

September 29, 2017

VIA EMAIL

The Honourable Navdeep Bains, P.C., M.P.
Minister of Innovation, Science and Economic Development Canada
House of Commons
Ottawa, ON K1A 0A6

The Honourable Mélanie Joly,
Minister of Canadian Heritage
House of Commons
Ottawa, ON K1A 0A6

Monsieur Gilles McDougall
Copyright Board Canada
56 Sparks St., Suite 800
Ottawa, ON K1A 0C9

Re: Comments of SOCAN in response to “A Consultation on Options for Reform to the Copyright Board of Canada”

1. Introduction

SOCAN welcomes this opportunity to participate in the Consultation on Options for Reform to the Copyright Board of Canada by the Department of Innovation, Science and Economic Development, the Department of Canadian Heritage and the Copyright Board of Canada.

SOCAN is Canada’s only music performing rights society. It connects more than four-million music creators worldwide and more than a quarter-million businesses and individuals in Canada. Nearly 150,000 songwriters, composers and music publishers are its direct members, and more than 130,000 organizations are “Licensed to Play” music across Canada. SOCAN is also a collective society for the purposes of section 67 of the *Copyright Act*. As such, it is currently subject to the mandatory tariff filing provisions of the *Act*.

At the outset, SOCAN notes from the Consultation Paper that “Any required changes in funding to the Board or its number of appointees is beyond the scope of this particular consultation and will be assessed at a later time when the appropriate reforms to the Board’s powers and procedures have been identified”. SOCAN assumes that these exclusions from the present consultation are not indicative of any lack of importance attributed to them by government or the Copyright Board. These are extremely important issues that must be fully addressed if real and permanent solutions to the current challenges with the Copyright process are to be found and maintained.

Also, while SOCAN welcomes the opportunity to comment on the many issues outlined in the Consultation Paper, we wish to emphasize our view that *the single most important problem at hand is the time that the Copyright Board currently takes to render its decisions after hearing the evidence and arguments of the parties*. That is not to say that the other matters raised in the Consultation Paper are not important, but SOCAN urges ISED, Canadian Heritage and the Copyright Board to make the timeliness of decisions their first priority.

2. Discussion of Potential Options for Reform

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.

Clearly, the desire to have Copyright Board proceedings advance expeditiously is an objective shared by all stakeholders. The importance of timely decisions is acknowledged by all, including the Board itself, and SOCAN has no reason to believe that the Board's members and staff do not already make all reasonable efforts to conduct proceedings and issue decisions as soon as possible with the resources that are currently at their disposal. SOCAN has no objection to the adoption of language explicitly requiring the Board to act expeditiously, etc., either in the *Copyright Act* or by regulation. That said, it is most doubtful that doing so would have any significant impact on the Board's current process.

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

SOCAN would welcome the advent of specific deadlines for various steps in the process, especially in relation to the time by which decisions must be issued by the Board. However, that position assumes that the Board will have the resources necessary to meet any deadlines that may be implemented. Otherwise, such requirements may prove to be pointless and even result in the Board being set up to fail.

Such requirements would also need to take into account (as noted in the Consultation Paper) "the broad variability in the complexity of cases that the Board must consider." This includes considerations such as:

- (a) Whether a proposed tariff has been the subject of objections;
- (b) Does the matter require an oral or written hearing;
- (c) The number of parties in the proceedings;
- (d) The amount of evidence to be presented (some hearings last one day; others can go on for several weeks);
- (e) The complexity of the issues (legal, economic, etc.);
- (f) The overall workload of the Board and its staff.

On the last point, parties before the Board often complain of the time the Board takes to issue decisions in "their case". However, the Board virtually always handles multiple cases at once.

The fact that a decision may have taken three years to render does not mean that the Board spent three years working on that case. This largely takes us back to the issue of resources.

From SOCAN's perspective, in the absence of very unusual circumstances, even the most complex matters requiring a hearing before the Board should be decided, with reasons, within 12 months from the conclusion of the hearings. Stakeholders (both users and rights holders) require such timely dispositions as a matter of reasonable certainty in the conduct of their affairs. Obviously, judicial review proceedings may leave the Board's decisions in a further state of suspense, but a timely decision of the Board can at least provide the parties with general guidance as to how they should organize their respective operations (e.g., making reserves and other budgeting decisions).

A shorter period of 6 months should apply in other cases where:

- (a) no objection has been filed to a tariff;
- (b) in the case of a single objector, an agreement has been reached with the collective;
- (c) in the case of multiple objectors, an agreement has been reached the collective and all of the objectors.

