CANADIAN MUSICAL REPRODUCTION RIGHTS AGENCY LTD.
AGENCE CANADIENNE DES DROITS DE REPRODUCTION MUSICAUX LTÉE

September 29, 2017

VIA EMAIL: cbconsultations@canada.ca

Department of Innovation, Science and Economic Development
Department of Canadian Heritage
Copyright Board of Canada

To Whom It May Concern:

Re: Copyright Board Consultations

Canadian Musical Reproduction Rights Agency Ltd. (CMRRA) applauds the decision of the Minister of Canadian Heritage and the Minister of Innovation, Science, and Economic Development to assess the operations of the Copyright Board of Canada via consultation with stakeholders. The purpose of this submission is to offer an initial outline of CMRRA's proposals to improve the efficiency of the Board's processes and the timeliness and predictability of its decisions.

The Board is supposed to play an integral role in the Canadian creative industries, particularly the music industry. However, various challenges regarding the process and operations of the Board have led to dangerous uncertainty in the markets that it regulates. That uncertainty has been detrimental to rightsholders, users, and the public.

CMRRA believes that the modifications to the Board's processes and operations described below may help to restore certainty and predictability to the market for copyright-protected works, and thereby to foster innovation, investment and growth in the Canadian music industry.

1) Issues with Board Timelines for Proceedings and Decisions

(i) The Challenge

While the stakeholders whose businesses are affected by Board decisions may not agree on much, they do agree on this: the time it takes the Board to examine a proposed tariff and render a decision is an extremely serious problem.[1]

By way of example, the increasing lengths of time required for the Board to set tariffs for digital uses of music shows that the Board is ill-equipped to handle the needs of an increasingly sophisticated and fast-paced market. CMRRA files tariffs before the Board to set the royalties payable for certain reproductions of musical works, including by online music services and commercial radio broadcasters. The Board certified CSI's[2] first *Commercial Radio Tariff* in March 2003, some 11 months after a hearing that began in April 2002, at a time when radio stations were beginning to copy musical works onto servers rather than broadcasting music from the compact discs on which the music was recorded. In March 2007, the Board certified CSI's first *Online Music Services Tariff* following a hearing that began only seven months, earlier in September 2006, at a time when the market was dominated by the iTunes store.

[1] Senate Standing Committee on Banking, Trade and Commerce, *Copyright Board: A Rationale for Urgent Review* (Ottawa, 2016) [Senate Report].

[2] A joint venture between CMRRA and La société du droit de reproduction des auteurs, compositeurs et editeurs au Canada (SODRAC) to jointly license certain types of music users.

Since those initial proceedings, however, the Board's ability to render timely decisions following each hearing has diminished severely. The *CSI Online Music Services Tariff* for the years 2011-2013 was initially filed in March 2010, the hearing before the Board concluded in November 2013, and oral arguments were made to the Board in March 2014. However, the Board delivered its decision on this tariff only very recently, on August 25, 2017, more than 45 months since the beginning of the hearing. Given that this was the first proposed tariff to require webcasting services to pay royalties for the right to reproduce musical works, the result has been great uncertainty in the entire streaming industry in Canada for a retroactive period going back to 2011.

	Tariff period	Start of public tariff hearing	Date of tariff decision	Number of months to render decision following start of public hearing
CSI Commercial Radio Tariffs	2001-2004	April 2002	March 2003	11
	2005-2006	n/a	March 2006	n/a
	2007	n/a	February 2007	n/a
	2008-2012	December 2008	July 2010	18
	2013	October 2013	April 2016	**30**
	2014-2017	TBD	TBD	TBD
CSI Online Music Services Tariffs	2005-2007	September 2006	March 2007	6
	2008-2010	June 2010	October 2012	**28**
	2011-2013	November 2013	August 2017	**45**
	2014-2017	TBD	TBD	TBD

The time it takes for the Board to render decisions may have been exacerbated to some degree by changes in Canada's legal framework for copyright in the past decade. More often than not, Board proceedings raise legal issues of first impression, including most recently the initial interpretation of new rights and exceptions introduced in the November 2012 amendments to the Copyright Act. In dealing with these novel issues, the Board is also grappling with new principles of interpretation established by the Supreme Court of Canada in a series of seminal copyright decisions rendered since 2012. This has substantially increased the Board's workload and underlines the need for specialized expertise in determining the value of copyrighted works as used by a growing number of different stakeholders in a rapidly changing market.

