



April 17, 2015

Copyright Board of Canada

56 Sparks St., Suite 800

Ottawa, Ontario K1A 0C9

Attention: Mr. Gilles McDougall, Secretary General

gilles.mcdougall@cb-cda.gc.ca

Re: Reply to Submissions Received by the Copyright Board related to the Discussion Paper of the Working Committee on the Operations, Procedures, and Processes of the Copyright Board

Dear Mr. McDougall:

This submission is made on behalf of Music Canada, and is in reply to the submissions already received by the Copyright Board (the “Board”) in respect of the Board’s “Discussion Paper of the Working Committee on the Operations, Procedures, and Processes of the Copyright Board”, dated February 4, 2015 (the “Discussion Paper”).

Music Canada provided its initial comments with respect to the Discussion Paper on March 6, 2014, and is thankful to the Board and its Working Committee for the opportunity to further add to the discussion surrounding the operations, procedures and processes of the Board.

Introductory Remarks

As a preliminary matter, Music Canada would like to take this opportunity to explain the purpose and scope of its initial submission in response to the Working Group.

The Board created the Working Committee to “act as a forum through which the Board, collectives and copyright users can exchange on the operations, procedures and processes of the Board, so as to make the Board’s work, and the participation of collectives and users in Board proceedings, more efficient and more productive.” Music Canada is appreciative of the Working Committee’s work to date, and commends the Board for setting in motion a process that seeks to improve hearings before the Board.

Music Canada is, however, concerned at the scope and pace at which the Board has proceeded to consider changes to increase the efficiency of the hearing process, which has long been

recognized by all actors, including the Board, as requiring urgent attention. As numerous stakeholders have commented, the fundamental uncertainty created by long delays in certifying tariffs has a detrimental effect on stakeholders and on copyright and user industries and Canadian consumers in general.

The Board chose to address these longstanding concerns by striking the Working Group in November 2013. Music Canada recognizes that the Working Committee, for the time being, chose to address only two issues related to the operations, procedures and processes of the Board. In Music Canada's respectful submission, for the Board to address the matters requiring procedural and substantive reform at this pace does not sufficiently address the urgency of needed reforms.

Given its concern about the urgency of these issues, Music Canada submitted initial comments that went beyond the scope of the two discrete procedural issues immediately raised by the Working Group. Although beyond the precise scope of the Board's invitation, Music Canada believes that it (and frankly any interested stakeholder) would be remiss if it did not take this opportunity to raise some of the broader issues that are affecting the productivity and efficiency of hearings before the Board and which require urgent attention.

Turning to the initial submissions made to the Board, Music Canada notes that there are some clear points of agreement between the various stakeholders, both rights holders and users alike. In the reply submission that follows, Music Canada will summarize those key points and expand upon several ideas it raised in its initial submission.

Stakeholders Agree: A More Efficient and Effective Copyright Board Process is Required

The Board established the Working Committee to, among other things, review the operations, procedures and processes of the Board so as to make them more efficient and more productive. In response to the Discussion Paper, many of the stakeholders made similar comments which Music Canada supports on this topic. Music Canada notes a remarkable concurrence and resonance amongst stakeholders on a number of these issues, irrespective of whether the commentators represent rights holders or users. For instance:

- **Access Copyright** advocated for improved transparency, predictability and efficiency, and a more comprehensive adoption of the civil adversarial model. Music Canada agrees with a more comprehensive adoption of this model, and supports the general idea that greater adherence to defined procedural rules will expedite Board hearings.
- The "BDUs" noted that while there is nothing problematic with many of the recommendations put forth by the Working Committee, they simply do not go far enough, nor do they significantly help achieve the end goal of making hearings before the Board more efficient and more productive. Music Canada recognizes that the issues raised in the Discussion Paper may have only been a starting point for the Working

Committee, but it is clear that Music Canada is not alone in seeking some urgency to any process that seeks to review or reshape the processes before the Board.

Music Canada also agrees with the BDUs that the Board's processes, on the whole, are rather ad hoc. The current procedures do not offer much procedural certainty when conducting hearings before the Board, nor do the Working Committee's recommendations appear to address procedural predictability in any meaningful way. As such, Music Canada encourages the Working Committee and the Board to consider the adoption of regulations to increase transparency and certainty.

- The **Canadian Association of Broadcasters** (the "CAB") agreed with the Working Committee's recommendation (No. 35) to create specific guidelines dealing with the interrogatory process. As noted above, Music Canada supports initiatives that streamline the process and introduce greater procedural certainty, subject to the protection of procedural fairness for all parties.

The CAB also made a comment that Music Canada made in its submission, namely that the Board (and presumably by extension the Working Committee) should examine broader issues not addressed in the Discussion Paper, on an urgent basis, that frequently lead to "barriers to business" in Canada. As Music Canada has noted, the time it takes to certify a tariff should not be economically prohibitive to businesses; rather the Board should attempt to facilitate the business of its stakeholders in a timely manner. The uncertainty caused by delay at the Board is a deterrent to businesses in Canada, as well as to new businesses considering launching in Canada. This is also discussed in more detail below, under the heading *The Copyright Board as a "Business Development Entity"*.