For item (a), the 6-month period should begin on the day following the deadline for objections. For items (b) and (c), the 6-month period should begin the day after the parties have given notice to the Board of their agreement.

With respect to the suggestion that the Board "could be required to determine a particular timeframe for each case before it, having regard to factors such as the nature and complexity of the case, its procedural steps and the number of participants involved", SOCAN notes that this approach is already in place, based on the input of the parties who are in the best position to assess those factors.

And while SOCAN takes no strong position on the issue, it has no objection to a requirement that the Board "track and make public the length of time it takes to render decisions following hearing".

SOCAN agrees that the period of time for filing objections to proposed tariffs could be shortened. We suggest 30 days. This would reflect the reality of the current process, by which objections essentially serve merely to identify the parties to a potential proceeding, rather than any meaningful assessment of substantive matters. Detailed reasons for objections are seldom provided, and none should be required. This would immediately reduce the pre-hearing phase of the process by 30 days, which is substantial.

2.1.2 Limiting the Contributions of Parties to Delays

3. Implement case management of Board proceedings.

SOCAN does not support the implementation of case management for Board proceedings. In SOCAN's experience, the vast majority of cases that go to a hearing involve parties who are

frequently involved in Board proceedings, with experienced counsel who work cooperatively to set a schedule and run the case in accordance with it.

Our primary concern is that case management could result in more resources and time being added to the process, rather than less. If case management is successful, it may very well have a positive effect. If it fails, it could just as easily represent a waste of time and resources. Other concerns include whether the Board has the expertise and resources necessary to conduct case management. As for mediation, nothing currently prevents parties from entering into private mediation if they are so inclined.

In the event that case management is implemented in the Board's framework, SOCAN believes it should be limited to cases where all of the parties are in agreement to take part in such process. In other words, case management should not be mandatory.

4. Empower the Board to award costs between parties.

SOCAN does not support the implementation of cost awards in Board proceedings. In our long history as one of the most frequent participants in Copyright Board proceedings, we cannot think of a single instance where the conduct of any given party could be considered so egregious as to merit a cost award. Simply put, there is no need to give the Board such power.

5. Require parties to provide more information at the commencement of tariff proceedings. (a) Require collective societies to include additional explanations with proposed tariffs.

With perhaps minor exceptions, SOCAN does not believe that collective societies should be required to provide more information at the commencement of tariff proceedings. The requirements that are already in the Act are more than sufficient to properly trigger the beginning of the Board's proceedings.

The manner in which this issue is raised in the Consultation Paper suggests a possible misunderstanding between the purpose of a tariff filing and that of a Statement of Case, which is filed much later in the process. There is also a very fine line between mere "information" and actual evidence. While the Consultation Paper suggests that no evidence would be required at the commencement stage, SOCAN is concerned that in practice this could be the result, or that disputes could arise (that would need to be resolved, thus adding additional time and expense to the process) in a manner that will not be helpful to the process generally or to users specifically.

SOCAN is also concerned that the Consultation Paper may be confusing the role of a tariff with copyright liability under the *Copyright Act*, particularly when it queries whether a tariff should specify its "targets". Tariffs do not create or absolve liability. That is something wholly reserved to the Act. Requiring a tariff to identify targets stands to bring confusion to this fundamental issue. Users not seeing themselves fit among a proposed tariff's description of potential targets may quite erroneously conclude that they need not file an objection or participate in the proceedings, only to find out subsequently that they are in fact liable. The tariffs should continue to focus on *uses* for which a licence is necessary, which is the basis upon which

collectives already file their tariffs, along with very detailed information in the form of terms and conditions as required by the Act. In fact, it is not unusual for SOCAN to hear complaints that its proposed tariffs or those certified by the Board with modifications are “too long”.

The issue of “greater clarity” is one that forms properly part of a collective’s filing of its Statement of Case. This logically follows the interrogatory process, which in turn allows the collective to obtain all of the information necessary to prepare a full case that includes information not otherwise available to it at the beginning of the process.

Moreover, if the provision of additional information at the beginning of the process is to be without prejudice to the collective (which it would have to be), doing so becomes rather pointless for the potential users. In fact, a user could potentially rely on that information to begin the preparation of its own case and expending resources to do so, only to discover upon reading the collective’s Statement of Case that the information in question is no longer relevant because the collective, having had the benefit of the interrogatory process, has decided not to pursue that aspect of its original tariff filing.