Meanwhile, the digital marketplace has remained anything but stagnant. Indeed, the Board's apparent inability to render decisions has coincided with a period of significant expansion and change in the music industry. A host of new online business models have emerged since the initial CSI Online Music Services Tariff was certified. On-demand music subscription services such as Spotify, Google Play, and Apple

Music have become significant players within the music industry, and have gradually replaced downloads as the predominant model for consumption. Each of these services only emerged in Canada since the close of the last tariff proceeding in the spring of 2014.

While awaiting the Board's decision, CMRRA has had the advantage of being able to privately negotiate licensing agreements with services. As the administrator of an exclusive right, CMRRA is able to enter into private agreements and is not required to appear before the Board. Historically, it has chosen to file tariffs because it has been advantageous for the Canadian marketplace as a whole. Sometimes users deny that they are using the reproduction right – or even that the right exists at all. Other times, users seek unacceptably low rates or negotiate in bad faith. In these scenarios, the Board has been a valuable resource by setting tariffs of first impression that outline the rates payable for certain types of activities in Canada. Without these types of decisions, rightsholders would be forced to turn to other means of enforcement such as lengthy court proceedings, which would antagonize licensees – particularly new and innovative ones – and send the wrong message about doing business in Canada.

The ability to negotiate directly has allowed CMRRA to work with music users to find solutions that benefit all stakeholders in a balanced way, using the guidance of existing rate structures set by the Board. Without the flexibility to negotiate privately (and it is important to note that not all collectives have this ability), the Board's pace could destroy the Canadian marketplace. As it is, by failing to provide domestic guidance on the value of music in a timely manner, the Board threatens to cause Canada's music industry to become either stunted or driven by decisions and developments in other territories.

In an optimal setting, CMRRA would be able to privately negotiate deals with services using established models and rate categories, and the Board would primarily assess the value of new types of uses. Instead, CSI has been put at a severe disadvantage while awaiting the recently released *Online Music Services Tariff* for 2011-2013. Without a tariff of first impression to set baseline rates for webcasting services in Canada, CSI has faced difficulties in negotiating direct deals with those services, some of whom have attempted to use the absence of a certified tariff to push for royalty rates that do not reflect the true value of music. Other services have simply chosen not to enter the territory, which is not beneficial to anyone. And all types of services have been hesitant to license without any guidance on the status or value of the making-available right, and what impact it might have on existing rate structures.[3]

Now that the Board's online music decisions have finally been released, the resulting tariffs are woefully inadequate and absurd. The Board made unpredictable and unwarranted changes – which were not proposed by any party – to a market that has developed by necessity in the absence of the Board's guidance, relying on established royalty rates. The certified tariff broke with past precedents by drastically and retroactively cutting the royalties payable by the dominant online music services operating in 2017. The Board's decision is divorced from reality, which is unsurprising when it is considered that the evidence was heard almost four years before the decision was rendered. The result will be further delays and uncertainty in the marketplace as the parties seek badly-needed clarity from the Federal Court of Appeal.

[3] The making-available right was the subject of a parallel proceeding that was conducted by the Board on a paper record in mid-2013 but did not result in a decision until August 25, 2017, the same day the Online Music Services decision was released.

In summary, the market uncertainty created by the Board's inefficient process and unpredictable decisions stymies the Canadian music industry in a number of ways. To list just a few:

- Rightsholders may be without revenue for lengthy periods of time while tariffs are pending.
- Some rightsholders are able to enter into licensing agreements with music services while a tariff is pending, but the lack of a certified tariff can put rightsholders at a disadvantage in negotiating the appropriate royalty rate.
- Market uncertainty in the face of pending tariffs can prevent some new music services from operating in Canada at all. Such services are fearful of entering the market without certainty regarding the costs associated with doing so, especially in the case of rights that cannot be privately licensed and depend on tariffs set by the Board. Rightsholders, services, and the public all lose out in these cases.
- When tariffs are certified after their effective dates, or even after their expiration dates, those tariffs have retroactive effect and may also apply prospectively on an interim basis until new tariffs are set. Retroactive and interim tariffs leave rightsholders and users uncertain of their legal rights and frustrate their ability to forecast their financial rights and obligations. This creates unnecessary legal and administrative costs for all parties, squandering the reductions in transaction costs that normally characterize collective administration.

