CAB | ACR

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Re: *A Consultation on Options for Reform to the Copyright Board of Canada*
Submission of the Canadian Association of Broadcasters

The Canadian Association of Broadcasters (CAB) welcomes the opportunity to provide submissions to the Department of Innovation, Science and Economic Development, the Department of Canadian Heritage, and the Copyright Board of Canada in respect of the above-noted consultation announced on August 9, 2017.

The CAB is the national voice of Canada's private broadcasters, representing the vast majority of Canadian programming services, including private radio and television stations, networks, specialty, pay and pay-per-view services. The CAB applauds the Departments and the Copyright Board (Board) for undertaking a review of the Board, and hopes that solutions can be developed to ensure that the Board can continue in its role of providing a valuable service to both rightsholders and users.

The following are the submission of the CAB in response to the Discussion Paper published on August 9, 2017. For ease of consideration, we have adopted the Discussion Paper's categorization of issues and organized this submission to reflect them. We thank you for the opportunity to provide this submission, and look forward to a more efficient and effective Board.

The CAB's key comments are as follows:

- The most important and potentially impactful recommendation in this Discussion Paper is to set a cap on the Board for rendering decisions of 12 months post-hearing.

- Some proposals in the Discussion Paper are more complex and not purely procedural, such as the proposal to set decision-making criteria. The CAB is strongly opposed to such measures.

- Any effort to reduce the burden of the interrogatory process without impacting parties' legitimate right to discover would benefit the Board's overall process.

- Requiring collectives to provide more detail in conjunction with tariff proposals would significantly enhance the efficiency and fairness of the process.

2.1 Enabling the Board to Deal with Matters More Expeditiously

2.1.1 Streamlining the Decision-Making Frameworks of the Board

1. Explicitly require or authorize the Board to advance proceedings expeditiously

From the CAB's perspective, the timelines relating to Board proceedings can be divided into three categories: (1) the time between the filing of a proposed tariff and the order from the Board to commence a proceeding in respect of that proposed tariff; (2) the time between when a proceeding is commenced and the hearing takes place; and (3) the time between the close of a hearing and the issuance of a decision and certification of a tariff. Each of these periods has distinct and unrelated issues that may or may not lead to delays. In particular, the CAB submits that the first and third time periods are currently far too long and should be significantly reduced in order to enhance efficiency.

Regulatory measures to ensure proceedings are launched within a predictable amount of time after the filing of a tariff would be welcomed by the CAB. Similarly, explicitly requiring the Board to issue its decisions and certify tariffs within a defined amount of time after the close of a hearing would be extremely beneficial to user groups who often wait to advance business developments until there is certainty from the Board.

In contrast, the second time period, the time it takes between scheduling a proceeding and the hearing itself, is currently executed efficiently, and has become even more efficient over the last several years as the Board and the parties have worked to carry out significant proceedings involving multiple collectives, rights, and technologies in less than a year; or less than the time that would be allotted to a comparable proceeding taking place at the Federal Court level. It would not enhance efficiency, and would potentially jeopardize the

quality of the argument and evidence if this phase of proceedings were shortened as compared to the current process. If, however, the interrogatory phase of the proceedings were substantially altered as a result of this consultation, the CAB would be open to corresponding changes in the proceeding timelines to align with any reductions in the interrogatory burden.

2. Create new deadlines or shorten existing deadlines in respect of Board proceedings

The CAB would support introducing a requirement that the Board render decisions within a fixed timeframe following a certain pre-established procedural step (e.g. within 12 months from the conclusion of hearings). Courts in Canada generally adopt internal and unofficial time limits for releasing decisions after the conclusion of arguments. The United States Copyright Royalty Board is subject to a number of statutory time limits for rendering decisions.[1] In our view, this component of the process is subject to the greatest delay. A simple and clear solution to this source of delay would benefit all stakeholders more than any other measure that the Government could implement in respect of the Copyright Board's process. Put simply, if the CAB could chose only one procedural fix for the Copyright Board, it would be this. Moreover, a time limit on rendering decisions would invariably result in downstream efficiencies and discipline for all participants thus addressing some of the other procedural issues addressed in the Discussion Paper. If this proposal were in place today, it would directly impact virtually every single outstanding tariff decision. A side benefit of this proposal is that it would assist all parties in knowing what the outcome is in one proceeding in order to inform an approach in another.

