

BUSINESS COALITION FOR BALANCED COPYRIGHT (BCBC)

Submission to “A Consultation on Options for Reform to the Copyright Board of Canada”

**Issued by Department of Innovation, Science and Economic Development;
Department of Canadian Heritage; and Copyright Board of Canada**

9/29/2017

Executive Summary

We submit these comments on the potential reform of the Copyright Board of Canada on behalf of the members of the Business Coalition for Balanced Copyright (BCBC). The BCBC has presented its comments in response to each of the specific options raised in the Consultation Paper. However, the BCBC considers the extent to which Board decisions are applied retroactively to be the most pressing concern that needs to be addressed through amendments to the legislation, new regulations governing procedural requirements and the Board's existing authority to establish and enforce its own procedures and processes.

The serious negative consequences of extensive retroactivity should be self-evident. Currently, users of copyright-protected material can wait for up to 10 years without knowing the price they have to pay to use musical works and other subject-matter. Then, when the Board does issue its decisions, there can be large retroactive amounts of royalties owed plus interest on the outstanding amounts. Obviously, it is extremely difficult for business to establish prices or set budgets when they cannot know the costs associated with a key input. This issue is exacerbated when the Board finally certifies the tariff and several years of outstanding royalties have to be paid in a single lump sum. When royalties are owed retroactively, a user's revenue obviously cannot be adjusted retroactively which can leave the service in a precarious financial position.

The fact that Board-certified tariffs almost always include a significant period of retroactive application creates a serious impediment to investment in new Canadian services which in turn unduly limits opportunities for rights holders to generate revenue in Canada and denies Canadians the same range and diversity of services that are available elsewhere.

Extending the time between the filing of proposed tariffs and the effective dates, coupled with requiring tariffs to be filed for three to five-year periods, and imposing strict deadlines for the Board to issue its decisions should mitigate any prejudice from eliminating the retroactive application of tariffs.

The Departments should focus on measures to expedite Board processes and make tariff-setting more efficient and less burdensome on parties. Demands by some stakeholders to interfere in the Board's substantive rate-setting methodology should be ignored. There is no evidence that the

Board's approach to rate-setting is structurally flawed. Parties who claim otherwise are simply dissatisfied with Board decisions that didn't go their way.

The following is the summary of the BCBC's positions, each of which is explained in more detail in this response:

- Retroactive rate-setting is highly damaging to both businesses and collectives and should be eliminated. Proposed tariffs should have to cover periods of three to five years and should be filed further in advance of their effective dates.
- Businesses need certainty. Therefore, directly-negotiated licences should always supersede Board-certified tariffs. If businesses are ordered to file their private agreements with the Board or the Commissioner of Competition, measures must be put in place to protect confidentiality.
- The Board should continue to have the authority to rely on the rate-setting methodology that is most appropriate given the quality and nature of the evidence before it. There should be no interference with the Board's broad discretion to consider a wide range of possible approaches to valuation.
- The Board should be required to commence proceedings to examine a proposed tariff within one year of its publication in the *Canada Gazette*, and should be required to issue decisions within one year of the conclusion of examination proceedings.
- The Board should be empowered to award costs against a party that engages in behaviour that unreasonably delays or prolongs proceedings or prejudices the interests of another party. There should be cost consequences when a collective files spurious or frivolous tariff proposals or fails to provide sufficient information when filing a proposed tariff.
- Prospective users should be able to participate in Board proceedings without necessarily having to bear the burden of responding to onerous interrogatories or retaining expert witnesses and legal counsel. Parties should be able to participate in a way that is proportionate and that does not create unreasonable barriers.

Introduction

These comments are submitted on behalf of the members of the Business Coalition for Balanced Copyright (BCBC) in response to the “Consultation on Options for Reform to the Copyright Board of Canada”, (“Consultation Paper”) issued by the Departments of Innovation, Science and Economic Development and Canadian Heritage, and the Copyright Board of Canada (“the Board”) on August 9, 2017.