(ii) CMRRA Proposal

CMRRA proposes that either the *Copyright Act* be amended or regulations be adopted to require that the Board release decisions and certify a tariff within no more than one year after the end of a timely hearing or before the effective date of the proposed tariff, whichever is later. All of this should additionally be subject to expedient pre-hearing case management, as further discussed below.

To impose mandatory decision-making timelines would be consistent with international practices. For example, in the United States, the Copyright Royalty Board is mandated to render decisions within 11 months of a mandatory settlement conference between the participants and in no event later than 15 days before the expiration of the then-current royalty rates and terms.[4]

CMRRA also supports modifications to the Board's procedures to expedite the period of time from the filing of a proposed tariff to the certification of the tariff, including mandatory mediation and optional case management. Case management can be a valuable tool for efficiency that helps focus and narrow the issues, and push the parties to accelerate the overall tariff process. It can help to ensure a proceeding is not delayed by the obfuscation of a party, and ensure that the matter is not unnecessarily weighed down by issues that are not material to the setting of the tariff. Overall, case management is a method of achieving efficiency by pushing the parties to work with the best interests of the administration of justice, typically under the direction of a judge or prothonotary. While the specific nature of those procedures may require further consultation, models for mandatory mediation and for optional case management may be found in the Ontario *Rules of Civil Procedure*[5] and the *Federal Court Rules*, respectively.[6] CMRRA notes that the

[4] US, 17 USC § 803. Available online: https://www.copyright.gov/title17/92chap8.html

[5] *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 24.1.01. Available online: <http://canlii.ca/t/t8m>

[6] *Federal Courts Rules*, SOR/98-106, Rules 383 – 385. Available online: <http://canlii.ca/t/80ps>

Governor in Council is authorized to give policy directions to the Board,[7] which could incorporate the proposals set out above.

The Copyright Board could fulfill an integral role in establishing the inherent value of music, and it is a vital institution to the survival of the music publishing industry in Canada. CMRRA's music publisher clients would like to see an independent and properly resourced Copyright Board that can nimbly deal with the constant changes in our technological landscape. This currently is not our reality. The delays in rate setting have introduced a great deal of uncertainty for domestic and foreign businesses in recent years, and we believe that uncertainty has influenced their decision to refrain from offering their services in Canada. When rates are finally set after long delay it leads to disruption in the market as rightsholders and users scramble to revaluate their operations and expectations in light of unexpected results. The situation is detrimental to music rightsholders and users alike.

2) *The Board Lacks Clear Guidance for Making Decisions*

(i) The Challenge

The Board is an economic regulatory body with a statutory mandate to set tariffs for Canada's cultural sector. However, despite that important role for guiding and fostering domestic marketplaces, the Board is mandated only to fix tariffs that are "fair and equitable,"[8] and even that standard only applies explicitly to the private copying regime,[9] not to the general or performing rights regimes.[10]This standard does not appear to have provided enough substantive guidance for the Board to fulfil its role.

The lack of a specific economic standard, or specific criteria to be considered, contributes to a lack of predictability in Board decisions. That unpredictability often increases the costs required for parties to participate in a Board proceeding, as the parties' expert economists are effectively forced to propose and respond to various economic models for determining the inherent value of music in the absence of clear guidelines or economic criteria. In effect, the parties are left guessing as to what approach the Board will take, and how that approach will be justified, from one case to the next.

It is also not uncommon for the Board to reject the economic models proposed by the parties' experts in favour of its own precedents or its own staff's economic analysis. In such circumstances, the parties may not have had the opportunity to consider or comment upon the economic model ultimately accepted by the Board. When this occurs, parties are often left with the impression that the significant cost and effort that has gone into the development of their economic evidence has gone entirely to waste. This is particularly true for the owners and administrators of exclusive rights that are not required to go before the Board to seek tariffs, and may instead be privately negotiated. For such rightsholders – including collectives like CMRRA – the uncertainty and costs involved in Board hearings make the entire process an unappetizing risk.

