representing the recording industry worldwide

IFPI Submission: A Consultation on Options for Reform to the Copyright Board of Canada

September 29, 2017

IFPI, the International Federation of the Phonographic Industry, representing the recording industry worldwide, thanks the Government of Canada for the opportunity to respond to the Consultation on Options for Reform to the Copyright Board of Canada. IFPI represents some 1,300 record companies in 63 countries and affiliated industry associations in another 57 countries, including in Canada. IFPI has over eighty years of experience in assisting governments worldwide in ensuring that their copyright laws and accompanying enforcement laws and procedures are fit for purpose in supporting investment in artists and music production and the development of thriving creative economies.

IFPI has been overseeing the effective, transparent, accountable and well-governed collective management of record producers' rights for many years, around the world. IFPI co-ordinates the collective management of recording industry performance rights (public performance and broadcast) globally, establishing best practices for collective management and assisting some 75 music licensing companies (MLCs) around the world (including in Canada) to ensure maximum transparency, accountability and good governance in their operations.

IFPI also works closely with its associated MLCs in establishing tariffs, and has experience with rate-setting and dispute resolution bodies (and their respective procedures) around the world. In particular, because of our international reach and involvement, we are uniquely positioned to comment on international best practices and trends for comparable rate-setting practices. It is on these bases that we are responding to this consultation.

IFPI is seeking to contribute to the consultation by focusing on areas where the present jurisdiction and procedures of the Copyright Board of Canada fall short of international best practices, resulting in delays in licensing and unpredictable rate-setting and decision-making practices (i.e. unclear rate-setting criteria, and resulting rates which are below market value).

In this submission we provide examples of best practices from other jurisdictions and suggest improvements that could be made to modernise the Canadian tariff-setting process and make it fit for purpose to the benefit of all Copyright Board stakeholders. We address our concerns under two main areas in need of urgent reform:

1. The over-broad jurisdiction of the Copyright Board, which causes unwarranted delays in licensing; and

2. The Board's application of the "fair and equitable" criteria to rate-setting, which has resulted in unpredictable and untenable valuations of rights.

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1. THE OVER-BROAD JURISDICTION OF THE COPYRIGHT BOARD CAUSES UNWARRANTED DELAYS IN LICENSING

The Copyright Board of Canada is required to certify all tariffs before they can become effective. This means that Canadian collective management organizations (CMOs) are unable to collect licensing revenues until the tariff has been set by the Tribunal. We understand that tariffs currently pending before the Tribunal have, on average, been outstanding for 5.3 years since filing. The effects that such delays can have on the licensing market are extremely harmful.

In large part, these delays appear to be caused by the jurisdiction of the Board being unnecessarily broad. Not only does the Board have to approve a tariff even if there is no dispute between the parties, but in doing so it carries out a detailed analysis of the "fairness" of the tariff. In simple terms, instead of the current procedure, which is out of kilter with that in most developed markets, tariffs should be decided in free negotiations between the parties, with recourse to rate-setting and dispute resolution bodies (such as the Copyright Board) only in the case of disputes.

Therefore, we consider as best practice territories those where CMOs and organisations representing users can freely negotiate the fees and other commercial terms; and only should they fail to reach an agreement, parties can then resort to swift and effective independent judicial/quasi-judicial dispute resolution procedures. Unfortunately, in Canada, even licence terms agreed between the parties must be submitted to the Board for (lengthy and uncertain) approval.

International comparisons

The jurisdiction of the Copyright Board may be compared to the jurisdictions of the equivalent bodies in the **UK**, **Hong Kong**, **Australia** and **New Zealand**, for example, which have jurisdiction over disputes referred to them.

Jurisdiction of Tribunals in the UK, Hong Kong, Australia and New Zealand
As to the jurisdiction concerning the licensing of sound recordings, the Tribunals in these countries generally hear and determine disputes related to specifically identified rights and/or collectively managed rights:

- copying the work,
- rental of copies of the work to the public (including sound recordings),
- performing, playing or showing the work in the public,
- broadcasting the work or including it in cable programme services,
- issuing or making available copies of the work to the public,
- any other act restricted by the copyright in the work.

