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Delivered by E-mail

Mr. Gilles McDougall,
Secretary-General,
Copyright Board of Canada
56 Sparks St., Suite 800
Ottawa, Ontario
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April 17, 2015

Dear Mr. McDougall,

Re: Discussion Paper On Two Procedural Issues: Identification And Disclosure Of Issues to be Addressed During a Tariff Proceeding and Interrogatory Process

Canadian Retransmission Collective (CRC) is pleased to respond to your invitation of March 16, 2015 to all Copyright Board stakeholders, requesting Replies to Comments filed in response to the above-noted Discussion Paper.

CRC fully supports the Board's stated objectives in reviewing its operations and procedures. In this regard, the introduction to the Discussion Paper states that the Board established a Working Committee to undertake a review, in order "to look into the operations, procedures and processes of the Board so as to make them more efficient and more productive".

This Reply is limited to several issues raised in other stakeholders' Comments, and which are generally related to retransmission tariffs. Retransmission tariffs are the sole focus of CRC's participation in Board proceedings. CRC believes that the Board's procedures should generally be expedited to reduce the time and resources that CRC and other parties are required to devote to retransmission proceedings.

A. Recommendations 1-5: Publicizing Proposed Tariffs

These recommendations in the Discussion Paper generally propose that new methods be developed to notify current and potential users of the filing of proposed tariffs. In

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response, the Comments of some users have picked up on the suggestion in the Discussion Paper that collectives should bear more of the burden of notifying users.¹

In reply, CRC submits that imposing increased notifications requirements on collectives would generally be inefficient and unproductive. CRC agrees with the recommendation in the Discussion Paper that “Electronic notice should be favoured over other forms of communications”², and agrees with Comments that support this recommendation.³ While collectives could post proposed tariffs on their web sites, imposition of further notification requirements, such as sending tariff notifications to individual users, would be inefficient and unproductive. Representatives of users, such as the CAB and counsel for the BDUs are far better positioned to identify the trade association members, or users they routinely represent and to notify them of tariff changes that affect them.

These associations and representatives, and, indeed individual copyright users, can readily obtain information on new tariffs from the Copyright Board’s web site. CRC submits that the Board’s web site is the best single source of electronic information on all proposed new tariffs and tariff-related developments. It is far more efficient and productive to use the Board’s web site as a comprehensive source of information on tariff proposals and related developments than to impose new notification requirements on a range of different collectives. Using the Board’s site as a single source of tariff information is also more efficient for copyright users than searching out information on the web sites of individual collectives.

CRC notes that using the Board’s site as the source of information on tariff filings would avoid inefficient skirmishing over whether sufficient notice was provided by a collective or actually received by a user. Using the Board’s site for notification is also consistent with the framing of the *Copyright Act*. Sections 67.1(5) and 72(1) of the Act provide that it is the Board that publishes notices by way of the *Canada Gazette*. Placing the burden on the collectives would conflict with the allocation of responsibilities under the Act.

B. Recommendations 6 - 7: Early Explanation by Collectives of the Content of a Proposed Tariff

C. Recommendation 9-10: Early explanation by objectors of the purpose of their objection

¹See, e.g. comments of CAB, page 2, last paragraph.

² Recommendation No. 1.

³ See, for example, Comments of CAB, page 2, last paragraph.

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The Discussion Paper notes that “Currently, a collective is not required to explain the content of the proposed tariffs it files.”⁴ and suggests that “A collective should be asked to provide some information with most proposed tariffs.” In particular, the Paper makes the following two 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.

In a reciprocal vein, the Discussion Paper also recommends that:

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.

CRC notes that some Comments filed in response to the Discussion Paper oppose these recommendations. One party comments that “...a collective should not be required to provide an explanation of the nature, purpose and ambit of any proposed change, material or otherwise, at the time of filing a proposed tariff. ...Requiring a collective to disclose all or part of its case at the time of filing a proposed tariff will risk undermining its right to the protection afforded by litigation privilege, and consequently place it at a strategic disadvantage in the adversarial process.”⁵

⁴ Page 4, fourth paragraph.

⁵ Comments of CCC, page 1.

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CRC respectfully disagrees. The Copyright Board's process is remarkable, and perhaps unique, among judicial and administrative tribunals. It permits claimants and objectors to file monetary claims to commence proceedings and objections thereto, with absolutely no explanation of the scope or rationale for the claim or objection.

This leads to a cat and mouse game. The opaque nature of the early stages of retransmission tariff proceedings leads to an inefficient and unproductive discovery (interrogatory) process. Under the current procedures, the Board must rule on the relevance and proportionality of interrogatory questions in the absence of any information on the reasons for a proposed tariff, or the reasons for objections to it. While the Board and its staff do their best to look at issues in past cases (over 20 years ago in the case of retransmission) to try to determine what the issues will be in a current case, the Board must make heroic assumptions about relevance and proportionality in order to rule on objections.