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[7] *Copyright Act*, s.66.91.

[8] *Copyright Act*, s.66.91.

[9] *Copyright Act*, s. 83(9).

[10] Although section 66.91 of the *Act* allows the Governor in Council to give directions to the Board concerning "general criteria to be applied by the Board or to which the Board must have regard in establishing fair and equitable royalties to be paid pursuant to this *Act*," that standard is not actually prescribed in the *Act* as applicable to the general or performing rights regime.

In addition to these substantive issues, the Board also lacks a sufficient procedural framework for how matters before it are to transpire before, during, and after hearings. At present there is no mandatory procedure for hearings before the Board, nor are there any statutory or regulated rules of procedure. Procedure before the Board is dictated only by a Model Directive on Procedure that the Board is free to modify, or even to dispense with entirely, in its sole discretion. This flexibility has worked well in some ways, but it also seems to have contributed to the extraordinary delays that are now standard fare in Board proceedings.

(ii) CMRRA's Proposal

CMRRA recommends that the *Copyright Act* or its regulations prescribe a specific economic standard, or a set of economic criteria to be applied by the Board in fixing the royalty rates to be paid by users of copyright-protected works. CMRRA notes that specific economic standards or criteria are utilized in other jurisdictions. For example, the U.S. Copyright Royalty Board is required to establish royalty rates and terms for certain uses of certain subject matter based upon a "willing buyer/willing seller" standard.[11] CMRRA does not support a particular economic standard at this time and acknowledges that further consultations would likely be necessary to determine what would be appropriate for Canada.

CMRRA recommends that rules of procedure be adopted, just as they have for other comparable administrative bodies in Canada, to ensure a fair, consistent, and predictable process for all proceedings before the Board. Rules of procedure would also help ensure that proceedings transpire within a reasonable time and in accordance with a set timetable that is likely to promote timely and efficient decisions. We can learn from other jurisdictions to some extent, but we can and should also learn from the experiences of other Canadian tribunals, all the while focusing on any unique aspects of proceedings before the Board in particular.

Finally, CMRRA recommends that the Board be required to decide matters put before it on the basis of the arguments and economic evidence presented at hearing by the parties to the proceeding. Legal experts have noted that this is the case in other jurisdictions, such as in the United States, where the Copyright Royalty Board decides on rate-setting matters based entirely on the evidence and arguments presented at hearings.[12] It is unacceptable that parties before the Board must undertake such lengthy and costly proceedings without any ability to predict how the decisions might turn out, at times years after the fact. In the most recent *Online Music Services Tariff*, the Board drastically reduced uncontested royalty rates for streaming with over a half-decade of retroactive effective.

[11] US, 17 USC § 114(f)(2)(B). Available online: < https://www.copyright.gov/title17/92chap1.html#114>. Generally speaking, the willing buyer/willing seller standard applies to the fixing of compulsory licences for the performance of sound recordings by certain types of online music services, namely ad-supported, non-interactive webcasters. A different standard, which is based upon criteria enumerated by statute, applies to other types of online music services. See US, 17 USC § 801(b), available online: <https://www.copyright.gov/title17/92chap8.html#801>

[12] See Strickler, David R., "Royalty Rate Setting for Sound Recordings by the United States Copyright Royalty Board: The Judicial Need for Independent Scholarly Economic Analysis" (December 31, 2015), *Review of Economic Research on Copyright Issues*, 2015, 12(1/2), Abstract p.1., available online: https://ssrn.com/abstract=2714784, in which Judge Strickler of the US Copyright Royalty Board notes that "Judges, who set copyright royalty rates through litigation, like all trial Judges, are constrained by the evidence and testimony. Thus, we can only determine rates that are supported by the record." See also 37 CFR §351.10 on the submission and admissibility of evidence at Copyright Royalty Board proceedings.

3) The Board Lacks the Proper Resources and Subject-Matter Expertise

(i) The Challenge

CMRRA is of the view that one of the main factors contributing to the delays in the Board's decision-making is that the resources available to the Board may not be commensurate with its mandate.

