



Copyright Collective of Canada

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By E-Mail (CBconsultations@canada.ca)

The Honourable Navdeep Bains

Minister of Innovation, Science and Economic Development

The Honourable Melanie Joly

Minister of Canadian Heritage

Mr. Claude Majeau

Vice-Chairman and Chief Executive Officer
Copyright Board of Canada

**Re: A Consultation on Options for Reform to the Copyright Board of Canada
Comments of the Copyright Collective of Canada (CCC)**

These comments are presented on behalf of the Copyright Collective of Canada (CCC) in response to the recent Consultation on Options for Reform to the Copyright Board.

CCC is a Canadian not-for-profit corporation and a collective society within the meaning of s. 71(1) of the *Copyright Act*. CCC collects and distributes royalties paid by retransmitters of television programs on distant signals in Canada pursuant to the Television Retransmission Tariff. CCC administers the royalties payable to the rights holders that it represents, including producers and distributors in the U.S. independent motion picture and television production industry.

CCC appreciates the opportunity to participate in this Consultation and to provide its preliminary views regarding options for reform to the Copyright Board. In general, CCC supports the stated objectives of the present Consultation, namely, to better position the Copyright Board to improve the efficiency and effectiveness of the Copyright Board so as to enable it to fulfil its important roles.

At this time, CCC has focused its comments on certain proposals which it anticipates may most directly affect CCC and the rights holders it represents in the Television Retransmission Tariff.

Proposals 1, 2, and 8: Various proposals to enable the Copyright Board to deal with matters more expeditiously.

It has been proposed that the Copyright Board be explicitly empowered to advance proceedings expeditiously, by, among other things, imposing shortened deadlines for proceedings, requiring the Copyright Board to render decisions within a certain period of time after a hearing, and requiring that proposed tariffs be filed farther in advance of their effective dates.

CCC is of the view that, in general, such proposals aimed at increasing the speed and efficiency of proceedings before the Copyright Board are positive and can and should be implemented as these objectives would be for the benefit of all parties appearing before the Board. However, any measures taken to expedite or streamline proceedings must nonetheless always allow for the Board's ability to tailor or amend timelines to reflect the complexity of the case before the Board and the particular needs of the parties.

Subject to the foregoing, CCC is of the view that it may be constructive to develop standard timelines for a given proceeding (or type of proceeding), as is the case for example under rules of other courts and decision-makers, such that, unless otherwise amended, proceedings and decisions issued by the Board would follow a known and predetermined timeline.

In CCC's view, where possible, such standard timelines should be developed having regard to both the required stages of a proceeding and the objective of allowing decisions to be rendered prior to, or contemporaneous with, the effective date of the tariff in question. The result would be to avoid or at least mitigate difficulties associated with certifying tariffs with retroactive effect.

To the extent that proposed tariffs need to be filed farther in advance than is currently required to accomplish that objective (prior to March 31st of the year prior to when they are intended to come into force) CCC supports such a change in the relevant legislation and/or procedure, provided that, in advance of such changes, consideration is given to any consequential impact of such a change on existing legislative, regulatory, and procedural rules now governing proceedings before the Board.

Proposal 4: Empowering the Board to award costs between parties.

It has been proposed that the Board be empowered to award costs between parties as a tool to encourage them to behave responsibly. As contemplated in the proposal, a party whose conduct unnecessarily lengthens or complicates a proceeding may be required to pay costs to the other party or parties.

CCC believes that fair implementation and application of such a proposal would be difficult to achieve, particularly in multi-collective and/or multi-user tariffs where the involvement and/or role of different collectives, collectives' members and/or users may differ significantly.

In such circumstances, it is unclear how a costs award would be fairly allocated between the parties liable to pay costs and/or the parties receiving costs. Moreover, the prospect of an adverse cost award could be used for strategic purposes by parties who might attempt to use such a sanction to "chill" presentation of evidence relevant to a proceeding before the Board or otherwise dissuade other parties from vigorously contesting a proceeding.

Moreover, the awarding of costs raises many questions including against whom such orders would be made (for example, whether underlying members of a collective who are not parties to the proceeding

would be liable for satisfying an award of costs made against a collective that is party to the proceeding) and how such costs awards would be enforced against members who may be resident in different jurisdictions around the world.

What appears likely is that requiring separate proceedings/submissions to decide the question of costs (and inevitable appeals or applications for judicial review on any decisions made by the Board on the question of costs, together with potential proceedings to enforce such costs awards) would invariably make proceedings more complex and lengthier, and further tax the Board's resources which may ultimately frustrate the Consultation's stated goal of limiting delays and increasing efficiencies.

Proposal 5(a): Requiring collective societies to provide more information at the commencement of tariff proceedings.

It has been proposed that collectives be required to provide "*more information*" at or shortly after the time a proposed tariff is filed.

CCC is of the view that this proposal would be problematic, particularly if the proposed "*more information*" would include "*the grounds on which the proposed royalty rates, terms, and conditions and effective periods have been determined*".

