Fasken Martineau DuMoulin LLP
Barristers and Solicitors
Patent and Trade-mark Agents

Suite 1300
55 Metcalfe Street
Ottawa, Ontario, Canada K1P 6L5

613 236 3882 Telephone
613 230 6423 Facsimile

www.fasken.com

FASKEN MARTINEAU

J. Aidan O'Neill
Direct 613.696.6878
aoneill@fasken.com

April 17, 2015

BY EMAIL

Copyright Board
56 Sparks Street
Suite 800
Ottawa, ON
K1A 0C9

Attention: **Gilles McDougall**
Secretary General to the Board

Dear Gilles,

Re: Discussion Paper on Two Procedural Issues (February 4, 2015)
The Copyright Board's Request for Comments – Reply Submissions

The purpose of this letter is to respond to submissions filed with the Board on March 6, 2015 in response to the Board's request for comments with respect to the Discussion Paper of the Working Committee on the Operations, Procedures and Processes of the Copyright Board dated February 4, 2015.

The Funding of the Board

A number of the parties that have chosen to participate in this public consultation (including Access Copyright, Musicians' Rights Organization Canada ("MROC") and Re:Sound) have properly pointed out that the Board must be provided with the necessary human and financial resources if it is to fulfil its statutory mandate under the *Copyright Act* and issue its tariff decisions within a reasonable timeframe – which most would argue is currently not the case.

Access Copyright is absolutely correct when it states that "[A]ny changes to the Board's processes and procedures will only achieve the desired outcomes of improved efficiency and productivity if the Board has sufficient resources and staff to implement these changes".

While this issue obviously lies beyond the direct control of the Board, unless the Board is adequately funded by the federal government, none of the procedural changes proposed in the Discussion Paper can be expected to truly contribute to resolving the systemic problems relating to its ability to certify the various tariff applications that it receives within an acceptable amount of time.

The fact that the Board often cannot do this is extremely prejudicial to the interests of copyright collectives and users alike, and undermines the Board's credibility among its various stakeholder groups. Dealing with this issue, as well as the appointment of a new Board Chairman (since the term of the former Chairman, Justice William J. Vancise, expired in May, 2014 — almost a year ago), should be a top priority for the federal government.

The Filing of a Statement of Issues

Access Copyright has suggested that, in lieu of a right of reply provided to the party that has objected to an interrogatory (Recommendation 27), each party should be required to "file a statement of issues prior to filing interrogatories". Although the filing of such a statement of issues should not necessarily replace the recommended right of reply, Access Copyright is correct that such a statement would help "focus the issues early on in tariff proceedings". A statement of issues could also be a helpful follow-up to the proposed preliminary meeting with the Board described in Recommendation 20.

Civil Adversarial Model

In its submission, referring to a footnote in the Discussion Paper, Access Copyright has suggested that "a more comprehensive adoption of the civil adversarial model would improve the efficiency and increase the predictability and transparency of tariff proceedings." Access Copyright has then suggested that the introduction of "more rules into the [Board's hearing] process could assist all parties ..." This being said, Access Copyright does not attempt to describe what these proposed rules may be, or explain how the adoption of additional rules could possibly contribute to the overall goal of the Discussion Paper, which is the streamlining of the Board's existing procedures.

In response to Access Copyright's suggestion, one can only note that it is far too vague to represent a meaningful contribution to the current public consultation process with respect to the recommendations set out in the Discussion Paper. Furthermore, the Board's current procedures must be "lightened" if the Board's hearing process is ever to become more efficient and productive, not weighed down with the addition of new — and unexplained — procedural requirements. In this regard, Access Copyright's suggestion on this

point runs completely contrary to the expressed purpose of the ongoing review of the Board's hearing process and would be more compatible with the operations of a civil court, rather than those of an administrative tribunal, such as the Board, which is intended to have significant flexibility in terms of applying its procedures on a case-by-case basis as circumstances require. In a nutshell, a tribunal like the Board is not intended to be "rule bound", which is the result that Access Copyright's suggestion, if implemented, would inevitably produce.

The Early Explanation of a Proposed Tariff

The Copyright Collective of Canada ("CCC") and Re:Sound have both objected to Recommendation 6 of the Discussion Paper, which would require a collective to provide, with its 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". CCC and Re:Sound objected to being required to disclose any of this information on the basis that a party is entitled to prepare its case in private as a matter of litigation privilege.

Based on their submissions, these two collectives appear to believe that Recommendation 6 would require them to disclose their confidential strategy and arguments in support of their proposed tariffs, which is certainly not the case. Instead, this recommendation seeks only sufficient information relating to a proposed tariff application so that potential users can understand whether they would be affected by the scope of the tariff — which has been a chronic problem in the past — and can have an understanding as to the basis upon which the tariff and the proposed rates are derived. This information is crucial to the decision as to whether users should object to a particular tariff application, or pursue their objections before the Board.

The information sought by Recommendation 6 is clearly not so intrusive that it would trample on a party's right to prepare its case in private and thereby impinge on its litigation privilege. To this extent, the arguments being advanced by CCC and Re:Sound relative to this recommendation should not be taken seriously.

