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VIA EMAIL

Mr. Gilles McDougall
Secretary General
Copyright Board of Canada
56 Sparks Street, Suite 800
Ottawa, ON K1A 0C9

Dear Mr. McDougall:

Re: **Re:Sound's Comments on the Discussion Paper of the Working Committee on the Operations, Procedures, and Processes of the Copyright Board**

The following are Re:Sound's comments on the Discussion Paper of the Working Committee in response to the invitation of the Copyright Board of February 5, 2015.

Re:Sound

Re:Sound is the collective society authorized under Part VII of the Copyright Act to collect and distribute royalties under section 19 of the Act on behalf of performers and makers of sound recordings. The royalties payable to Re:Sound's members are determined by the Copyright Board through the process of certifying proposed tariffs under section 68 of the Act. Re:Sound and its members are directly affected by any proposed changes to the Board's procedures for certifying tariffs and appreciate the opportunity to provide comments on the Discussion Paper.

General Comments

Re:Sound supports the initiative of the Copyright Board and the Working Committee in undertaking this review and its goal of making the Board's processes more efficient and productive. While this Discussion Paper represents a useful first step, as identified in the Committee's Terms of Reference, it addresses just two of many issues that warrant review.

In Re:Sound's view, the most critical issue to be addressed in any review of the Board's procedures, is reducing the time required for certification of tariffs, particularly undisputed tariffs in which the parties have reached an agreement. As noted in the Discussion Paper, the first recommendation of the Standing Committee of the House of Commons on Canadian Heritage in

its *Review of the Canadian Music Industry* is, “that the Government of Canada examine the time that it takes for decisions to be rendered by the Copyright Board of Canada ahead of the upcoming review of the Copyright Act so that any changes could be considered by the Copyright Board of Canada as soon as possible.” The issues and procedures addressed in the Discussion Paper, while helpful, do not assist with the critical objective of reducing the time required to issue decisions and certify tariffs.

The Copyright Board serves an essential function in setting royalties payable to rights holders. In the case of Re:Sound’s tariffs, these royalties are relied on by performers and makers for their livelihood, and directly impact the viability of the Canadian recorded music industry. It is therefore critical that the Copyright Board be provided with the necessary resources to address this issue.

Specific Comments on the Issues Addressed in the Discussion Paper

Re:Sound’s comments on the specific issues addressed in the Discussion Paper are based on the overall objective of trying to make the tariff certification process more efficient, expeditious and cost-effective for collectives, users and the Copyright Board. The Copyright Board has a very important mandate, but limited resources to fulfill that mandate. Re:Sound’s comments are aimed at making the most productive use of the Board’s finite resources.

II.A – Publicizing proposed tariffs

The input of users affected by a tariff is a necessary and valuable part of the tariff-setting process. Re:Sound therefore supports the initiative of publicizing proposed tariffs beyond the legal requirements of publication in the Canada Gazette. However, Re:Sound has serious concerns with any suggestion that collectives be required to contact individual businesses and licensees to notify them of a proposed tariff.

The effort and cost of contacting tens of thousands of individual businesses, even by email would be prohibitive. As noted in the Discussion Paper, this issue also raises concerns regarding compliance with privacy and anti-spam legislation. In addition, individual businesses who are unfamiliar with the tariff-setting process are likely to be unnecessarily confused and annoyed by receiving such a notice from a collective like Re:Sound. This is particularly true with the suggestion that collectives identify and contact potential users that might be subject to inaugural tariffs. Re:Sound typically does not research and obtain contact information for all individual businesses that might be subject to its tariffs until a tariff is certified and royalties are payable. Requiring that such research be done prior to filing a proposed tariff (which is typically several years before certification) creates an unnecessary and onerous burden on the collective. Communication with individual businesses and broadcasters is much better achieved through industry associations who are familiar with the Copyright Board and the tariff-setting process and are much better suited to communicate such information to their members. Re:Sound agrees that all relevant industry associations should receive notice of proposed tariffs where possible.

Currently, Re:Sound posts a press release on its website to announce the publication of its proposed tariffs in the Canada Gazette. This could be accompanied by either posting the

proposed tariffs or a link to the tariffs on the Copyright Board's website. Re:Sound is also willing to explore additional methods of providing publicity through social media initiatives. Such efforts will help achieve the goal of greater publicity regarding proposed tariffs, while not imposing an undue burden on collectives, users or the Copyright Board.

II.B – Early explanation by collectives of the content of a proposed tariff

Re:Sound has serious concerns about the proposed additional requirements on collectives to file detailed explanations accompanying their tariff filings. These concerns stem from the nature of the tariff-setting process itself.

The Copyright Act requires collectives such as Re:Sound to file a proposed tariff with the Copyright Board by March 31 of the year before it takes effect. Re:Sound must therefore propose a royalty rate and tariff structure prior to the commencement of the hearing process and before it has obtained current expert economic evidence on the value of music to that industry or received input from the parties representing the industry impacted by the tariff. As a result, Re:Sound typically modifies its tariff proposal (often more than once) over the course of the hearing process in response to the input and new information received from the relevant industry as well as the results of the expert studies and reports commissioned by the parties such as music use and repertoire studies, surveys on the value of music, and expert economic analysis.