While it is stated in the proposal that "*the level of information required could be similar to that of originating documents in court proceedings*" and that "*a notice need not provide information about the evidence that would be relied upon by the collective*", if implemented this proposal would nonetheless impose a significantly greater burden on collectives than exists presently.

In the Television Retransmission Tariff, there is a very significant imbalance of information as between the collective societies and the users, including access to the confidential financial information of the users that may be of significant importance in establishing the "grounds" for a fair and equitable tariff. As a result of this information imbalance, at the time a proposed tariff is filed the "grounds" on which a royalty request may be based cannot be known by a collective with any particularity. This remains the case, at least, until the collective has had an opportunity to review the users' answers to the collective's interrogatories.

Therefore imposing a requirement that a collective must state at the outset of a proceeding all grounds on which a proposed royalty rate, term and/or conditions for a tariff may be based could result in unnecessarily long and complex lists of grounds being put forward by collectives wary of being precluded from asserting or amending grounds following the interrogatory stage in a proceeding.

Accordingly, CCC is of the view that requiring collectives to provide "*more information*" at the outset of a proceeding is unlikely to contribute to a streamlining of the issues, and may in fact have an effect opposite to that intended.

Alternatively, if this proposal is adopted, CCC is of the view that it is imperative that the provision of such "*more information*" by a collective at the outset of a proceeding must be made without prejudice to any arguments or grounds a collective might advance in support of the proposed rates or terms at a later stage of the proceeding, and/or a collective must be given the explicit ability to amend its notice and "grounds" as of right after the interrogatory stage.

Proposal 9: Interim tariffs.

Various proposals have been put forward to simplify the procedure when a tariff expires prior to the certification of a new tariff, as has been and may again be the case in the Television Retransmission Tariff.

Under the current process, at least as it relates to the Television Retransmission Tariff, a collective must make a request for an Order imposing an interim tariff prior to the expiry of the then in-force tariff. However, in CCC's view, in the interests of simplifying and reducing procedural obstacles for the Board and parties, it would be preferable for an existing tariff to presumptively continue as an interim tariff upon its expiry until the certification of a new tariff.

Thus CCC supports a proposal whereby the current existing tariff will continue to apply on an interim basis automatically and indefinitely upon expiry of the prior tariff, provided that a proposed tariff for the next tariff period has been filed.

Proposal 10(d): Expert evidence.

It has been proposed that the Board could be permitted, where it believes it would be of assistance, to appoint independent experts to enquire into and report on any issue relevant to the proceeding; further, the Board could be permitted to require parties to file combined evidence, have experts for the parties testify together as a panel, and so forth.

CCC is of the view that very careful consideration of this proposal is required as it has the potential to give rise to fundamental and practical concerns about the fairness of proceedings before the Board.

For example, the proposal raises at least the following questions:

- by whom and how would a mandate be prepared for Board-appointed experts, or experts mandated to provide combined evidence;
- what documents and information would be made available for review by such experts, and how would such documents and information be provided and disclosed to all parties. For example, would Board-appointed experts be empowered to compel the production of documents and information from parties to the proceeding;
- what process would be followed and what disclosure would be given by the experts during the preparation of their reports/combined reports;
- would Board-appointed experts necessarily provide public testimony, or otherwise put evidence into the public record, or would such experts provide some type of confidential opinion to the Board;

- to what extent would a party be permitted to review and question the qualifications, objectivity, and independence of experts appointed by the Board, or otherwise test that expert's opinions and evidence through cross-examination; and
- how would costs associated with retaining Board-appointed experts or resulting from the requirement that experts prepared combined reports be borne and by whom.

In CCC's view, particular consideration should be given to the need for and benefit of adopting such a proposal in the context of a proceeding like the Television Retransmission Tariff where the Board will already have the benefit of considering and weighing extensive expert opinion evidence, including responding and reply opinion evidence, on the relevant issues in dispute presented to it by the independent experts retained by the parties in the normal course.

In such circumstances, it appears very likely that the appointment of independent experts by the Board, or requiring the parties' experts to provide joint reports, would result in the proceedings becoming unnecessarily more complex and more lengthy, as well as more costly for the parties, including right holders represented by the collectives.

Furthermore, such appointment(s) could inadvertently introduce impermissible bias in favour of one or another of the parties thereby undermining the actual or perceived fairness of the proceeding. This outcome would ultimately frustrate the Consultation's stated goal of limiting delays and increasing efficiencies.

Given the foregoing, unless full consideration is given to the possible serious consequences of adopting this proposal, including consideration of procedural safeguards satisfactory to all parties who would be affected are put into place contemporaneously with the implementation of the proposal, it appears that there is a material risk that adopting the proposal would work directly counter to the Consultation's stated goals, and may also undermine the actual or perceived fairness of copyright board proceedings.

Conclusion

CCC appreciates the opportunity to participate in this Consultation and provide its preliminary views regarding options for reform to the Copyright Board.

We look forward to continued participation in this important process and the opportunity to provide further comments on these issues in due course.

Yours very truly,



Lucy Medeiros
Executive Director
Copyright Collective of Canada