There are many compelling reasons why the collectives should provide an explanation of their various tariff proposals at the time they are filed with the Board. For example, such a requirement would encourage some of the different collectives to give serious thought to the underlying rationale for their proposed tariffs rather than simply following the oft-used practice of filing obviously unjustifiable and inflated tariff rates with the Board that can later be "dialed-back" pursuant to the *ultra petita* rule.

As things currently stand, the collectives can request completely unreasonable tariff rates to which copyright users are forced to respond in a vacuum as to the true basis of the proposals. This makes a mockery of the Board's hearing process as the rates often proposed by several of the collectives can be entirely disconnected from any reasonable expectation of ever being approved by the Board. As such, in many cases, they appear to be simply used as a "placeholder" in order to comply with the technical requirements of a collective's tariff application.

It is extremely ironic that, of all the collectives, Re:Sound would argue before the Board that it would only cause confusion for users to be provided with an explanation of the underlying rationale for a tariff. This is the same collective that, in the context of the *Re:Sound Semi-Interactive Webcasting Tariff, 2011-2012*, as published in the Supplement to the *Canada Gazette*, Part I, on July 24, 2010, proposed royalty rates of 30% and 45% of the gross revenues of semi-interactive webcasting services, the higher rate applying to sites or services that offered semi-interactive communications "for reception by cellular phones or other personal communication devices". This was, of course, in addition to the tariff rates that were payable to SOCAN in respect of such services.

In these circumstances, any "confusion" that may have been caused to users was likely the direct result of their failure to understand the basis upon which such proposed rates were being pursued by Re:Sound. In such a situation, an explanation from Re:Sound, even a simple one, relating to the thinking and justification behind its proposed 30% and 45% royalty rates would undoubtedly have been helpful to users and would have focused the discussion between Re:Sound and potential objectors.

In any case, the Discussion Paper is clear that any explanation of a proposed tariff pursuant to Recommendation 6 would be on a "without prejudice" basis and that the requirement would be subject to "soft" compliance measures. As such, the concerns raised by CCC and Re:Sound in their submissions appear to be highly exaggerated and not directly applicable to the recommendation made in the Discussion Paper.

Finally, these concerns do not seem to be equally shared by Access Copyright, CMRRA, or SOCAN. For example, CMRRA, while recognizing the issue of litigation privilege, also writes that "[T]here is a real and substantial benefit to having a collective provide a general explanation of the scope of a proposed tariff ..." For its part, SOCAN writes that it "agrees with the Board's recommendation that collectives be required to provide a general explanation of the tariffs they file".

Music Canada and Market Based Benchmarks

In its submission, Music Canada, without commenting on any of the 43 specific recommendations made in the Discussion Paper — which was the entire purpose of the Board's public consultation — has made a number of unrelated comments with respect to the timing of the Board's decisions, as well as to its decision-making process.

This includes criticism of the economic basis upon which the Board reaches its tariff decisions as, in the view of Music Canada, the Board "has not yet shown a willingness to approve market-rate based benchmarks" and that, by adopting a fairness standard, the Board has complicated the process by "ignoring already-agreed upon marketplace agreements". Music Canada urges the Board to look at how copyright tribunals operate in other countries and recognize that "tariffs should reflect the value of the use of rights in trade — otherwise known as marketplace rates".

Music Canada's comments relating to the economic basis upon which the Board establishes fair and equitable tariff rates have absolutely no place in a public consultation relating to the Board's procedures arising from the 43 recommendations contained in the Discussion Paper. In this regard, Music Canada's submissions on this point are at best irrelevant and, at worst, improper because they represent a misuse of the Board's February 5, 2015 call for comments with respect to the recommendations. In the event Music Canada would like to advance these views to the Board, the appropriate forum to do so would be in the context of a tariff-setting proceeding before the Board at which Music Canada would possibly be free to participate, if permitted by the Board, as an intervenor.

The Interrogatory Process – Oral Submissions

In its submission, Re:Sound suggests that that the Board's interrogatory process could be streamlined by substituting the exchange of "detailed written submissions on objections to interrogatories" with oral representations during a conference call with Board staff. According to this suggestion, written materials could be reduced to a chart that briefly summarizes the basis for each objection.

The suggestion for a conference call with Board staff in relation to disputed interrogatories may be a good one, although it would be best implemented in addition to the exchange of formal objections and replies to interrogatories, rather than in substitution for them. In this way, Board staff could

be involved in the final discussions among legal counsel prior to a particular dispute being put to the Board for final resolution. Although not binding on the parties, input from Board staff may contribute to a compromise between the parties with respect to certain interrogatories, and thereby obviate the need to bring the matter to the Board for a decision. This process, if used wisely by the parties, could in itself help streamline the Board's interrogatory process as it may encourage the settlement of some of these disputes at an earlier stage than is currently the case.

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I appreciate this opportunity to make these comments in response to the submissions made by the other participants in this public process. If the Board has any questions or comments with respect to this letter, please let me know.

Yours very truly,

J. Aidan O'Neill