



March 6, 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: 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, a non-profit trade organization that promotes the interests of its recording industry members, as well as their partners, the artists. This submission is in response to the Copyright Board's request for comments, dated February 5, 2015, on the matters addressed in 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's members are engaged in all aspects of the recording industry, including the production, promotion and distribution of music. Accordingly, Music Canada (on behalf of its interested members) is a key stakeholder on matters related to the operations, procedures and processes of the Copyright Board. In particular, Music Canada's members have a keen interest in providing input on all matters that may positively impact the Board's efficiency and productivity.

Music Canada acknowledges that the issues raised in the Discussion Paper (and the recommendations made therein) are specific in nature and are intended to bring about efficiencies in a short time frame. The focus of Music Canada's submission, while encompassing the issues identified in the Discussion Paper, instead provides general commentary on: (1) the length of time required for the Copyright Board to render its decisions; and (2) the role of the Copyright Board. In addition to the following submission, Music Canada supports and incorporates by reference the submission made by Re:Sound. Music Canada is aligned with Re:Sound in this regard since Re:Sound administers the broadcast and public performance rights of Music Canada's membership.

Length of Time to Render Decisions is Too Long

There is currently a widespread concern among the government, key stakeholders and the Board itself concerning the time it takes for decisions to be rendered by the Board. The June 2014, report of the Standing Committee of the House of Commons on Canadian Heritage, entitled “Review of the Canadian Music Industry”, recommended that the government examine the issue of timing, so that any changes may be considered “as soon as possible”. The government acknowledged this recommendation, stating that the Board’s current review process, as well as the upcoming mandated Parliamentary review of the *Copyright Act*, presents an opportune time to consider important copyright issues, such as the broader framework in which the Copyright Board operates.

In pursuing a more streamlined, productive tariff-setting process, the Board must not lose sight of the impact its decisions have on the industries which are affected by the rates it sets. The Copyright Board makes decisions that determine the value of numerous uses of all copyrighted works in Canada. The Board determines, in large part, the economic fortunes of thousands of Canadians – all while operating relatively free from express legislative or regulatory obligations. Therefore, the Board – through its own internal review process – has a real opportunity and an obligation to address some of the inefficiencies that delay the tariff-setting process.

As a starting point, the time it takes to certify a tariff should not be economically prohibitive to existing businesses, nor the introduction of new business models that benefit users and stakeholders; rather, the Copyright Board (as an economic regulatory body) should 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. As a result, the Board must commit to producing timely decisions that are consistent with (and not contrary to) marketplace dealings and expectations.

The Recommendations Are Insufficient to Significantly Enhance Efficiency

In its Discussion Paper, the Board has reviewed two very specific issues in detail: (1) the identification and disclosure of issues to be addressed during a tariff proceeding; and (2) a review of the interrogatory process. On the basis of this review, members of the Working Committee have offered 43 recommendations. Some represent a “consensus” course of action, while others are put forward as “alternative courses of action”.

Unfortunately, implementing the recommendations would be unlikely in and of itself to yield significant efficiencies. For instance, many of the recommendations propose maintaining a procedural status quo, or would not challenge the basic structure of the current procedures in any meaningful way. More fundamental changes to the Board’s mandate, structure and decision-making process are needed.

Music Canada offers no specific comments in respect of the 43 recommendations, but offers the following general remarks concerning the time it takes the Board to render its decisions:

1. It takes too long for the Board to render its decisions, largely because of a process that lacks deadlines and procedural certainty;
2. The Board should actively pursue measures to: (i) minimize the burden on parties to participate in tariff proceedings; (ii) streamline the process and create procedural certainty for the parties; and (iii) simplify or consolidate the nature of the disputes between the parties;
3. It appears that the overarching requirement the Board considers in setting a tariff is that the rates must be “fair”. The Board has not yet shown a willingness to approve market-rate based benchmarks. The adoption of its “fairness” standard greatly complicates the process by ignoring already-agreed upon marketplace agreements. Considering and applying market-rate based figures (which should also be considered “fair”) would significantly reduce procedural lag time, and help to better align the Canadian Copyright Board with other copyright tribunals around the world;
4. The recommendations will have a minimal effect on the stated problem that the Committee was asked to address, *i.e.*, how can the Board increase its efficiency and productivity, when many inefficiencies will still exist. Some of the recommendations, particularly 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. The Board – and its stakeholders – would be better served by re-examining and re-thinking the process as a whole, not merely the processes that already exist;
5. Music Canada agrees that the Board may impose procedural discipline in the absence of express regulations. Specifically, it agrees, to a certain extent, that some of the recommendations could be enforced through “soft compliance measures” (although these are not specifically defined in the Discussion Paper). However, Music Canada suggests that the Board consider adopting a method of providing greater procedural certainty, such as the “Practice Guides” and “Notices to the Parties and the Legal Profession” that are used by the Federal Court and the “Practice Directions” used by the Federal Court of Appeal. These types of detailed Guides, Notices and Directions have proven to be very effective in streamlining the hearing of disputes before the Court. While the Board does provide basic procedural information through the use of its “Model Directive on Procedure”, more could be done. For example, greater efficiency and procedural certainty may be achieved by regularly publishing best-practice reminders, more detailed practice guides, checklists, etc. An improvement in this regard may also lead to an open (and ongoing) dialogue on procedural reforms, and a greater sense of accountability from all stakeholders; and
6. Finally, the Working Group identified a fix that could immediately eliminate years of uncertainty and delay, namely, promptly considering and certifying proposed tariffs that are unopposed or agreed upon. Where rights holders and users have come to agreement on a tariff, it does not make sense for the Board to delay its certification. Numerous consensus tariffs sit with the Board for up to years for approval. In other jurisdictions, such approval of uncontested tariffs is unnecessary or as a matter of course. There is no reason for the Board to delay approval of what the affected stakeholders have agreed

upon, and such delay appears emblematic of a lack of appreciation of the urgency of such matters. The Board should allow the marketplace to operate efficiently.