It is an existing practice for parties to work together to develop timelines from instigation of a tariff proceeding up to the date of the hearing. The Board is asked to intervene in situations where parties can't agree. The CAB supports formalizing this existing practice subject to the following comments. As with other suggestions in the Discussion Paper, the proposal to have the Board determine a particular timeframe for each case before it, would have to be implemented in conjunction with other proposals. In order to develop a timeline for any single case, the Board would have to have an understanding from the outset as to the complexity of the issues to be addressed in a particular proceeding. This would require parties to disclose more information at the outset of a tariff proceeding. The Board would then have to determine the length of time for the proceeding to commence, when the hearing will occur and how long it will take to render a decision. In our view, it would be essential that the Board consult with all parties to determine an appropriate time frame for the first two steps as they involve multiple participants who may have other commitments and considerations at any point in time.

Based on the experience of the CAB, a number of factors have to be considered in developing a timeframe for a particular process:

- The number of participants involved in the process,

[1] See s. 803(c)(1) of the Copyright Royalty and Distribution Reform Act of 2004

- The scope of interrogatories,
- Whether the tariff in question is a first time tariff, and
- Whether any issues of law are in play.

The CAB supports this measure if it is implemented in a predictable and rigorous manner with clear regard for the factors listed above. This proposal would have more impact if the Board were required to determine an overall timeframe for a proceeding sufficiently in advance of the proceeding such that the parties were able to evaluate and understand the implications of participating in such a proceeding. If, for example, the Board decided that the timeframe for a proceeding, including the time to make a decision, was going to be three years, the parties may, to the extent the statute allowed, determine that it would be preferable to engage in direct negotiations and avoid a Board process altogether.
In our view, the proposal to require the Board to track and make public the length of time it takes to render decisions following hearings would have minimal impact on the efficiency of the overall process. If the Board were subject to a fixed maximum time frame for rendering decisions, it should not require any sort of interim tracking and reporting. In any event, the CAB does not object to this proposal.

The proposal to shorten the period of time following publication of proposed tariffs from which objections may be filed would have no material impact on the overall efficiency of the process. The CAB does not support the option to shorten the period of time following publication of proposed tariffs from which objections may be filed. If collectives have to table more detailed tariff proposals than under current practice, and include further justifications as outlined below in Proposal 2.1.2, 5.(a), both options CAB supports, then objectors will need a proportionate amount of time to develop more complex objections, if required.

Under the current and proposed system, collectives have essentially unlimited time to prepare proposals. A collective can, in theory, have a proposal for a tariff in development for years before it asks the Board to formally publish it. Under the current system, 60 days is easily sufficient for a known objector to file an opposition to a tariff proposal. In theory, a known objector could file a simple "I object" opposition within two weeks to allow for client consultation, temporary absences, etc.

If the collectives' tariff proposals were required to be more detailed or substantive in nature, an option the CAB supports, then it would be necessary, if anything, to *increase* the amount of time if a more detailed objection as described below in Proposal 2.1.2, 5.(b) is to be required.

2.1.2 Limiting the Contributions of Parties to Delays

3. Implement case management of Board proceedings

Case management has been implemented in a range of court systems in Canada and has been adopted, at least informally, by the Copyright Board in many past and current proceedings. In theory, it can be an excellent means of enhancing efficiency, but only if

enacted effectively.[2] In the view of the CAB, case management must be implemented in a manner that is fair and not prejudicial. Subject to these considerations, the CAB supports the principle of formalizing the implementation of case management in respect of Board proceedings.

4. Empower the Board to award costs between parties

As a starting position, the CAB does not object to giving the Board the power to make cost determinations in situations where the Board determines that one party's conduct has unnecessarily lengthened the duration of a proceeding and contributed to the inefficiency of the process. It would be prudent to also require the Board to provide reasons for any such determination. However, our view is that cost awards are relatively ineffective in addressing particularly egregious behaviour on the part of a litigant. The amounts that would be assessed pursuant to the Federal Court Rules are relatively minor and follow a process so they do little to encourage efficiency during a process. In any event, the Board already has powers that can be used to speed up the process.