The jurisdiction of tribunals is triggered by an application by one of the parties (or prospective parties) to a licensing scheme. These tribunals do not have jurisdiction to set tariffs or other licensing terms *ab initio*.

Typically, the jurisdiction of these tribunals extends to:

1. References With Respect To Proposed Licencing Schemes

The Tribunals have jurisdiction with respect to **disputes relating to a proposed licensing scheme** to be operated by a licensing body (Sec. 118, 149 CDPA; Sec. 155 Copyright Ordinance; Sec. 154 Copyright Act 1968; Sec. 149 Copyright Act 1994) – in particular, in cases in which users are claiming that they require licences in cases of a description to which the scheme would apply. However, the Tribunals may decline to entertain the reference if they find that the reference to the Tribunal is premature.

The Tribunals may further render orders to be in force indefinitely or for such a period as the Tribunal may determine (see Sec. 118(4), 149 CDPA; Sec. 155(4) Copyright Ordinance, Sec. 154(5) Copyright Act 1968; Sec. 149(4) Copyright Act 1994).

2. **References With Respect To Existing Licensing Schemes**

The tribunals are also competent with respect to **disputes relating to existing licensing schemes** operated by a licensing body (Sec. 119, 149 CDPA; Sec. 156 Copyright Ordinance; Sec. 155 Copyright Act 1968; Sec. 149 Copyright Act 1994). Their jurisdictions cover **disputes** between licensing bodies and users, or organisations representing such users, as to the terms of the licensing schemes in operation. The Tribunals may either vary or confirm such licensing schemes insofar as they concern cases of the description to which the reference was relating. As to the order rendered, the Tribunals may again make orders so as to be in force indefinitely for such a period as the Tribunal may determine (see Sec. 119(4), 149 CDPA; Sec. 156(4) Copyright Ordinance; Sec. 155(6) Copyright Act 1968; Sec. 150(4) Copyright Act 1994).

3. Applications With Respect To The Application For A License Under The Scheme

Disputes under the Tribunals' jurisdiction can further arise in cases where licensing schemes exist. These are cases in which a licensing scheme exists and the applicant, who wishes to be licensed under the scheme, is claiming that the licensing schemes' operator has refused to grant it a licence under the licensing scheme, or has not done so within a reasonable time after

having received a request for such a licence (see Sec. 121(1), (2)(a), 149 CDPA; Sec. 158(1), (2)(a) Copyright Ordinance; Sec. 157(1), (7) Copyright Act 1968; Sec. 153(1), (2)(a) Copyright Act 1994). The Tribunals' jurisdiction also extends to situations in which the licensing body offered an applicant, who is not covered by the licensing scheme, a licence, but the offer contains unreasonable conditions (see Sec. 120(2)(b), 149 CDPA; Sec. 158(2)(b) Copyright Ordinance; Sec. 157(3) and (4) Copyright Act 1968; Sec. 153(2)(b) Copyright Act 1994).

In case of a valid claim, the Tribunal may order a licence which it finds to be reasonable in the circumstances.

The Tribunals may render an order so as to be in force indefinitely or for a limited time period as the Tribunal may determine (see Sec. 121(5), 149 CDPA; Sec. 158(5) Copyright Ordinance; Sec. 155(6) Copyright Act 1968; Sec. 153(5) Copyright Act 1994).

In summary, the Tribunals are dispute resolution bodies. They do not interfere in rate-setting or other matters relating to licensing unless proceedings are initiated by one of the parties.