There is therefore no practical benefit to requiring a collective to file details of the basis of its tariff proposal, particularly rate calculations, at the time of filing the proposed tariff. The time for providing details and rationale for the proposed tariff is when the collective files its Statement of Case, at which point it will have obtained the necessary current industry information through the interrogatory process and relevant valuation studies from its experts.

In addition to prejudicing a collective's litigation strategy, such advance disclosure will only create confusion for users, as it requires a collective to provide a rationale for a proposal that will likely be supplanted and modified during the hearing process, making such information irrelevant and misleading. While the Discussion Paper states that, "changing the explanations provided with a proposed tariff and making changes to that tariff itself are different things," the fact is that an explanation for a proposed tariff that is likely to be subsequently changed based on new information will only create, rather than resolve, any confusion regarding the proposed tariff. Obtaining current information and input regarding what constitutes an appropriate tariff is the very reason for having a hearing process. Collectives must be free to modify their tariff proposals in order to respond to such information and reflect the valuable input of the industry participants.

At the time a proposed tariff is published in the Canada Gazette, the only information a potential objector should need in order to decide whether to file an objection is whether the tariff applies to them, what the proposed rates are, and in the case of a renewal of an existing tariff, how the new proposed tariff differs from the certified tariff. The scope and application of the proposed tariff and the proposed rates, structure and administrative provisions are already set out in the proposed tariff itself. For renewals of existing tariffs, Re:Sound already files with the Board redlined documents showing the proposed changes to the most recent proposed or certified tariff.

Re:Sound agrees with the suggestion that such redlined documents be publicized to potential objectors, either in the Canada Gazette or on the Board's website. This information should therefore be sufficient to allow a potential objector to decide whether or not to file an objection.

Should there be any confusion regarding the application of the tariff to a particular user, this could be resolved by directing such questions to the collective during the 60 day objection period. Requiring any additional information at the time of filing a proposed tariff constitutes inappropriate advance discovery and serves no useful purpose.

Re:Sound strongly disagrees with the recommendation that a collective be required to advise all existing users when it proposes significant changes to an existing tariff. Every proposed tariff filed by Re:Sound would constitute a significant change to the existing tariff. In addition to the practical difficulties of contacting tens of thousands of licensees, such notice would only create unnecessary confusion for individual businesses unfamiliar with the tariff-setting process. As discussed above, such communications are far more appropriate coming from the relevant industry association or objector, who Re:Sound agrees should receive notice when such tariffs are published.

II.C – Early explanation by objectors of the purpose of their objection

Objectors are in the same position as collectives, in that they may not be able to provide details of their objection until they have commissioned their expert studies and received the collective's Statement of Case. Rather than requiring either collectives or objectors to file detailed explanations at the outset, the goal of identifying and narrowing the issues in dispute would be best achieved through an early case conference as suggested in the Discussion Paper in the section on reforms to the interrogatory process.

II.D – The collective's reply

For the same reasons discussed above, Re:Sound disagrees with the recommendation that a collective be asked to provide a detailed reply to the objections it receives.

III – Interrogatory Process

While Re:Sound is in general agreement with the various recommendations regarding the interrogatory process, as noted in the comments on page 25 of the Discussion Paper, such recommendations are unlikely to achieve the stated goals of streamlining and shortening the process of dealing with interrogatories. They may in fact, lengthen it.

One potential method of streamlining the process is that rather than requiring detailed written submissions on objections to interrogatories, the matter could be dealt with on the basis of oral submissions in a conference call. Written materials would be limited to the suggested chart format which briefly summarizes the reason for each objection. A conference call could be convened, similar to the procedure currently followed by the parties to try to resolve their objections, however a staff member of the Board would also participate in order to provide their preliminary (or potentially final) views on the determination of objections that cannot be

resolved. Such a procedure is similar to certain case management practices of the Federal Court as well as the staff-assisted mediation and arbitration procedures used by the CRTC.

While this procedure would require additional resources from the Board by participating in the call, to the extent most if not all objections could be resolved or determined through verbal discussions, it would eliminate the need for the parties to prepare, and the Board to review, detailed written submissions. Often objections stem from misunderstandings regarding the scope and language of the interrogatory and objections could be more easily resolved verbally. The participation of a staff member of the Board could encourage further resolution of objections if the Board's preliminary views on how it would determine the objection were made known. It would also afford the Board the opportunity to ask questions of the parties to assist it in understanding the basis of the objection. Where possible, the Board could make its determination on unresolved objections during the call, and reserve its decision on those issues it needs further time to reflect on.

A similar process could be used to deal with unsatisfactory responses to interrogatories.

Regardless of whether the above process is adopted, Re:Sound suggests that a date and time for a conference call amongst the parties to discuss resolving objections to interrogatories (and a subsequent date for resolving unsatisfactory responses to interrogatories) be built into the initial timetable so that all parties can hold the time free in their schedules well in advance.

Re:Sound would welcome the adoption of recommendations 34 and 35 regarding the creation of a database of orders of precedential value and development by the Board of more specific guidelines dealing with the interrogatory process.

Conclusion

Re:Sound wishes to reiterate its appreciation for the work of the Copyright Board and the Working Committee in preparing this Discussion Paper. Re:Sound is grateful for the opportunity to participate in this process and looks forward to having a similar opportunity to provide input as the Board expands its review to include larger issues, in particular methods of expediting the process for issuing decisions and certifying tariffs.

Yours very truly,

Re:Sound



Melanie Hubbard
Director of Legal Affairs