Under s. 66.7(1) of the *Copyright Act*, "[t]he Board has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its decisions and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record." Arguably this provision already provides the Board with sufficient power to compel parties to participate efficiently. We suggest that for clarity, this provision could be amended as follows:

> The Board has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its decisions, <u>the efficiency of its proceedings</u> and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.

This proposed addition explicitly confers upon the Board the ability to use court-like powers (issuance of orders, subpoenas, etc.) to ensure that proceedings move efficiently during the proceeding itself. In our view, this is the most effective way to enhance efficiency.

5. Require parties to provide more information at the commencement of tariff proceedings

(a) Require collective societies to include additional explanations with proposed tariffs

[2] Department of Justice Canada, *Guiding Principles for Effective Case Management*, http://www.justice.gc.ca/eng/rp-pr/csj-sjc/esc-cde/pdf/eff.pdf

The CAB has long considered this to be a significant issue. We consider the added burden on the collectives that would result from this proposal to be necessary given the fact that collectives exist solely to seek and administer tariffs and have years to prepare filings in support of such proposals. In addition, any increased burden on the collectives arising from stronger disclosure requirements is fully justified when considered against the prejudice imposed in the following circumstances which are currently routine experience for prospective licensees:

- Proposed tariff language is unclear and targeted user population is not explicitly delineated.
- Proposed tariff rate is inordinately high, unjustified and has no realistic expectation of being adopted by the Board.
- Targeted uses are not clearly explained leaving users unsure which category of use (if any) they may engage.

Perhaps some specific illustrations will help clarify the CAB's perspective on this issue:

- Canadian online music use tariffs to date[3] have included many different definitions of interactivity, both within different iterations of the same tariff (i.e. over different years) and across different collectives (i.e. how SOCAN defines interactivity is different than Re:Sound which is different than CSI).

- Re:Sound Tariff 8 was initially proposed at a rate of 45% of revenues, which could not have reasonably been expected to be certified by the Board. This extremely high rate was not justified in any way that would have enabled potential objectors to determine the feasibility of entering the Canadian market, and therefore the proposal had a chilling effect on the Canadian webcasting industry.

- Various iterations of SOCAN Tariff 22 proposals have included changes in the name and description of activity in each category, leaving users unsure whether or to what extent their activities were captured under one or more categories of the tariff in which years.

In all cases, if the collectives could be asked by the Board to provide some indication of the types of services (i.e. real examples that they intend to target under a particular definition of use) and some explanation of why a high rate was being proposed, potential objectors would be better positioned to develop clear and rational objections. If more information is provided, the public would be better informed as to the potential impacts of such tariff proposals, which in many cases can impact the public either directly or indirectly.

[3] We acknowledge that this has changed in the recent decision of the Board in respect of Online Music Services CSI (2011-2013); SOCAN (2011-2013); SODRAC (2010-2013) in which the Board sought to align the definitions of the different types of webcast services.

The tariff proposal process should be viewed as the first step in an adversarial process and should attract a slightly greater degree of formality than it currently bears. We agree that it would be unfair for the additional information provided alongside the proposed tariff to be strictly binding, and support the notion that it be without prejudice, but it should meet the proposed requirements. In particular, requiring the collectives to provide some broad justification or underlying rationale for the proposed rates to the extent they vary from pre-existing rates seeks to remedy an ongoing injustice perpetrated by collective participants before the Copyright Board. There have been many instances in the past of collectives seeking what prove to be unjustified increases to existing tariffs or excessive rates in proposed tariffs as a bargaining tactic or as a means to set the starting rate at a maximum level. By seeking early disclosure relating to rate proposals, the Board would be engaging in the equivalent of a leave granting process. Not leave to propose a tariff, but leave to propose increases or high rates. It is entirely reasonable to expect a collective to justify its rates up front in a manner consistent with the economic model upon which such rates were developed.