BCBC’s members provide a wide variety of communications, internet and entertainment services to the vast majority of Canadian households. They include large and small cable, satellite and IPTV broadcasting distribution undertakings, telecommunications carriers, internet service providers, television and radio broadcasters, and online music and video services. A list of the BCBC members on whose behalf these responses are submitted is included as “Appendix A” to this submission.

BCBC’s members depend on the tariffs certified by the Board to clear the rights to the musical works, sound recordings and other subject matter that are delivered to Canadians. Efficient and effective Board processes are necessary for the orderly functioning of the market for these services. Companies need to know the royalty rates, terms and conditions associated with the use of works and other subject matter so they can develop innovative business models and respond quickly to an increasingly consumer-driven market. The BCBC strongly believes that the most pressing problem that needs to be addressed through this consultation process is the time it takes the Copyright Board to issue its decisions, and the extent to which tariffs are certified retroactively. While we recognize that other improvements in Board processes might be desirable, these are secondary to the primary concerns of the necessity of a timely and prospective decision-making process.

Delays in Board decisions cause considerable uncertainty in what are often quickly evolving industries. As an example, the BCBC notes that on August 25, 2017 the Board issued its decision to certify the SOCAN, CSI and SODRAC Online Music Tariff for the period ending December 31, 2013.¹ It took the Board more than three years after the conclusion of the hearing to issue its

¹ *Statement of Royalties to be Collected for the Communication to the Public by Telecommunication or the Reproduction, in Canada, of Musical Works*, Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013), August 26, 2017, online: <<http://cb-cda.gc.ca/decisions/2017/DEC-2017-SAT->

decision and certify the tariff. This means that an online music service that launched in Canada any time after January 1, 2014 still has no idea of the final royalty rates it will be required to pay for the right to reproduce and publicly perform musical works. While online music services are entitled to operate pursuant to the 2013 tariff, which remains in effect as the interim tariff, the rates, terms and conditions certified in the 2013 tariff are subject to change whenever the tariff is reconsidered and certified for the period after 2013 (which may not be for several more years). Not knowing the rates, terms and conditions that apply to the right to reproduce and publicly perform musical works for the past four years obviously creates a significant amount of risk and uncertainty and constitutes a significant barrier to new online music services launching in Canada.

BCBC will address each of the potential options for reforming the Copyright Board that were identified in the consultation document. However, as a preliminary general comment, the BCBC notes that the Board already has sufficiently broad discretionary powers to adopt many of the reforms proposed in the Consultation Paper without the need for substantial regulatory or legislative changes. In order to foster a culture of efficiency and expediency at the Board, the Governor-in-Council should use its regulatory authority pursuant to section 66.91 of the *Copyright Act* (“the Act”) to issue policy directions to the Board to conduct its proceedings and to issue its decisions as quickly and efficiently as possible. The Board should continue to have discretion to modify its procedures to reflect the circumstances of each particular hearing, to make sure that its processes remain fair.

BCBC Responses to Potential Options for Reforming the Copyright Board

1. Explicitly require or authorize the Board to advance proceedings expeditiously

As noted above, the Board already has considerable discretion to advance proceedings expeditiously. Once a proposed tariff has been published in the *Canada Gazette* and statements of objection have been filed, the Board’s only statutory requirement is to consider the proposed tariffs and objections, taking into account any factor it considers appropriate.² Establishing the process by which parties adduce evidence and make arguments is left entirely to the Board to determine so long as it satisfies the requirements for procedural fairness.

25082017.pdf>.

² *Copyright Act*, subsection 68(3); subsection 70.15.

It would be useful for the Governor-in-Council to pass regulations making it explicit that the Board has the authority to modify or dispense with some of its procedural rules where circumstances and considerations of fairness permit and that the Board must consider the efficiency and expediency of its proceedings when establishing the procedures for the examination of a tariff.

