effective. According to CPCC, beginning the claim period on the date when an approved tariff ceases to be effective is detrimental to the collecting body, its member collectives and eligible rights owners for the following reasons:

- (a) The Regulations, as proposed, would delay claims to be made by orphans by making them wait until the expiry of a tariff as opposed to the end of the year. Subsection 83(11) determines when the right to be paid the royalties arises whereas subsection 83(13) indicates when it expires;
- (b) The calculation of the claim periods would cause unnecessary difficulty to eligible rights owners because the periods are based on facts that are not generally known to the rights owners;
- (c) The proposed Regulations do not reflect the internal processes used by the collecting body and the collectives to distribute the royalties;
- (d) Uncertainty would be added to the duration of the entitlement to share in the remuneration;
- (e) The proposed Regulations reflect a misunderstanding of tariffs and tariff periods;
- (f) CPCC is required by section 84 of the Act to distribute levies as soon as practicable and the proposed timelines defeat this obligation.

Three of CPCC's member collectives, namely the Society of Composers, Authors and Music Publishers of Canada (SOCAN), the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) and the Re: Sound Music Licensing Company (Re: Sound) also submitted letters of comment, all of which supported the comments of the collecting body. The collective societies represent the known universe of eligible rights owners.

Orphans are necessarily not known and are not represented. It was therefore impossible to consult with them.

The Board believes that the Regulations should be based on the following three principles submitted by CPCC:

- The respective final distributions to eligible rights owners cannot be synchronous, given the varying difficulties in identifying eligibility in each college (authors, performers and makers). Accordingly, the Regulations must allow for the entitlement periods to vary between orphan authors, performers and makers;
- Given the Act's requirement in this regard, it is important for final distribution to occur as soon as practicable after the collecting body has received the levies. Accordingly, where

final distribution is feasible for one rights owners' college, it should not be delayed by the fact that another college is not yet ready for final distribution;

- The first years of distribution take longer than later years due to the time required to implement distribution processes/systems and to compile complete distribution data.

However, the Board cannot agree with CPCC's comments described above for the following reasons:

- CPCC's comment (a): CPCC's practical concerns must heed the language of the Act. Subsection 83(11) determines the existence of the entitlement to remuneration, which is not triggered by a specific act. Paragraph 83(13)(b) is the provision that indicates when the claim can first be made, which is when the approved tariff ceases to be effective.
- CPCC's comment (b): The problem is more theoretical than practical. Information on tariffs and the tariff setting process is readily available on the Board's and CPCC's Web sites. Furthermore, the collecting body's Web site features a detailed chart on the rates applicable for each of the approved tariffs.
- CPCC's comments (c), (d), (e) and (f): Again, CPCC's practical concerns must heed the language of the Act. While it is true that CPCC may have alter its distribution protocols and increase some costs, the eligible rights owner's right to remuneration is nevertheless linked to the tariff's end, and not to the year's end. Similarly, CPCC's obligation to distribute levies "as soon as practicable" must account for the fact that an orphan's entitlement to receive remuneration is linked to the end of the tariff.

Considering the above, the Board has not made any changes to the body of the regulatory text. In the future, however, in order to alleviate some of the costs CPCC perceives to be associated with these Regulations, the Board will consider, on a case-by-case basis, the opportunity to certify single-year tariffs even in instances where multi-year tariffs were heard together. This would allow the parties to still benefit from a lower procedural burden associated with multi-year tariff proceedings while minimizing the burden of these Regulations for CPCC.

### ***Compliance and enforcement***

Compliance and enforcement mechanisms are not required. The Regulations establish a period of entitlement which is self-explanatory.

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<sup>i</sup> Published in the *Canada Gazette* Part II on July 17, 2013.