It may be that this stage of the process would require additional information to be provided by the collectives in the interests of enabling objectors to sufficiently understand the case to be met, and would therefore represent a more onerous burden for the collectives than for the objectors. However, this is balanced against the interrogatory stage of the process which is inherently more onerous for the objectors than for the collectives, both in terms of the number of questions asked and also the type and volume of information required to be provided. By its very nature, the interrogatory process is designed to ensure parties have access to the information required to understand the relevant facts of the other party; however, past practice has shown that the collectives rarely have "factual" information that is relevant to helping an objector understand the case, and virtually all questions relating to how and why a tariff was proposed are shielded by litigation privilege. Requiring the collectives to provide justification and rationale for their rates, terms and tariff models at the outset would introduce some balance to the overall information disclosure requirements of the tariff hearing process, which is currently heavily skewed against the objectors.

The proposed tariff itself is the legally binding and actionable instrument to which users must object. The supplementary information described above forms part of a legitimate disclosure that can allow the collectives and Board to determine who will be impacted and therefore who should be notified. In this way, additional clarification at the proposal stage can assist the Board with ensuring proper publication of proposed tariffs to potential licensees and other affected parties.

Requiring more detail from the collectives at the time a tariff is proposed will also help focus the interrogatory process by refining areas of relevance.

(b) Require objectors to include additional information with objections

To the extent the collectives' obligation is enhanced as indicated in the Discussion Paper, the CAB is willing to provide more detailed objections at a later date and with a lower

expectation than that placed on the collectives due to the "fundamental difference in the dynamics of a tariff-setting proceeding as they affect collectives and objectors."[4] We note that a more detailed objection can only be prepared if the above-referenced disclosure requirements are met; without such disclosure and early justification of tariff proposals, the objectors have no basis upon which to develop more detailed objections.

2.2 Reducing the Number of Matters Coming Before the Board Annually

6. Permit all collective societies to enter into licensing agreements of overriding effect with users independently of the Board

The CAB agrees with the suggestion to allow all collective societies to enter into licensing agreements of overriding effect with users, independently of the Board, as long as (1) the parameters for so allowing carefully consider and provide protection against the competition issues that arise from dealing with collective societies, and (2) in the event of a failed negotiation, one or both of the parties could bring the tariff/licence before the Board for consideration and certification.

The collective societies are essentially monopolies; they each function as the single point of clearance for each of the rights required to use music in business. As such, they wield significant power in a negotiation with a potential user of music content. Without the requirement for Board involvement, the collectives could use this imbalance in bargaining power to achieve super competitive rates through individual negotiation. If the parties were not protected against the abuse of the monopoly position through recourse to the Board, this type of regime could lead to unfair outcomes in the copyright environment in Canada.

7. Change the time requirements for the filing of proposed tariffs

As noted in the Discussion Paper, "the appropriate length of a tariff's effective period depends greatly upon the uses it encompasses, and in many cases could be longer than one year." The CAB would support a requirement that tariffs be extended over periods longer than one year for uses such as commercial radio, conventional television, and discretionary services. These are well-established business models and are well suited to longer tariff periods. Some Internet uses, however, are not well suited to longer tariff periods because of the uncertainty inherent in a nascent marketplace.

More important than longer periods, however, is the alignment of tariff terms among collectives seeking tariffs applicable to the same uses. Using commercial radio as an example, the five currently applicable tariffs apply over four different time periods, despite all having been heard and considered by the Board in the same, consolidated proceeding. It

[4] See "Discussion Paper of the Working Committee on the Operations, Procedures, and Processes of the Copyright Board" February 4, 2015.

would be administratively simpler and more logical for all the tariffs payable by a single user for a single use to be subject to the same term.

2.3 Preventing Tariff Retroactivity or Limiting Its Impact by Other Means

8. Require proposed tariffs to be filed longer in advance of their effective dates

This could work for tariffs that are applicable to uses other than internet uses, such as commercial radio or conventional television. These business models are well entrenched and the application of the tariff to the business is generally non-contentious. It is more difficult to anticipate uses of copyright protected works online, and would be challenging for both the collectives and the user groups to accurately anticipate such uses multiple years in advance.