One of the current challenges faced by stakeholders is that proposed tariffs can often sit for years without any consideration by the Board. This exacerbates the problem of prolonged periods of uncertainty during which licensees do not know the amount of royalties that will have to be paid once the tariff is finally considered and certified, and the concomitant problem with having tariff decisions with very long retroactive periods requiring the payment of large lump sum royalty payments with interest charges. As is easy to imagine, this is very disruptive to the nascent businesses in a new industry who are required to make these large lump sum payments; it is very difficult to financially plan for an uncertain obligation stretching over several years and to prepare investors for this uncertainty. Indeed, retroactivity harms Collectives as well, as they often must wait years to receive the first royalties owed pursuant to an inaugural tariff.

The regulations issued by the Governor-in-Council to encourage the Board to expedite its processes could include a requirement that proceedings to consider a proposed tariff must commence within one year of the proposed tariff's publication in the *Canada Gazette* unless the collective and any objectors apply to the Board to delay the commencement of proceedings or it would be unreasonable or unfair in the circumstances for proceedings to commence within the one-year period. An example of circumstances which might justify a delay in the commencement of proceedings is if a previous decision of the Board with respect to the same tariff is subject to ongoing judicial review or appeal proceedings. Another reason to justify a delay could be the fact that some of the parties are already engaged in other ongoing tariff proceedings and do not have the resources to start another hearing.

The BCBC believes that the approach taken in the United Kingdom is instructive. The United Kingdom's *Copyright Tribunal Rules* stress the importance of dealing with matters justly and proportionately.³ Section 29 states that the Tribunal shall avoid formality in its proceedings and

³ See the Overriding Objective s 3. The Copyright Tribunal Rules 2010, <http://www.legislation.gov.uk/uksi/2010/791/pdfs/uksi_20100791_en.pdf>. (2) Dealing with a case justly

shall “conduct the hearing in such manner as it considers most appropriate for the clarification of the issues before it and generally to the just, expeditious and economical handling of the proceedings”.⁴ The UK Tribunal is empowered to order that a party be barred from taking further part in proceedings without the permission of the Tribunal if it does not comply with any direction in the Rules.⁵ The Tribunal is also able to, either on its own initiative or at the request of a party, order that proceedings on the same licensing scheme be consolidated.⁶ While the Board is master of its own procedures and could currently do any of the above under the existing rules, it is possible that the Board is concerned about procedural fairness complaints should it be seen to be abrogating any party’s rights. If that is the case, it may be helpful for the Board to have similar explicit direction and powers to those of the UK Tribunal.

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

While the BCBC agrees with the principle of establishing deadlines that will encourage Board proceedings to advance efficiently and expeditiously, it is important to recognize that the matters heard by the Board can vary widely in complexity and may require substantially different procedures to ensure a fair and thorough examination of a proposed tariff. Some matters might involve a single collective and a single user or group representing all affected users, while others might involve multiple collectives who own or administer multiple rights in different types of works or other subject-matter. Some matters might only raise pure issues of economic value that require the Board to consider limited evidence, while others might require the Board to consider and rule on novel and complex legal questions, or consider very divergent interests among collectives, licensees and the public interest. There is no “one size fits all” approach to Board processes that can adequately reflect the requirements of all types and sizes of proceedings. Therefore it is important that, regardless of the regulatory measures adopted to encourage the

includes, so far as practicable— (a) ensuring that the parties are on an equal footing; (b) saving expense; (c) dealing with the case in ways which are proportionate— (i) to the amount of money involved, (ii) to the importance of the case, (iii) to the complexity of the issues, and (iv) to the financial position of each party; (d) ensuring that it is dealt with expeditiously and fairly; and (e) allotting to it an appropriate share of the resources available to the Tribunal, while taking into account the need to allot resources to other cases. (3) The parties are required to help the Tribunal to further the overriding objective.

⁴ The Copyright Tribunal Rules 2010, s 29, online: <http://www.legislation.gov.uk/uksi/2010/791/pdfs/ukxi_20100791_en.pdf>.

⁵ The Copyright Tribunal Rules 2010, s 27, online: <http://www.legislation.gov.uk/uksi/2010/791/pdfs/ukxi_20100791_en.pdf>.