The Board should play an integral role in Canada's copyright regime. As detailed above, Board proceedings very frequently raise legal issues of first impression, including the initial interpretation of new rights and exceptions. The Board has also been called upon to apply new principles of interpretation established by the Supreme Court of Canada in a series of seminal copyright decisions rendered since 2012. The Board's primary role in an increasingly complex copyright regime has substantially increased its workload, straining its resources and presumably contributing to delays in its decision-making.

The Board's role also underlines the need for specialized expertise in the areas of copyright law and economics. As the Vice-Chair of the Board has recently explained, "decisions must be based on solid legal and economic principles [and] reflect a solid understanding of constantly evolving technologies."[13] It cannot be overstated how important it is for the Board to quickly and competently assess and respond to rapidly changing technologies, especially for the music industry when it has become so easy to distribute songs online. The negative consequences of the Board being ill-equipped to do so are evident in the submissions of CSI and SOCAN in relation to the judicial review of to the recent *Online Music Services Tariff*, as well as other matters that have been before the Board and reviewing courts. In order to fulfil its mandate, and provide sound and timely decisions, the Board must have access to the right mix of resources, including a minimum level of subject matter expertise in the areas of copyright law and economics amongst Board appointees.

(ii) CMRRA's Proposal

CMRRA recommends, generally, that the type of resources allocated to the Board be commensurate with its important mandate.

One concrete way to maximize the Board's limited resources, and to improve the timeliness of the Board's decisions, would be to require that a certain number of Board members have a minimum level of subject-matter expertise in either copyright law or economics. For example, in the United States, the U.S. *Copyright Act* prescribes the composition of the three-member Copyright Royalty Board. The Chief Copyright Royalty Judge must have at least five years of adjudicative experience, which mirrors the requirement in Canada that the chair of the Copyright Board be either a judge or a retired judge. Of the other two Copyright Royalty Judges in the U.S., one must have significant knowledge of copyright law, and the other must have significant knowledge of economics.[14] Introducing a similar requirement in Canada might serve to improve the quality and consistency of the Board's decisions, although it is again important to determine the best approach for Canada and the Board in particular. Although examples from other jurisdictions may provide guidance, Canada should also look to domestic models with comparable administrative bodies.

The important mandate of the Board might also warrant a greater expertise, and requires full-time, senior legal and specialized economic staff with proper technological expertise. Currently, the Board has

[13] Copyright Board of Canada, *Presentation delivered by Mr. Claude Majeau, Vice Chairman and Chief Executive Officer*, (Presentation to the Standing Senate Committee on Banking, Trade and Commerce) (Ottawa, November 3, 2016). Available online: http://www.cb-cda.gc.ca/about-apropos/speeches-discours/PRE-2016-11-03-EN.pdf

only two economists and four lawyers on staff,[15] and there has not been a General Counsel at the Board since at least August 2015.[16] As an independent tribunal, the Board is unable to obtain support from lawyers in government departments, such as the Department of Justice, when additional support is needed.[17] The Board has noted that copyright tribunals in other jurisdictions receive support from government departments in their jurisdictions, such as the Library of Congress in the U.S., the Intellectual Property Office in the U.K., and the Federal Court in Australia.[18]

4) All Collective Societies Should Be Able to Enter into Licensing Agreements

Although it does not affect CMRRA directly, it nevertheless supports the recommendation that all collective societies should be permitted to enter into licensing agreements of overriding effect with users independently of the Board.

CMRRA is already able to enter into private agreements, as a collective that administers an exclusive right – the reproduction right – that can be negotiated in the absence of a tariff set by the Board. The fact that CMRRA has been able to do so has allowed it to continue to operate in the absence of guidance from the Board during the most significant years of growth in Canada's online music marketplace, as private deals were struck to ensure that music users could operate with business certainty and rightsholders would be compensated.