9. Allow for the use of the copyrighted content at issue and the collection of royalties pending the approval of tariffs in all Board proceedings

The *Copyright Act* already provides that tariffs applicable to CAB members continue as interim tariffs until such time as a new tariff is approved. This is preferential to outright expiry of tariffs, but is an imperfect solution, particularly in respect of inaugural tariffs for which there is no interim rate to apply. The idea that the content could be used and royalties could be paid in advance of the tariff certification is an interesting idea, but it would be difficult in practice to agree on the price to be paid for the royalties in the pre-approval period without some consideration of the argument and evidence. If the Board were to set an arbitrary price to be paid in the interim that decision would be subject to judicial review by either side who felt the price was unfairly set. It would also risk becoming the precedent for the appropriate price, without any basis upon which to make it so. The solution for inaugural tariffs is to have them considered by the Board faster, and to have decisions issued by the Board more quickly after the close of argument and evidence, rather than to have the Board set an arbitrary price to be paid.

2.4 Further Clarifying the Board Decision-Making Processes

10. Codify and clarify specific Board procedures through regulation

The CAB has no position on the codification of the Board's procedures, other than to note that if general procedures are entrenched, it is important to allow the Board some flexibility to adapt its procedures in the event of irregularities in a particular proceeding (i.e. a party attempts to put something into evidence or withhold evidence and the opposing party wishes to make submissions in respect of the propriety of such actions – the Board would need to retain discretion for how to address such unanticipated situations). This could be achieved by allowing the Board to issue practice notices, as recommended in the Discussion Paper. The CAB agrees that it would be better to enshrine the Board's procedures through amendments to its Model Directive or through regulation, rather than through amendments to the *Copyright Act*.

(a) Statement of issues

In general, the CAB supports the idea of a statement of issue as a means to assist the Board in clarifying the scope of any particular hearing. Parties currently prepare proposed schedules for proceedings and generally also recommend consolidation with other related proceedings. This practice could easily continue. The extent to which objectors could identify relevant points of law and material facts will depend in large part on the degree of up front justification and explanation provided by the collectives with their proposals. If the proposed application of the tariffs is sufficiently explained, and if the objectors are given sufficient time to consider the proposed application against their business operations, the CAB would support a requirement that the parties be compelled to find points of agreement that can be removed from the proceeding to narrow its scope, particularly as it relates to interrogatories.

(b) Interrogatory process

- *Clarified that parties may only make and need only respond to requests that are proportionate to the nature and complexity of their disputes and their respective positions and relevant material to the resolution of disputed issues*

In general, the CAB agrees with the recommendation that parties may only make and need only respond to requests that are (a) proportionate to the nature and complexity of their disputes and respective positions, (b) relevant, and (c) material to the resolution of disputed issues. Currently the collectives are often permitted to ask an excessive range of questions, most of the responses to which do not get used in the proceeding, and serve merely to impose a substantial burden on the objectors, both in terms of the work required to produce satisfactory responses and in terms of the overall exposure of a business that is required to disclose so much operational and financial information. The objectors consistently object to this over-reaching, the collectives often respond that they cannot know if it is relevant until they see the answer, and the Board typically allows the question. In principle, requiring that all questions be proportionate to the nature and complexity of the case and respective positions is a good idea; but practically speaking, it is difficult to enforce.

From the perspective of the CAB, adopting a principle of proportionality requires the Board to consider the CAB both as a single point of contact and as a sum of its parts, consisting of a range of different members, including many small broadcasters with only a few employees each. With the type of organizational structure that the CAB necessarily has, it is virtually impossible to adapt to the information overload of a large interrogatory process as compared to the day-to-day requirements of providing support to CAB members on copyright and related legal and regulatory issues. In theory, it may seem like the CAB would have significant resources to address an industry-wide issue such as responding to interrogatories. However, in reality, the CAB does not have access to a pool of untapped specialized human resources waiting every two or three years to participate in a massive interrogatory undertaking for a couple of months.

Thus, applying a principle of proportionality to the CAB and its members would lead to a few logical outcomes for the Board in any attempt to manage an interrogatory process in a hypothetical forthcoming proceeding:

1. Have the Board keep track of and consider which interrogatory questions have been asked in the past and not utilized by the requester of such information. Apply a stricter threshold in determining whether to allow such questions.