⁶ The Copyright Tribunal Rules 2010, s 16, online: <http://www.legislation.gov.uk/uksi/2010/791/pdfs/ukxi_20100791_en.pdf>.

Board to improve the efficiency and expediency of its proceedings, the Board retain the discretionary authority to establish the procedures in each case that are best suited to the circumstances of the matter.

There are two new statutory deadlines that would be useful to implement in order to encourage the Board to expedite its decision-making process. The first would be a deadline following the conclusion of proceedings by which the Board should render its decision. As discussed above, it is the delay by the Board in issuing its decisions that is the most significant problem that needs to be addressed. While there may be some exceptions for extremely complex hearings with large evidentiary records, it is difficult to imagine that the Board should not be able to render its decisions in the majority of cases within a year of the conclusion of the hearing, especially if the Government adopts some of the other options outlined in the Consultation Paper to minimize the complexity of proceedings and the size of the records the Board needs to consider. While it is unlikely the Board could face consequences if a deadline is missed, it could be required to publicly report on its website its performance in issuing its decisions in a timely fashion. This additional accountability should further encourage expediency.

In the United States, s. 803(c)(1) of the *Copyright Act* provides that the Copyright Royalty Judges shall issue their determination not later than 11 months after the conclusion of the 21-day settlement conference period. In the case of a proceeding to determine successors to rates or terms that expire on a specified date, the Judges must issue their determination no later than 15 days before the expiration of the current statutory rates and terms.”⁷ Australia’s *Copyright Act* provides for a six month deadline for making its decision following the conclusion of hearing of an application, however, the Tribunal has discretion to extend this deadline if the matter is complex or special in some nature.⁸

The second new deadline that would be useful to impose would be a deadline for the Board to commence proceedings to consider a proposed tariff. A deadline that falls one year after the publication of the proposed tariff in the *Canada Gazette* would appear to be reasonable. Where there are objectors to the proposed tariff, the Board could be required to appoint a case manager

⁷ United States Code, Title 17, Copyright Act of 1979, Chapter 8 Proceedings by Copyright Royalty Judges, s 803(c)(1). See also ss 803(b)(1)(A)(ii), 804(b)(1) (B), and 804(b)(3) (C) (i), online: <<https://www.copyright.gov/title17/92chap8.html#801>>.

⁸ Copyright Act 1968, No. 63, 1968, s 153H, online: <<https://www.legislation.gov.au/Details/C2017C00180>>.

and issue a directive on procedure and schedule to commence the examination process. Setting a deadline for a hearing to commence would encourage parties to actively engage in settlement discussions and should significantly reduce the number of proposed tariffs that sit idle for many years with no action by the Board to start their examinations.

Where there are no objectors to the proposed tariff, the Board could be required to issue its decision certifying the tariff with whatever changes to the rates, terms and conditions it thinks necessary. Ideally, the deadline to certify unopposed tariffs could be even shorter than one year, such as six months. Currently, it can take the Board several years to certify tariffs to which there are no objections.

3. Implement case management of Board proceedings

The BCBC strongly supports the adoption of case management in all contested proceedings. Once the deadline for statement of objections has passed and the parties to a proceeding have been identified, the Board should appoint a case manager for the proceeding. The case manager could be either an appointed member of the Board or a senior staff member. Ideally, the case manager would not sit on the panel of Board members that would ultimately consider the merits of the tariff proposal.

The case manager could work with the parties to establish a reasonable schedule leading to a hearing and could supervise the various steps in the proceeding including the exchange of interrogatories and responses to interrogatories, the designation of confidential information, the filing of evidence and any pre-hearing procedural issues that might arise. Giving the case manager the authority to determine the scope of the interrogatories could result in parties needing far less time to prepare and produce responses, which is currently one of the most time-consuming and burdensome steps faced by parties to Board proceedings.

The BCBC agrees with the list set out in the Consultation Paper of the various issues that could be addressed by a case manager in order to improve the efficiency of Board processes and expedite entire proceedings.