However, when not all collectives are able to enter into private agreements, those collectives that do require tariffs from the Board force the entire market to wait before the affected services can operate with certainty. Although a service may be able to come to private terms with certain rightsholders – such as with CMRRA for the reproduction right – they may be forced to wait before entering into agreements with other collectives that require tariffs from the Board. In the absence of such licensing for other rights, those services may choose not to enter the Canadian market since they are effectively unable to know the full costs of their business until years after the fact. The licensing of other rights also affects collectives like CMRRA when there is uncertainty as to how those other rights might affect the reproduction right, as was the case for many years as rightsholders and users awaited the Board's decision on – and valuation of – the making available right.[19] CMRRA believes that the inability of some collectives to enter into private agreements, combined with the delays in the Board's decisions, have resulted in certain services choosing not to enter the territory and have stunted the growth of Canada's music industry.

[15] Minutes of the Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, October 17, 2016, per Member Majeau.

[16] Chantal Carbonneau held the position of Acting General Counsel from November 2014 through August 2015, and the last permanent General Counsel at the Board, Mario Bouchard, retired from the position in August 2013.

[17] Minutes of the Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, October 17, 2016, per Member Majeau.

[18] Minutes of the Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, October 17, 2016, per Member Majeau.

[19] The recent decisions of the Board have done little to alleviate that uncertainty, since the Board recognized in its decision on the scope of making available (available online http://www.cb-cda.gc.ca/decisions/2017/DEC-2017-SCOPE-25082017.pdf) that the right to communicate to the public applies to both downloads and streams, but declined in the Online Music Services tariff decision to certify royalties for the use

In light of all of the foregoing, CMRRA believes it would be significantly beneficial to rightsholders and users alike for all collectives to be granted the ability to enter into private licensing agreements independently of the Board.

5) All Collective Societies Should Have the Same Enforcement Remedies Available

A right is only as valuable as the rightsholder's ability to enforce it, but unfortunately the remedies afforded to different collectives are not consistent under the *Copyright Act*. CMRRA proposes that all copyright collectives should have the same ability to enforce their tariffs, and more specifically that all collectives should have the right to claim statutory damages under s. 38.1(4) of the *Copyright Act*.

Presently, those collectives captured by the mandatory regime[20] are entitled to enforce their right to royalties by claiming statutory damages under section 38.1(4), which provides for damages of three to 10 times the licence fees owed under the tariff. Similarly, the private copying collecting body can resort to s.88(2) for non-payment of levies due,[21] and a court may order the payment of up to five times the amount of the levies owed. However, for collectives operating under the general regime,[22] the only remedy available in cases of unpaid royalties is the royalties themselves.

In applying the statutory damages in s.38.1(4), the Federal Court has noted that"[d]amages available to copyright holders under the *Copyright Act* serve an important function and should not be treated as just another cost of doing business."[23] The different remedies outlined above impart a different "value" on the rights of different collectives and also different deterrents to unauthorized use. For a user of a right administered by a collective operating under the general regime, the potential penalty for non-compliance may be no greater than the royalties that would have been owed under the tariff in any event, and only where the collective pursues enforcement of the tariff. There is a clear need to change the remedies so that users have a real deterrent to unauthorized use, and to ensure that different rights under the *Act* are treated evenhandedly.

Extending the deterrent in s.38.1(4) to all collectives is sound public policy. Among other things, it would establish that there are consequences to flouting the law that protects the rights and livelihood of all artists and their creations. All copyright owners should have equal access to the statutory damages remedies available to performing right collectives in s.38.1(4) of the Act because "…rights are only formalities if they cannot be exercised."[24] This deterrent measure should be designed to instil in all users a sense of respect for the advancement of creativity, the legislative process, and the collective administration of rights. It would also increase the efficiency of collective management, the important role of the Board, and the legitimacy of certified tariffs.

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[20] Pursuant to ss. 67 to 68.2 of the *Act*

[21] Pursuant to the private copying section of the *Act*, Part VIII,

[22] Under s. 70.1 of the *Act*

[23] *Society of Composer, Authors and Music Publishers of Canada v. IIC Enterprises Ltd. (Cheetah's Nightclub)*, 2011 FC 1088 at para 21.

[24] Axworthy, Thomas, "Justice delayed is justice denied," The Toronto Star, 17 April 2007, available online: https://www.thestar.com/opinion/2007/04/17/justice_delayed_is_justice_denied.html