In these circumstances, it is virtually impossible for the Board to make accurate rulings on relevance or proportionality of questions. In addition, a large amount of time and resources can be expended by the parties and the Board on the interrogatory process to resolve issues that counsel should be able to resolve, if they had a better sense of the issues in a case. Neither the current process nor its results are as efficient or productive as they should be.

CRC agrees that it would be impossible for retransmission (and other) collectives to provide detailed, *binding* pleadings, supported by evidence at the time of filing their tariffs. This is largely so because most of the relevant evidence is in the hands of BDUs (and other users). However, the recommendations in the Discussion Paper do not require comprehensive or detailed evidence to be filed at the time of tariff claims or objections – but only general information about the nature, purpose and ambit of the tariff – and the purpose of the objections thereto. Both would, and should, be filed on a non-binding basis, subject to amendment as the proceeding evolves and the evidence emerges. However, while the statements of reasons for tariff changes and objections thereto would not be binding, they will provide some basis for the Board to rule on questions of relevance at the interrogatory stage to ensure a more efficient and fair discovery process.

Requiring collectives and objectors to develop and articulate the reasons for their claims and objections early on would increase the efficiency of tariff proceedings. It should also expedite them, and hopefully lead to a situation where tariffs would be approved by the Board early in a 5-year tariff period, instead of at the end of the period. Among other things, this would reduce the costs and complexity required to calculate and collect

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retroactive tariff adjustments, and reduce the need, pending certification of the tariff, to estimate and maintain reserves when distributing royalties to cover potentially adverse tariff rulings. Delays in approving tariffs penalize retransmission rights holders, because they do not receive royalties until years after they are due.

Expediting the clarification of issues in a tariff proceeding should also expedite prospects for settlement. Finally, it should reduce overall litigation and consultants' costs, which generally correlate positively with the length of the proceedings.

II – The Interrogatory Process

Comments on the recommendations in the Discussion Paper regarding the interrogatory process generally agreed on the continued need for an interrogatory process but differed on some specific recommendations.

CRC supports the Comments on recommendations, including numbers 16 and 17, that interrogatories should remain the preferred form of discovery before the Board. CRC also agrees with parties that supported recommendation 18, that interrogatories should be exchanged before the detailed Statements of Case (and the Expert Reports that accompany the Statements).

CRC also agrees with the Comments of the BDUs⁶ supporting recommendations 29 and 33: that objections to interrogatories and allegations that responses are deficient should be filed in a table format to enable readers to easily cross-reference claims, responses, replies and the Board's rulings. As the BDUs point out, this step that has already been adopted in many proceedings. Technical filing requirements like this should be included in the directive on procedure.

CRC also agrees with the Comments of various parties⁷ supporting recommendation 36, namely: "The current principle according to which a responding party provides what it has, in the form it exists, should continue to apply". In this regard, CRC supports the comments of CCC that a party should not be obligated to either create new documents, or be obligated to try to compel or otherwise seek documents or information from third parties in order to respond to interrogatories.⁸ In the past, the Board has compelled some parties to try to obtain information from third parties, and has not compelled others. This approach leads to spotty and unrepresentative responses, and puts undue pressure

⁶ Comments of BDUs at page 5.

⁷ For example, Comments of CAB at page 13.

⁸ Comments of CCC at page 1.

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on the resources of some collectives that must rely on goodwill to attempt to extract information from third-party rights holders they do not control.

Board rulings that require collectives to obtain information from rights holders have different practical implications for different collectives. CRC currently represents more than 7,000 rights holders from 32 countries. Many entities to which CRC distributes retransmission royalties are agents or administrators, who frequently do not have the type of information about programs that is requested in interrogatories. In the case of a collective like CRC, a requirement to seek out information from rights holders will thus inevitably lead to spotty and unrepresentative results. The time and resources that must be expended by a collective like CRC to obtain information from rights holders far exceeds the probative value of any such information.

CRC supports the Comments of parties that agreed with recommendation 38.⁹ The amount of effort required of respondents to interrogatories should be related to the importance of the amounts at stake and the resources of the parties. It should also be related to the probative value of the information sought, and its relevance to the issues, insofar as they can be ascertained.

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In conclusion, CRC thanks the Board for this opportunity to reply to Comments on the Discussion Paper. CRC also wishes to thank the Board for its initiatives to attempt to improve the efficiency and productiveness of its operations and procedures, which should ultimately benefit all stakeholders.

Yours sincerely,

Carol J. Cooper
President and Chief Executive Officer

⁹ For example, Comments of CAB at page 13.

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