The US Copyright Royalty Board is empowered to order a settlement conference following the 60-day discovery period.⁹ Parties are also able to participate in voluntary negotiations after filing

petitions to participate in a proceeding.¹⁰ The Copyright Royalty Judges may also conduct a prehearing conference to help organize evidence and witnesses.¹¹ The UK Copyright Tribunal Rules empower the Tribunal or the parties to initiate a case management conference or a pre-hearing review. The Tribunal may also give “directions as it thinks fit to secure the just, expeditious and economical conduct of the proceedings.”¹² The Australian Copyright Tribunal also has the ability to direct that a conference, or another alternative dispute resolution process, be held.¹³

4. Empower the Board to award costs between parties

Any Board power to award costs should only be used in circumstances where the offending party’s conduct results in unreasonable delays in a Board proceeding or prejudices the fairness of the process. For example, if a Collective files a spurious or frivolous tariff proposal, or fails to provide sufficient information when filing a proposed tariff, there should be cost consequences attached. In the BCBC members’ experience appearing before the Board there have been very few, if any, circumstances that would justify cost awards. However, the availability of costs awards as a potential remedy for misconduct should serve to discipline parties’ behaviour. The BCBC notes that a number of commentators have recommended granting the Board the power to award costs as a useful tool for enhancing the efficiency of the Copyright Board.¹⁴ Legislation in

⁹ United States Code, Title 17, Copyright Act of 1979, Chapter 8 Proceedings by Copyright Royalty Judges, s 803(b)(6)(C)(x), online: <<https://www.copyright.gov/title17/92chap8.html#801>> and Code of Federal Regulations, Title 37 Patents, Trademarks, and Copyrights, Chapter III Copyright Royalty Board, Library of Congress, Subchapter B Copyright Royalty Judges Rules and Procedures, Part 351 Proceedings, s 351.7, online: <https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=a6af8ff5333594e6fc2e0163cb225cda&mc=true&r=PART&n=pt37.1.351#se37.1.351_11>.

¹⁰ United States Code, Title 17, Copyright Act of 1979, Chapter 8 Proceedings by Copyright Royalty Judges, s 803(b)(3), online: <<https://www.copyright.gov/title17/92chap8.html#801>>.

¹¹ Code of Federal Regulations, Title 37 Patents, Trademarks, and Copyrights, Chapter III Copyright Royalty Board, Library of Congress, Subchapter B Copyright Royalty Judges Rules and Procedures, Part 351 Proceedings, s 351.8, online: <https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=a6af8ff5333594e6fc2e0163cb225cda&mc=true&r=PART&n=pt37.1.351#se37.1.351_11>.

¹² The Copyright Tribunal Rules 2010, ss 19-20, online: <http://www.legislation.gov.uk/ukxi/2010/791/pdfs/ukxi_20100791_en.pdf>. See also section 22 - case management of standard applications.

¹³ Copyright Act 1968, No. 63, 1968, s 169A, online: <<https://www.legislation.gov.au/Details/C2017C00180>>. This section was introduced through amendments in 2006. See Lindgren, Justice Kevin --- "The Jurisdiction of the Copyright Tribunal of Australia: the 2006 Amendments" (FCA) [2007] FedJSchol 8, online: <<http://www.austlii.edu.au/au/journals/FedJSchol/2007/8.html>>.

¹⁴ Louis J D'Alton, "The Copyright Board and Tribunals Process: Users in the Balance" (2016), at 55-56,

the US¹⁵, UK¹⁶ and Australia¹⁷ all grant some form of power to copyright tribunals to award costs.

The BCBC agrees with the statement in the Consultation Paper that costs should not be awarded against a party on the basis that the party was unsuccessful on the merits of the decision. As noted in the Consultation Paper, Copyright Board proceedings are unlike adversarial civil litigation proceedings. In many cases, including the certification of tariffs for the public performance of musical works and sound recordings and the retransmission of works in distant signals, the Board is required to certify tariffs in order for royalties to be paid and uses to be licensed. This means that many parties before the Board are institutional litigants who would be unfairly prejudiced by the imposition of costs awards as the result of unsuccessfully participating in Board proceedings. The BCBC agrees that the power to award costs should be confined to those circumstances where a party's conduct in the proceeding—for example, an unfounded refusal to answer interrogatories—has resulted in unreasonable delay or has otherwise prejudiced the legitimate interests of another party.