Article 35 of the **European CRM Directive**[1] is also instructive on the appropriate jurisdiction of bodies set up to adjudicate disputes in relation to the collective management of rights – i.e. as a body with jurisdiction over disputes, but not with *ab initio* jurisdiction to set or approve negotiated tariffs:

> *"Member States shall ensure that disputes between collective management organisations and users concerning, in particular, existing and proposed licensing conditions or a breach of contract can be submitted to a court, or if appropriate, to another independent and impartial dispute resolution body where that body has expertise in intellectual property law."*

In the **US**, although the Copyright Royalty Board has a somewhat broader jurisdiction than the tribunals of countries such as the UK, in that it periodically sets rates for certain licences, the US Board's decision-making must take place according to a **prescribed timetable**, thereby avoiding the delays seen in Canada.

The Report of the Standing Senate Committee on Banking, Trade and Commerce on the Copyright Board sets out **the Copyright Board's explanation** for its certification role in respect of all tariffs:

> *"The Board explained that this certification* [i.e. its jurisdiction over tariffs agreed between the parties] *is a result of its mandate to protect the public interest; consent among two or more parties does not mean that the proposal's terms are beneficial to the cultural sector as a whole".*

[1] Directive 2014/26 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

Respectfully, this overstates and misconstrues the role of the Board.

In practice, the fundamental role of rate-setting and dispute resolution bodies in other jurisdictions is to safeguard against any market distortions that could arise as a result of rights being managed collectively. Providing users with the opportunity to challenge a tariff provides the correct balance between enabling the market to function without undue state interference, while ensuring that CMOs do not abuse their market power.

Recommendations

We recommend that:

- In line with international best practices, the jurisdiction of the Board be limited to tariffs referred to it by users or right holders.
- Failing that, where a tariff is undisputed, certification of that tariff should be automatic so as to prevent unnecessary hold-ups in the commencement of licensing.

We would also recommend that efficiencies be introduced into the tariff-setting process itself. For example, the UK Copyright Tribunal Rules 2010 introduced a fast-track system for smaller and simplified claims, and brought tribunal proceedings more in line with High Court proceedings, including proactive case management by the Tribunal and the parties.

2. THE BOARD'S APPLICATION OF THE "FAIR AND EQUITABLE" CRITERIA IN RATE-SETTING HAS RESULTED IN UNPREDICTABLE AND UNTENABLE VALUATIONS OF RIGHTS

Overall Canada's recorded music market was the 7th largest globally in 2016, but the market for performance rights was just 13th, clearly illustrating the extent to which Canadian artists and music creators are being held back, at least in part due to the approach of the Board to rate-setting.

Paradoxically, the manner in which the Board applies the "fair and equitable" criteria[2] appears to preclude a market-based approach to rate-setting where the principal consideration should be the **economic value of the rights in trade**. The rules under which the Board currently operates amount to a true "catch 22", in particular for sound recording right holders and users: record producers and artists are forced to manage their performance rights, and users are forced to license such rights, through the mandatory tariff regime, denying them the ability to negotiate mutually acceptable rates, and resulting in substantial delays in licensing.

[2] Section 83(9) of the Canadian *Copyright Act*.

For instance, a true economic valuation of the rights of sound recording refers to the fact that, for example, a pub or restaurant extracts significant value from playing music. Economic studies have shown this benefit to be associated directly with an increase in patronage and sales. The same is true of broadcasts, for which music is the content most valued by users. To that end, we refer to the following recent studies:

1. https://www.recordoftheday.com/news-and-press/new-research-suggests-playing-music-increases-retailers-net-promoter-scores; and

2. *Uncovering a Musical Myth* (a copy of which is at Annex 1 to this submission).

The fundamental point is that the remuneration for the use of a sound recording is a payment for the use of a commercial product. For the remuneration to be equitable it should amount to the market price for the rights at issue.