2. Take into account all the following factors in determining the "burden" associated with responding to prospective interrogatory questions:

    a. The number of individuals at the targeted entities that would have to participate in the process.
    b. The amount of time required at each targeted entity to respond to some or all questions.
    c. The total volume of information to be processed, treating sub-questions as individual questions.
    d. Viewing the process through the lens of the targeted entity. Are definitions clear? Are questions answerable by a person that is not a copyright lawyer?
    e. The additional time required for counsel to collate and process responses.

3. Afford more time to respond to and process interrogatories in more complex cases. As noted at page 23 of the Board's 2015 Discussion Paper, "fairness requires that there must be sufficient evidence before the Board to allow it to arrive at a fair tariff." Artificially tight deadlines can cause challenges for small entities faced with a large interrogatory burden in a complex case. If the objective of the interrogatory process is to collect and provide relevant and useful evidence, parties should be given sufficient time to do so.

- *required in cases involving multiple collective societies or objectors that generally aligned parties must consolidate their interrogatories into a single set or satisfy the Board as to why it would be unjust or inefficient to do so*

The CAB notes that this is generally the practice in the proceedings in which it has been involved, and agrees that a single set of interrogatories is easier and more efficient for the answering party to address.

- *required that parties must explicitly link their interrogatories to specific issues identified in their statements of issues (see above) and that parties must include in their replies to objections to interrogatories explanations as to how the information sought is relevant to specific issues identified in their statements*

The CAB agrees that it would be beneficial to require the Collective to link their interrogatory questions to a specific issue under consideration in the proceeding, and notes that this could be done even without the statements of issue, if the collectives were required to provide an original justification/objection. This requirement could lead to an overall reduction in the questions asked of the Objectors, which would undoubtedly streamline the proceeding and make the process more efficient.

- *clarified that interrogatories are to be exchanged after collective societies' replies to objections have been sent to the objectors*

The CAB does not have any specific comment on this proposal.

- *clarified that responses to interrogatories need only be gathered from a representative sample of an association's members, rather than from all members*

The CAB agrees with this suggestion and notes that this is generally the practice in the proceedings in which it is involved. The CAB has had instances where the sample chosen to respond to interrogatories was too large and, combined with a very long list of questions, the overall burden on the CAB was unreasonably significant. If the number and complexity of permitted interrogatory questions is limited and asked only of a representative sample of the association's members, this could lead to a simplification of the process. Similarly this principle should apply to collectives and their members.

- *required that a party's responses to interrogatories be provided at the same time as its objections to other interrogatories posed, if any, so motions regarding the sufficiency of the party's responses and objections to interrogatories may be heard at the same time*

We understand that under this proposal a party to a tariff proceeding would simultaneously respond to questions that it is not objecting to while objecting to the remaining questions. In our view, this is not an efficient process for two reasons. First, it takes far more time to answer most interrogatories than it does to develop objections. Most objections can be developed by counsel. Interrogatory responses often require a significant amount of client input involving many personnel as well as interactions with counsel. Second, from our experience, it is only possible to request clients to answer interrogatories so many times without compromising the process, thus it is better to limit the number of times a client has to respond.

- *required that parties use a standardized format for communicating interrogatories, responses thereto, objections thereto, replies to objections, etc., such as a table that enables readers to cross-reference the foregoing*

The CAB agrees with this suggestion and notes that this is generally the practice in the proceedings in which it is involved. The parties have developed a template over the course of the last several years that has been used in a variety of proceedings involving different objectors and different collectives. If the Board wishes to develop a different template and

impose it on the parties, as long as it is easy to use/replicate, the CAB does not object to the use of something along those lines. It would be ideal if the Board were to prepare a template, circulate it with the parties for input and have it adopted prior to the onset of the process. This would enhance efficiency and predictability of the process.

(c) Simplified procedure

In cases where no objection has been filed in respect of a proposed tariff and it is not substantially different from a previously certified tariff that the proposed tariff is sought to renew, there could be a simplified procedure set down that would include specific timelines for certification of the tariff. This is essentially already in place; where there is no objection, there is no obvious process and the tariffs are certified as filed. It is difficult to imagine a scenario other than this one where a simplified procedure could be used.