Notwithstanding the above, SOCAN would have no objection to a requirement that its filing of tariffs with the Board include a redlined version showing the changes to the tariff by comparison to its previous filing. The Board could make the redlined version available to users. SOCAN has been doing this as a matter of course for years.

(b) Require objectors to include additional information with objections.

SOCAN does not believe that the objectors should be required to provide additional information with their objections. A short pro forma objection stating their intention to participate in the proceedings is all that is required. As suggested above, this would obviate the time and resources needed to prepare a “full” objection and would also remove the need for a collective to reply to the objection.

Where such pro forma objections are filed, the next step would be for the parties to establish, within a set period of time (perhaps 30 days) whether they need to engage in the hearing process or whether there is a basis for them to reach an agreement without doing so.

2.2 Reducing the Number of Matters Coming Before the Board Annually

SOCAN strongly agrees with the suggestions in the Consultation Paper that:

- (a) “Reducing the number of matters it must consider could provide the Board with more time to consider each, resulting in faster decision-making; and
- (b) “Such a goal could be accomplished by permitting all collective societies to enter into licensing agreements of overriding effect with users and without Board involvement.

SOCAN believes there is no valid reason for not permitting all collective societies to enter into licensing agreements of overriding effect with users independently of the Board. As eloquently stated in the Consultation Paper:

“[T]ariff proceedings required by the Act strain the time and resources of the Board and may not be necessary in all cases. To alleviate these demands upon the Board and to provide greater flexibility, all collective societies could be permitted to choose whether to file proposed tariffs with the Board or to establish licences independently with prospective users that would take precedence over any tariff approved or licence fixed by the Board in respect of overlapping uses, parties and effective periods.”

In the case of SOCAN, this does not mean that we would cease to file all of our current tariffs. In fact, we would expect to continue to file most of them, especially as they relate to general licensing activities (bars, restaurants, etc.). Even in those cases, there may be a basis for reaching agreements with industry trade associations. The key is that in all instances a collective would have the *option* to file tariffs with the Board, rather than the current *obligation* to do so in some cases, including that of SOCAN.

SOCAN and its users should also qualify for individual dispute resolution by the Board. We agree that, because the Board receives very few requests for individual dispute resolution, it is unlikely that any significant additional burden would result from expanding the current framework.

SOCAN has also consulted with the collective Re:Sound on these issues and agrees with the submissions of Re:Sound that:

- (a) Allowing parties to negotiate their own terms respects the free market and gives parties much-needed early certainty regarding their royalty obligations, while saving the time and expense of a hearing for the parties and the unnecessary use of the Board’s resources; and
- (b) Having to file all agreements with the Board and making them public would disadvantage both collectives and music users and would undermine the goal of encouraging settlements to reduce the use of the Board’s resources;

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

It should be noted that SOCAN already files many of its tariffs for multi-year periods, especially general licensing tariffs for which the uses seldom change and for which there are often no or few objections. SOCAN has been doing this for years. However, this option should not become a legal requirement because multi-year tariff filings are not apt for all situations. The obvious example at the moment is online music use, for which technology and business models have changed and continue to change at a very rapid pace. Over a relatively short period of time, the market has gone from downloading services to non-interactive streaming, to on-demand streaming and most recently to music recommendation services (i.e., non-interactive, interactive and semi-interactive services, respectively).

One might be tempted to suggest that multi-year tariff filings could also be required for uses that are often in transition, such as online uses, if the collectives were permitted to make changes during the multi-year tariff filing. However, this raises the issue of adequate notice to users if the proposed changes are significant, including possibly filing revised tariffs with the Board for publication in the Canada Gazette.

Given the above, SOCAN suggests that the term of a tariff filing be left to the discretion of the collectives.

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.

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.

It could be somewhat helpful to “move up” the current date of no later than March 31 for filing proposed tariffs by a few months. SOCAN would have no objection to such change. Doing so more than a few months would increase the risk that the evidence gathered during the Board’s process may become less relevant by the time the hearing before the Board commences, or by the time the decision of the Board is released.

That said, SOCAN maintains that the problems associated with retroactivity (which are problems that can affect users and rights holders equally) exist largely because of the extremely long period of time it currently takes for the Board to issue its decisions after hearings. If the current consultation is ultimately successful in significantly reducing the time the Board takes to render its decisions, , retroactivity will no longer be a significant issue for anyone. Requiring the collectives to file their tariffs longer in advance is just not a real solution.