- Music Canada supports the position taken by the **Copyright Collective of Canada** with respect to the early explanations by collectives, namely 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. Many of the Working Committee's recommendations, such as those that may lead to further explanations, more involvement at an early stage, the notification by collectives of "all known users" when a tariff is filed, and the addition of a reply stage for interrogatory objections, would likely lead to a lengthened and more burdensome and expensive process. As noted by **MROC** in its submission, for example, early explanations may lead to unfair results such as objectors being provided with greater insight and more "ammunition," as opposed to simply narrowing the issues. The Board and its stakeholders would be better served by having the Working Committee re-examine and re-think the process as a whole, not merely the processes that already exist. This is also a view that was shared by **MROC** in its submission.
- **CMRRA** made an important point about procedural fairness: that any changes to increase the efficiency and speed with which the Board is able to render decisions must not come

at the expense of fairness. While other stakeholders appear to share the view that the tariff-setting process should be expedited (see the joint submission by the **Hotel Association of Canada** and **Restaurants Canada** in particular), Music Canada supports CMRRA's qualification with respect to procedural fairness, and encourages the Working Committee and the Board to keep it in mind when conducting its more thorough assessment of the Board's processes.

- The point has also been raised by various stakeholders that the recommendations are very limited and, even if implemented, will do little or nothing to reduce the time and cost to conduct hearings before the Board. As noted by Music Canada (and others), many of the recommendations maintain a procedural status quo, or do not challenge the structure of the current procedures in any way. In some cases, as **MROC** noted, the recommendations create additional duties or layers, or are even at "cross-purposes" with the goal of streamlining the process.

It has also been submitted that the complete tariff-setting process before the Board takes far more time than at other comparable tribunals in Canada (even compared to the tribunals hearing more complex matters). As an example, one can look to the Federal Court's disposal of cases under the *Patented Medicines (Notice of Compliance) Regulations*. While that system is certainly not without complaint, the Federal Court adheres to a rigid schedule (set by Regulation) and utilizes case management to move the process along fairly and efficiently. Music Canada therefore encourages the Working Committee to investigate this and other comparisons to better assist the Board in dealing with and disposing of complex hearings in a more effective and timely manner.

- As noted in its initial submission, Music Canada supported and incorporated by reference the submission made by **Re:Sound**. For the purposes of this reply, Music Canada wishes to underscore an important point raised by Re:Sound, namely that the Discussion Paper represents a useful first step, but addresses just two of the many issues that warrant review; and the Discussion Paper does not assist with the critical objective of reducing the time required to hear and issue decisions and certify tariffs.

Historical Context: CRTC Submission

In addition to the comments received by the various stakeholders, Music Canada would like to refer the Working Committee to the **submission of the CRTC** dated September 11, 2009, which was made as part of a public consultation on copyright reform.¹ As part of its submission, the CRTC referred to what it describes as an "obligation and power" to streamline the Board's hearing process. The following noteworthy points (made nearly six years ago) have been raised

¹ CRTC, "Submission to Public Consultation on Copyright Reform" (September 11, 2009), online: Copyright Consultations, Industry Canada <<http://www.ic.gc.ca/eic/site/008.nsf/eng/02459.html>>.

by other stakeholders during this process, which should signal to the Working Committee that broader changes are urgently needed:

- (1) The current tariff-setting process creates significant uncertainty for all parties;
- (2) Given that the periods specified in the new tariffs often relate to years which have since past, users must set aside significant funds in anticipation of the royalties to be set by the Board. At the same time, rights holders do not receive appropriate royalties in a timely manner;
- (3) As the digital economy grows, the need for timely decisions becomes greater; and
- (4) Establishing timelines by which the Board will certify a tariff would assist in reducing industry-wide uncertainty associated with delays in certification.

In large part, the issues at the heart of the recommendations made by the CRTC in 2009 are still live, and need to be addressed urgently.

Historical Context: a Past Chairman's Pledge

Similarly, Music Canada draws the Working Committee's attention to a 2006 **statement from then Chair, the Honourable Justice William J. Vancise**, wherein he declared his dissatisfaction with the time it takes the Board to render a decision,² comments which he echoed on a number of subsequent public appearances. The Chair's comments were apt, and the issue of delay remains unsolved. The issue is therefore more critical than ever, and Music Canada urges the Working Committee and the Board to urgently consider the many broader issues (in addition to or in advance of "fine tuning" existing procedural issues) that severely affect the productivity and efficiency of Board hearings.

The Copyright Board as a "Business Development Entity"

In Music Canada's initial submission, it urged the Board to act as a business facilitator. More specifically, Music Canada urged the Board to adopt a role similar to that of a "business development entity".

The June, 2014 Report of the Standing Committee of the House of Commons on Canadian Heritage, entitled "Review of the Canadian Music Industry", noted that "issues the Board must address are getting more complex" and the Board "needs to be able to adapt to rapidly changing business models" or it "risks becoming a business barrier, not a business facilitator."