(d) Evidence

Most of the suggestions in this section of the Discussion Paper form part of existing practice, except for the requirement to file combined evidence. The CAB agrees that it is important to provide the Board with the evidence it needs to render fair decisions. To date, the CAB has consistently endeavoured to provide the Board with useful and comprehensive evidence in every proceeding, the contents of which reflect the parameters outlined in the Discussion Paper. The CAB has also participated in the creation of joint evidence where it is appropriate to do so. This decision is best left to the parties, and should not be dictated by the Board. The CAB understands that it may be more efficient for the Board to only have to review a single report on any given issue, but there are circumstances where the preparation and delivery of the evidence and the subsequent framing of the issue are integral to the dispute between the parties and it would not be practical or appropriate for the parties to prepare joint submissions on points of dispute.

The CAB sees no efficiency benefits from allowing the Board to appoint independent experts as part of a tariff hearing. The Board has no independent vested interest in the outcome of proceedings other than adjudicating the evidence brought before it by the parties that are directly affected by the tariffs under consideration. Allowing the Board to appoint its own experts risks adding layers of complexity, extending the time required for a proceeding, and compromising the objectivity of the Board, whose mandate it is to evaluate and rule on the evidence and argument put before it by the parties appearing. Section 66.4(3) of the Act already allows the Board to "engage on a temporary basis the services of persons having technical or specialized knowledge to advise and assist in the performance of its duties". This should be sufficient to allow the Board to retain whatever expertise it feels it is lacking.

(e) Confidentiality

The CAB opposes any measure that would increase the risk of public disclosure of sensitive business information. The very nature of the Board's work - rate setting in the private sector – requires that the Board consider commercially sensitive economic, financial, and

strategic business information in order to assess the value of copyright-protected works to a particular user's business interests. However, the very nature of the disputes before the Board – the appropriate price to pay for a business input – is inherently sensitive. Any disclosure of sensitive business information from the objectors compromises their ability to engage in negotiations with the collectives. If this information were automatically deemed public, its disclosure would also compromise the ability of objectors to compete with each other in the marketplace outside the context of the Board process. It is essential then that for the Board to consider the evidence it requires to set rates, that evidence must be given this highest level of protection.

The Board is not in the best position to determine whether sensitive business information should be public or private – that decision rests with the business whose information risks being disclosed. The CAB strongly opposes the codification of the principle that all documents filed with the Board are deemed public unless the Board orders otherwise. This invites a more protracted process than is currently in place; one in which parties would have to make multiple requests for the Board to rule, wait for consultation with the parties, consideration by the Board and ultimately a decision, which may or may not be judicially reviewed depending on the interests of the party whose information risks disclosure. The current process, in which parties make their own designations, is not time-intensive, does not require extensive resources, or create barriers to participation. There is no public interest in access to sensitive business information of private sector enterprises. There is no reason for the Board to seek more public disclosure of documents filed during proceedings.

The production and possible disclosure of sensitive business information is already a barrier to participation in Board proceedings for many objectors. Granting the Board the power to make confidentiality determinations on its own accord risks further alienating parties and disassociating them with the Board process entirely.

11. Stipulate a mandate for the Board in the Act

The CAB does not object to a codified mandate for the Board in keeping with the suggestions raised in the Discussion Paper, namely that the Board be required to ensure that royalty rates and their related terms and conditions are fair and to do so in the most efficient manner possible. This would require further input – it comes down to what the actual mandate proposal is going to be. The CAB requests that any proposed change to the mandate of the Board be subject to a full, formal and broad consultation.

12. Specify decision-making criteria that the Board is to consider

In terms of stipulating the criteria the Board is to consider in its decision making, the CAB does not think that this measure is required and does not think that it will enhance either fairness or efficiency. Care should be taken with identifying new criteria to not upset this balance.

