
**ACTRA SUBMISSION
ON THE CONSULTATION
ON OPTIONS FOR REFORM TO THE
COPYRIGHT BOARD OF CANADA**

September 29, 2017



ABOUT ACTRA, ACTRA PRS AND ACTRA RACS

This is the submission of ACTRA (Alliance of Canadian Cinema Television and Radio Artists), ACTRA PRS (Performers' Rights Society) and ACTRA RACS (Recording Artists' Collecting Society) in response to the Consultation on Options for Reform to the Copyright Board of Canada.

ACTRA brings to this process the perspective of 23,000 professional performers working in the English-language recorded media sector in Canada. For close to 75 years, ACTRA has represented performers living and working in every corner of the country who are pivotal to bringing Canadian stories to life in film, television, sound recording, radio and digital media.

As a division of ACTRA, ACTRA PRS and its subsidiary ACTRA RACS operate as a collective management organization (CMO) with mandates to represent the rights and interests of artists who perform in audiovisual productions and on sound recordings. ACTRA PRS and ACTRA RACS respectively collect and distribute: residuals, royalties and any other form of compensation or remuneration to which performers appearing in audiovisual productions produced under ACTRA's jurisdiction are entitled; and neighbouring rights and private copying royalties owed to performers under the Canadian Copyright Act for the broadcast, public performance and private copying of sound recordings.

Bilateral agreements with international partners allow ACTRA PRS and ACTRA RACS to collect royalties for Canadian artists who perform in audiovisual productions and on sound recordings for the use of their work in foreign territories, and distribute money to foreign CMOs for the use of their artists' work on sound recordings within Canada.

THE COPYRIGHT BOARD OF CANADA

ACTRA, ACTRA PRS and ACTRA RACS (collectively referred to as "**ACTRA**") acknowledge the important role the Board has to play for the members we represent. In addition to setting licence rates, the Board's decisions both make copyright policy, and are often required to implement copyright policy mandated by Parliament and the Supreme Court of Canada. Yet, both the Standing Committee of Canadian Heritage¹ and, more recently, the Senate Committee on Banking, Trade and Commerce² have taken note of some of the operational problems with the Board's tariff-setting process. The Senate Report concluded the Board is "dated, dysfunctional, and in dire need of reform," and recommended an in-depth examination of the Board's mandate, practices and resources. For its part, the report from the Heritage Committee recommended urgent action so changes could be implemented "as soon as possible."

RECOMMENDATIONS

In the call for consultation comments, the government laid out several possibilities for potential reform options. ACTRA's recommendations echo those of other stakeholders and coalitions in the industry, including the Intellectual Property Institute of Canada and the Canadian Music Policy Coalition, and focus on the following areas:

¹ Standing Committee on Canadian Heritage, Review of the Canadian Music Industry (Ottawa, 2014) [*Canadian Music Industry Review*];

² Standing Senate Committee on Banking, Trade and Commerce, Copyright Board: A Rationale for Urgent Review (Ottawa, 2016) [*Senate Report*];

- Creating new deadlines with respect to Board decisions;
- Clarifying Board procedures through regulations;
- Specifying Board decision-making criteria;
- Simplifying and expediting process for rates settled by agreement; and
- Making mediation mandatory for contested tariff matters.

CREATING NEW DEADLINES WITH RESPECT TO BOARD DECISIONS

In an increasingly digitized era, change happens rapidly. Processes designed for a pre-digital era need to be re-assessed. Currently, it can take as long as three years after hearings for a decision to be rendered. Industry practices and business realities often change dramatically in that time.

Recommendation: Like the CMPC, ACTRA agrees lengthy delays are both unacceptable and preventable and also submits that:

- *deadlines must be imposed on Copyright Board decisions requiring tariffs be certified 12 months after the end of a hearing, for example; and*
- *an expedited approval process must be imposed for settled and unopposed tariffs requiring they be approved six months following their joint or unopposed submission to the Board.*

CLARIFYING BOARD PROCEDURES THROUGH REGULATIONS

It is important our copyright regime, including our Board, reflects the international reality of the music industry by considering the processes and resources involved in the copyright systems and tribunals in other jurisdictions.

Recommendation: Echoing the CMPC’s submission, ACTRA also recommends attention be paid to copyright tribunals around the world. Specifically, notable practices of other countries’ copyright tribunals include:

- *Countries, including the U.S., Australia and New Zealand, establish mandatory criteria for their tribunals to consider when making their decisions, the most common of which is the market rate negotiated by creators and music users;*
- *The U.S. Copyright Royalty Board consists of three full-time judges: one is the chief judge, one has copyright expertise and one has economics expertise. The judges serve staggered six-year terms and are supported by three full-time staff members. The U.S. Board has an annual budget of \$5.3 million, \$1.8 million of which is just for personnel expenses such as salaries, awards and benefits;³ and*
- *In many countries, the copyright tribunal is viewed as a last resort. The aim is to have creators and music users settle as much as they can between themselves.*

SPECIFYING BOARD DECISION-MAKING CRITERIA

Beyond Section 66.91 of the *Copyright Act*, which requires royalties be “fair and equitable”, the Board does not have mandated criteria to guide decision-making. This is not the case in other jurisdictions.

Recommendation: Again echoing the CMPC’s submission, ACTRA recommends mandated guidance for the Copyright Board in setting tariff rates. Canada is unique in its lack of guidance for its copyright tribunal. As mentioned above, tribunals in the U.S., U.K., Australia and New Zealand have mandated criteria to

³ Library of Congress, [U.S. Copyright Office Licensing Division Operating Costs](#) as of 06/30/2016 (page 1);

consider in setting tariff rates all of which include the market rate determined by willing buyers and willing sellers.

SIMPLIFYING AND EXPEDITING PROCESS FOR RATES SETTLED BY AGREEMENT

Other jurisdictions only call upon rate-setting bodies to resolve disputes among parties, when negotiated solutions prove not to be possible.⁴

Recommendation: ACTRA echoes the position of IPIC in its submission that, where joint written submissions for the certification of a tariff are filed by a relevant collective society and one or more representative objectors or other prospective licensees, the Board shall:

- *consider the tariff in an expedited manner on the basis of the joint written submissions and any written submissions received from other objectors to the original proposed tariff;*
- *certify the tariff on the terms and conditions proposed by the joint submissions, subject to any alterations the Board considers necessary to address the submissions or interests, of any Objectors that are not party to the agreement; and*
- *certify the approved tariff as soon as practicable and, in any event, no later than three (3) months after the date of the joint submissions.*

MAKING MEDIATION MANDATORY FOR CONTESTED TARIFF MATTERS

Mandatory pre-hearing mediation is another means by which negotiated settlement can be encouraged.

Recommendation: Like the IPIC, ACTRA believes all contested tariff matters before the Board should be subject to a mandatory pre-hearing mediation process.

CONCLUSION

ACTRA looks forward to the outcome of the Consultation on Options for Reform to the Copyright Board of Canada, and would be pleased to offer further suggestions and comments.

Sincerely,

Alliance of Canadian Cinema Television and Radio Artists (ACTRA)
ACTRA Performers' Rights Society (PRS)
ACTRA Recording Artists' Collecting Society (RACS)

⁴ See, e.g., Austria, Australia, Germany, Italy, Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, UK, USA (webcasting statutory license). See [National Reports](#) to ALAI 2015 International Congress, Daniel Gervais, ed., *Collective Management of Copyright and Related Rights*, 3d ed. (The Netherlands: Kluwer Law International, 2016);