In rendering its decisions, Music Canada believes the stakeholders would benefit from the Board considering its duties from the standpoint of stakeholders, who are statutorily required to turn to the Board to render determinations that otherwise would be decided in the marketplace. Greater business growth can be driven through clearer market definition, and by providing greater business certainty to new and existing businesses in Canada. Such a fundamental shift in the

² Honourable Justice William J. Vancise, "Bill C-32 – Ten Years Later" (Seminar Jointly Sponsored by the Intellectual Property Institute of Canada and McGill University, Toronto, August 23, 2006).

Board's vision would not necessarily require an increase in resources (despite what has been suggested by some stakeholders), but would require more of a structural overhaul. This is discussed briefly in the next section, below.

The concern of the House Committee that the Board may inadvertently act as a business barrier requires two significant deterrents are addressed: (1) the difficulties businesses face in reacting to slow decisions made by the Board; and (2) the uncertainty in the legal landscape facing rights holders and businesses. A simpler mandate, of simply facilitating the marketplace to establish rates and attempting to replicate such rates where they cannot be set, will facilitate rather than hinder business. Cognizant of the effect of the uncertainty caused by delay in its decisions, rights holders and new and existing businesses could be allowed to deal directly at fair market value rather than having to wait years for the Board to determine "fair" rates retroactively. The Board would facilitate business far more effectively if it focused its efforts on connecting rights holders and consumers in the marketplace more quickly, and reduced procedural barriers for those already in the marketplace. The current recommendations of the Working Committee do not appear to address this problem, despite the fact that this issue was flagged (at least in part) in the "first identification of issues to be addressed by the Committee" (at Appendix B of the Discussion Paper), as follows:

Dealing with proposed tariffs that are unopposed or agreed upon

Currently, the certification of tariffs that are unopposed or agreed upon can take considerable time. Can the process be streamlined? Should the Board consult widely on tariffs that are unopposed or agreed upon? Should it consult at all? Should the timelines for analysis and consultation be clearly framed?

The Board is capable of facilitating the attraction of new businesses and new business models to Canada. Effectively, the Board needs to render decisions more quickly, at the pace of technological development and business growth, so that rights holders, business services and users alike know what their respective obligations are. The Working Committee's recommendations unfortunately do not go this far.

Moving forward, and to the extent that it is possible, Music Canada urges the Working Committee to propose recommendations that will better position the Board as a true business facilitator.

Broader Structural Changes are Needed at the Board

The Working Committee's recommendations were isolated and specific in nature. The Discussion Paper promised that "[o]ver time, the Committee will conduct a thorough review of the Board's processes in general", but that to start with, "the Committee identified three areas which it found amenable to significant improvements within a fairly short time frame." From the time the Working Committee was established, however, that "short time frame" will likely take years before any significant changes can be implemented.

While Music Canada acknowledges that many of its comments have been global in nature (and not confined to the very specific procedural recommendations made by the Working Committee), Music Canada considers this a rare opportunity to publicly speak about some of the most pressing issues facing the Board. Despite the fact that the Working Committee and the Board have only invited comments on two issues out of the three it has identified at this stage, and given that it will have taken nearly two years to release and implement the Working Committee's recommendations, Music Canada believes it is prudent on all stakeholders to also address some of the broader issues that need urgent attention.

The statement made by **MROC** in its submission is particularly on point in this regard, a view that is shared by Music Canada: "It is doubtful that fine-tuning existing operations, procedures and processes can be as effective as major structural change." Several other stakeholders (such as the **BDUs** and **Re:Sound**) shared the similar view that the Working Committee's initial recommendations simply didn't go far enough.

Participation in the Working Committee Should be Broadened

Finally, Music Canada noted in its initial submission that the Board should consider adding members to the Working Committee who directly represent rights holders, such as in-house counsel at the Collectives. Music Canada maintains that view, and notes that it appears to be shared by other stakeholders (see, for example, the submission of **Access Copyright**). Music Canada would be happy to work with other stakeholders to ensure that a broader representation is achieved.

Concluding Remarks

Music Canada recognizes that the underlying intent of the Discussion Paper – and the work of the Working Committee up to this point – is to bring about efficiencies in a short time frame. Music Canada thanks the Board, as well as the Working Committee, for taking these initial steps.

It is clear from reading the submissions of the stakeholders, however, that broader thinking is warranted. Although this process has been described only as a "first step", many are calling for more rapid and far-reaching changes to how the Board hears and disposes of matters that come before it.

"Fine-tuning" the existing operations, processes and procedures of the Board may lead to some efficiencies, but big-picture changes to the Board and its mandate are likely needed to address the types of concerns that have been raised by stakeholders through this process.

Music Canada is grateful to have had the opportunity to make submissions (including these in reply) on matters related to the efficiency and productivity of hearings before the Board. Given that the majority of its submissions were more global in nature (and did speak directly to the Working Committee's narrow recommendations), Music Canada welcomes the opportunity to be a part of any next steps taken by either the Working Committee or the Board.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Ryan Steeves', with a long horizontal flourish extending to the right.

Ryan Steeves
Director of Legal Affairs, Music Canada