SOCAN also believes, very strongly, that users should not be authorized to use the works of the collectives prior to the approval of tariffs without compensation. This would be tantamount to creating a new exception to copyright infringement under the *Act*, which would likely fail the application of the “three step test” for exceptions. Moreover, it could provide incentive to users to delay the process leading to a hearing.

For SOCAN, this risk is largely limited by virtue of the continuation of tariffs provision in the *Act* (section 68.2(3)). But, it can be a significant issue in the case of new tariffs filed for the first time. While the powers of the Board include the power to approve tariffs on an interim basis, this does not require the Board to do so. SOCAN would expect that in the current environment of delays, the Board may be more likely to issue interim tariffs in order to reduce the worse effects of the absence of compensation for rights holders.

The single best (and possibly only) way to avoid retroactivity problems is to have Copyright Board decisions issued on a timely basis. This should remain the focus of the possible remedies.

2.4 Further Clarifying the Board Decision-Making Processes

10. Codify and clarify specific Board procedures through regulation.

Virtually all of these issues relate to procedural matters that take place before or during the Board's hearings. As noted above, that is not where the real problems exist. The simple reality is that the time it takes from the issuance of the Board's Schedule of Proceedings to the commencement of the hearings before the Board takes approximately 12 months. From

SOCAN's standpoint, this is perfectly acceptable as a matter of practice to allow the parties to go through the interrogatory process and prepare their respective case materials. Twelve months certainly compares favourably to the time required to obtain a trial in a civil case in the province of Ontario.

Administrative law recognizes that tribunals such as the Copyright Board should be the masters of their own procedures, subject to their overriding duty to act fairly. The Copyright Board has always been open to having a dialogue with stakeholders on what the best procedures should be. In fact virtually all steps and other procedural aspects of the Board's hearings are typically conducted on the basis of joint submissions and consent by the parties.

SOCAN's concern is that the many suggestions raised in the discussion paper in respect of procedural matters would likely *prolong* rather than *shorten* or expedite the Board's proceedings, which is the very opposite of what the stakeholders and the Board are trying to achieve. They add to, rather than remove steps in the process and have the potential for increasing, rather than reducing, the number of disputes that would require determination by the Board.

These issues may be interesting from a conceptual or theoretical standpoint, especially for lawyers, but they are not the source of the real problem, which from SOCAN's perspective always goes back to the amount of time it takes the Board to issue decisions after a hearing.

That said, as noted above, SOCAN would welcome simplified procedures for obvious cases where, for example, no objections are filed to a tariff or an agreement is reached between the parties.

SOCAN is also concerned that the Board often resorts to discarding the evidence presented by the parties in favour of its own approaches and assumptions. This often takes place after the evidence phase of the Board's hearings and, because of the duty of fairness, essentially requires a re-opening of the hearing in a manner that can substantially increase costs for participants and further delays the issuance of decisions. Allowing the Board to engage its own independent experts would further aggravate the problem. The Board should be more inclined to rely on the traditional common law principles of adversarial proceedings, during which the parties, rather than the decision-maker, are responsible for the identification of issues and presentation of evidence in relation to those issues.

11. Stipulate a mandate for the Board in the Act.

The mandate of the Copyright Board is limited and well-known. It is to approve fair and equitable royalties and related terms and conditions on a reasonable basis. SOCAN has no

objection to the suggestion that the Board's mandate be codified but does not believe that such codification will have any meaningful impact on the Board's current process. SOCAN does not believe that the mandate of the Board should be expanded beyond its present scope.

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

The starting point in virtually all rate-setting exercises should be the agreed upon rates between a willing buyer and a willing seller in a free market. Virtually all expert economists who appear before the Board accept this notion. In SOCAN's experience, the Board has typically considered that criterion and SOCAN has no objection to its formal establishment in board proceedings.

13. Harmonize the tariff-setting regimes of the Act.

SOCAN welcomes any harmonization exercise that would further clarify the collective administration provisions of the Act. That said, other than as may be submitted above, SOCAN does not believe this should be a priority for the purpose of addressing the key challenges in the current processes of the Copyright Board.

Other.

SOCAN strongly recommends that a full complement of five members of the Board be in place at all times, with at least three of those members appointed on a full-time basis in order to allow for their fulsome participation in the matters they must decide.

3. Conclusion

SOCAN is grateful for the opportunity to participate in this consultation and hopes that the present submission will be of assistance to government and all stakeholders.

Yours truly,



Gilles Daigle
General Counsel

GMD/jb