Examples of international best practice in the criteria applied to rate-setting include:

- **European Union CRM Directive - *Economic Value of the Rights in Trade***

An example of international best practice is established within the legal framework of the EU Directive 2014/26/EU *"On Collective Management Of Copyright And Related Rights And Multi-Territorial Licensing Of Rights In Musical Works For Online Use In The Internal Market"* ("CRM Directive") – a piece of EU copyright legislation which has to be implemented in all EU Member States.[3]

As to the legal standard for setting royalty rates, the CRM Directive's framework presupposes a **market-oriented approach** as to the establishment of the value of the use of the right holders' rights by requiring that *"**the rights to remuneration shall be reasonable in relation to […] the economic value of the rights in trade**"* (Emphasis added). In this regard, account shall also be taken of the nature and scope of the use of the work and other subject matter (see Art. 16(2) CRM Directive).

For ensuring the appropriate remuneration of right holders on the basis of that standard, the CRM Directive's Recital 31 emphasises that *"Collective management organisations and users should […] conduct **licensing negotiations** in good faith and apply tariffs which should be determined on the basis of objective and non-discriminatory criteria."* (Emphasis added).

It should be noted that the CRM Directive aims to protect right holders and users alike. In other words, marketplace rates protect all parties by being determined relative to the economic value that parties would place on the rights in the marketplace.

[3] According to EU law, as a rule, in EU Member States which had not implemented the CRM Directive by 10 April 2016 (implementation deadline), the provisions of the Directive became directly applicable.

In conclusion, the CRM Directive provides for a fair market value-based rate-setting standard without unreasonable interference of state bodies with the rate-setting process.

- **United States – *Willing Buyer and Willing Seller Model***

In the **United States**, US law requires the US Copyright Royalty Board to establish ***"reasonable rates and terms"***. In relation to webcasting services, the Board is required to *"establish rates and terms that most clearly represent the rates and terms that would have been* ***negotiated in a marketplace between a willing buyer and a willing seller****"*.

The clear principle is that fair market value-based rates should apply.

Other countries that broadly follow this practice include **Hong Kong**, **New Zealand, the UK, and Australia**[4].

Recommendation

To bring the Board's rate-setting in line with international best practice, we recommend that pursuant to section 66.91 of the Copyright Act 1985, The Governor in Council issue regulations establishing that tariffs must reflect *the economic value of the rights in trade*, in other words terms that a willing buyer and a willing seller would have agreed to.

CONCLUSION

This consultation provides an opportunity to bring the Canadian tariff-setting process in line with international best practices. The goal should be to reduce unwarranted delays and unnecessary control of rate-setting in Canada, which to date has resulted in a dysfunctional system whereby the certification of tariffs by the Board lags behind developments in the licensing markets and causes unreasonable delays to right holders receiving their income.

[4] In exercising its powers and their decision making, the UK, Hong Kong, Australian and the New Zealand Tribunals have to make their decisions by taking into account what is "**reasonable in the circumstances**" (referred in the respective laws in particular in Sec. 118(3), 119(3), 121(4), 122(3), 126(4), 127(3), 151A CDPA; Sec. 155(3), 156(3), 157(4), 159(3), 162(3), 163(1) and (3) Copyright Ordinance; Sec. 154(4), 155(5), 156(4), 157(6C) Copyright Act 1968; Sec. 149(3), 150(3), 151(4), 153(4), 154(3), 157(3), 158(1) and (4) Copyright Act 1994). This standard means that the Tribunals shall neither favour the copyright owners, nor users, but that they must maintain a balance between them.

"Reasonableness" also means safeguarding that there is no unreasonable discrimination between the actual and prospective licensees. When making their determination, the Tribunals shall in particular have regard to (i) the availability of other schemes, or the granting of other licences to other similar users in similar circumstances, and (ii) the terms of those schemes or licences (Sec. 129 CDPA; Sec. 167 Copyright Ordinance; Sec. 161 Copyright Act 1994).

We strongly advocate a greater role for market-based negotiations alongside a more focused jurisdiction for the Copyright Board, whereby its role is clearly targeted at providing a forum for expert dispute resolution. This will give room for the market to determine the value of rights, while providing appropriate oversight where disputes arise.

We stand ready to provide any further assistance to the Government in this consultation.

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ANNEX

Uncovering a Musical Myth

[See separate attachment to submission email.]