As an example, some parties who appear before the Board have argued that greater efficiencies could be achieved if the Board abandoned the requirement to set fair tariffs and instead set tariffs based on "market-rate based benchmarks." This equates to simply asking the Board to first consider the argument and position of the one side without any regard to the arguments of the other side or any inclination toward ensuring the rates it sets are fair. If, in codifying rate setting criteria for the Board, the Board were required to look to and consider market rates in determining fair rates for tariffs that do come before it for review, it would be problematic if collectives were able to negotiate directly with rights holders outside of a Board process in order to set precedents favourable to themselves. If the collectives or their members were allowed to use their monopoly positions to achieve prejudicially high rates through negotiation, and then were permitted to bring those unfairly negotiated contracts before the Board as market-rate evidence that the Board was compelled to prioritize in its consideration, this would perpetuate prejudicial rates and eliminate the fundamental balance in copyright law.

Furthermore this suggestion may be inconsistent with the mandate of the Copyright Board as set out in the *Copyright Act* which requires the Board to set royalties that are fair and reasonable,[5] a requirement the CAB submits should remain.

Finally, any efforts to adopt decision making criteria would require broad consultation as such criteria would have significant impact on the current balance between rights holders, intermediaries such as content producers and broadcasters, and the public who consume content. Imposing a concept such as "market-rate based benchmarks" could predictably lead to rate inflation for webcasting services, as an example, and significantly impact the scale and scope of services benefiting the Canadian public.

Fair and market-based are not opposites; for the Board, the principal consideration is, and should be, that the rates be fair, consistent with the necessary balance between rights holders and users identified by the Supreme Court of Canada.[6]

13. Harmonize the tariff-setting regimes of the Act

The CAB supports a harmonization of many of the structural components of the tariff setting regimes to the extent doing so is required to streamline the tariff setting process. As noted above, the CAB agrees that it would be beneficial to all parties if collective societies and users are allowed to enter into agreements of overriding effect without Board involvement as long as those agreements were subject to some protection against competition law abuses and as long as parties retained the right to bring the tariff/licence before the Board in the event of a failed negotiation. The CAB also agrees that the arrangements established by a previously certified tariff continue to apply until a new tariff is approved or an agreement entered into; this is currently the practice for all tariffs

[5] *Copyright Act*, R.S.C. 1985 c. C-42 at ss. 66.91, 83(9)
[6] See for example, *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336 at para 31; *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231 at paras 47 and 123; and *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283 at para 65.

applicable to the CAB which apply on an interim basis until a new tariff is approved. The CAB has no opinion on whether this makes sense for tariffs that are not currently subject to an interim tariff model. Also, as noted above, the CAB notes that it is important that the Board not be compelled to consider any single criteria to the detriment of any other.

The CAB notes that there are some components in the tariff setting regimes of the Act that should be preserved in the event of overall structural harmonization. For example, section 68.1(1) of the *Copyright Act* provides for special rates for the tariffs applicable to the performance in public or the communication to the public by telecommunication of performer's performances of musical works, or of sound recordings embodying such performer's performances. Similarly, section 68.1(3) provides for preferential rates for small wireless transmission systems. These are statutory protections for small businesses and are not related to the efficiency of Board procedures.

In addition, section 31 of the *Copyright Act* establishes a compulsory licence regime for the retransmission of broadcasters' distant communication signals. Under this regime, distributors – "retransmitters" – pay the tariff certified by the Copyright Board and do not require the consent of broadcasters to retransmit over-the-air, distant, radio or television signals. This regime only applies to terrestrial retransmitters. Section 31 must be considered in conjunction with the CRTC *Exemption Order for New Media Broadcasting Undertakings*,[7] which has the effect of ensuring broadcasters retain the ability to decide whether to make their communication signals available on the internet, and for what price. In this way, the retransmission regime under the *Copyright Act* protects over-the-air broadcasters from unauthorized retransmission of their signals on the internet. This is a specifically and purposefully crafted section of the Act that is essential to protect broadcasters in the digital age. It has zero connection to the Copyright Board process, and it should not be subject to modification under the guise of Copyright Board reform.

Sincerely,

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[7] For the original exemption order, see Public Notice CRTC 1999-197, *Exemption order for new media broadcasting undertakings*, December 17, 1999, http://www.crtc.gc.ca/eng/archive/1999/PB99-197.HTM.