The Copyright Board as a Business Facilitator

As alluded to above, the time it takes for tariff rates to be set should not be economically prohibitive for stakeholders. Rather, the Copyright Board should facilitate the business of its interested parties in the most efficient and cost-effective manner. Too often, the Board engages instead in the setting of *post facto* rates – often years after a tariff is filed – thereby forcing businesses and other interested parties to make sense of retroactively-set rates.

Greater results are likely to be achieved if the Copyright Board reconsiders its role, perhaps adopting a mandate similar to that of a business development entity. The reality is that the process currently takes far too long, and this has a real negative economic impact on many key stakeholders, including businesses that have not yet launched in Canada. Therefore, rather than simply dissecting some of the very specific procedural issues that are addressed in the Discussion Paper, the Copyright Board should consider ways in which it can better serve the economic interests of its stakeholders.

This is not to say that the Committee’s work may not lead to some procedural efficiencies through: (1) the early identification and disclosure of issues to be addressed during a tariff proceeding; and (2) a more transparent and effective discovery process (as outlined in the Discussion Paper). However, it is seemingly counterproductive to drill down into procedural minutia without also (or perhaps first) considering how the Copyright Board’s role as an economic regulatory body can be improved.

The recommendations in the Discussion Paper make no mention or suggestion related to how the Copyright Board could play an improved role in driving business and sustaining viable marketplaces. For example, the Copyright Board does not view itself as being required to consider market-rate based benchmarks in setting tariffs. Part of the discourse surrounding the Board’s reform, therefore, should consider how copyright tribunals operate in other countries. For instance, the European Community Directive on Collective Rights Management establishes that tariffs should reflect the value of the use of rights in trade – otherwise known as marketplace rates. This practice of considering what is paid in the marketplace to set royalties is being used in the U.S. and other major Commonwealth countries, such as the U.K., Australia and New Zealand. The Copyright Board should consider adopting this practice, which would not only bring Canada in line with other countries around the world, but would greatly reduce the time needed to set tariffs.

Additional Resource

In February 2015, the U.S. Copyright Office (“USCO”) issued a report of the Register of Copyrights, entitled “Copyright and the Music Marketplace” (the “U.S. Report”). Highlighting “the rules for the licensing of musical works and sound recordings as an area in significant need of reform”, the USCO undertook a study to consider the existing U.S. music marketplace. As a

result of its study, the USCO offered a series of guiding principles and preliminary recommendations for change. Among these were that: (1) music creators should be fairly compensated, and (2) the licensing process should be more efficient.

The U.S. Report is intended to be a framework document, serving to fuel a continuing discussion on how the U.S. can “reinvent [its] music licensing system”. Music Canada does not necessarily agree with all of the observations and conclusions of the U.S. Report, but it does believe that the Report can be a useful resource. While the U.S. music licensing scheme differs quite significantly in many respects from that of Canada, Music Canada urges the Board and its working committee to review the U.S. Report because: (1) the USCO has considered many of the same issues facing stakeholders in Canada; and (2) the U.S. Report consolidates many comments and recommendations in support of a global reform to the way in which music is licensed.

Concluding Remarks

As an advocate for music and those who create it, Music Canada is deeply concerned with making the Board’s operations, procedures and processes more efficient and productive. A more expedient and responsive Copyright Board means better results for all.

The Discussion Paper is the product of an ad hoc committee established in November 2012, to kick start initial stages of reform of the Copyright Board. The committee “identified three areas which it found amenable to significant improvements within a fairly short time frame.” These three areas are the subject of the Discussion Paper, and presumably a second one to follow thereafter. According to the Discussion Paper, the committee will conduct a more thorough review of the Board’s processes in general at some later point in time. After over two years of study, to solely consider two procedural areas does not indicate the urgency necessary to tackle the profound challenges at issue. While new tariffs are delayed, the marketplace faces uncertainty and businesses and new business models are deterred from launching in Canada.

This is not to say that Music Canada will not support the principles behind many of the recommendations outlined in the Discussion Paper. To be clear, Music Canada will support thoughtful efforts to reduce the number or complexity of issues before a tariff proceeding, as well as to simplify the process. As explained in the “Additional Note” section of the Discussion Paper, however, Music Canada appears to be aligned with the cited committee member in questioning whether the report’s recommendations will truly assist the Board in having more efficient and more productive procedures and processes.

Music Canada can appreciate the committee’s desire to achieve “quick victories” through simple procedural modifications; typically, those types of changes can be made and implemented fairly quickly. The problems facing the Copyright Board, however, are large in scale. A review of the Copyright Board’s processes in general is needed, one that will challenge the Board to re-think its purpose and decision-making process, and to evaluate how it applies its mandate.

As a final point, Music Canada notes that the working committee convened by the Board for the purposes of this Discussion Paper is comprised solely of external counsel. While it is recognized that the members (listed at Appendix A to the Discussion Paper) are exceptionally qualified and experienced in practising before the Copyright Board, going forward, the Board should consider adding members to the working committee who directly represent rights holders, such as in-house counsel at the Collectives. The Board would be served in its endeavour by directly sourcing the perspectives of key stakeholders.

In view of the above submission, Music Canada welcomes any questions or comments the Board or other interested parties may have in response. In addition, Music Canada would like to thank the Committee for its hard work in preparing the Discussion Paper and the very detailed recommendations.

Thank you.

Sincerely,

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

Ryan Steeves
Director of Legal Affairs, Music Canada