5. Require parties to provide more information at the commencement of tariff proceedings

Currently, each collective that is seeking Board certification of a tariff is required to file the proposed tariffs setting out the royalties that the collective is seeking and the other proposed terms and conditions for complying with the tariff. There is no requirement for the Collective to provide any rationale for the amounts it proposes or to justify any of the proposed terms and conditions. The Collective is not even required to establish that it controls the rights that it claims to control or administers the repertoire that it claims to administer. Not knowing, even in a general sense, the basis for a collective's proposal makes it difficult for prospective users to determine whether or not the proposed tariff is fair and reasonable or if they should be opposing

online:<<http://ir.lib.uwo.ca/etd/3708>>; Paul Daly, *Best Practices in Administrative Decision-Making: Viewing the Copyright Board of Canada in a Comparative Light*, at 3 and 44, online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2782487>.

¹⁵ United States Code, Title 17, Copyright Act of 1979, Chapter 8 Proceedings by Copyright Royalty Judges, s 803(b)(4)(B), online: <<https://www.copyright.gov/title17/92chap8.html#801>>.

¹⁶ The Copyright Tribunal Rules 2010, ss 20 and 31, online: <http://www.legislation.gov.uk/uksi/2010/791/pdfs/ukxi_20100791_en.pdf>. See also section 22 - case management of standard applications; Copyright, Designs and Patents Act 1988, 1988 c. 48 Part I Chapter VII, s 151, <http://www.legislation.gov.uk/ukpga/1988/48/section/123>

¹⁷ Copyright Act 1968, No. 63, 1968, s 174, online: <<https://www.legislation.gov.au/Details/C2017C00180>>.

the proposed tariff and seeking a determination by the Copyright Board. These objectors tend to object to every aspect of the proposed tariff in very broad and general terms because they lack sufficient detail to provide a more specified objection. As result, there is no narrowing of issues at the outset of a Copyright Board proceeding which leads to an overly broad interrogatory process and a lot of time and resources spent developing evidence and arguments which turn out to be immaterial to the issues that are really in dispute.

The BCBC believes that the Copyright Board process could be significantly streamlined and made much more efficient if collectives and objectors were required to disclose more information at the outset of the process. This requirement, coupled with the introduction of case management for all contested tariffs, would enable parties to narrow the issues that need to be determined by the Board and tailor the interrogatory process and the development of evidence so that only information that is relevant to one of the identified issues is put on the record.

The BCBC agrees with the list of additional information that should be provided by the Collectives in the form of a separate notice or supplementary brief that would be filed at the same time as the proposed tariff and published in the *Canada Gazette* and on the Board's website along with the proposed tariff. The BCBC further agrees with the additional information that would be required to be included in Statements of Objection filed with respect to proposed tariffs.

6. Permit all collective societies to enter into licensing agreements of overriding effect with users independently of the Board

Under the current structure of the Act, there are a number of uses of copyright-protected subject-matter that require the Board to certify a tariff in order for royalties to be paid and rights to be cleared. These include the public performance of musical works and sound recordings¹⁸ and the retransmission of works that are transmitted in distant television and radio signals.¹⁹ Some uses can either be licensed through direct agreements between owners (including collectives) and users, or optionally through a Board-certified tariff.²⁰ Under the optional regime, agreements take precedence over any certified tariff that applies to the same use.

¹⁸ *Copyright Act*, Sections 67 to 69.

¹⁹ *Copyright Act*, Sections 71 to 76.

²⁰ *Copyright Act*, Sections 70.1 to 70.191.

As a general principle, BCBC agrees that copyright owners and licensees should be able to enter into negotiated agreements without having to involve the Board, and that those agreements should supersede Board tariffs unless the parties explicitly agree otherwise. However, where a licensee is negotiating with a Collective and the parties are unable to reach agreement, either party should be able to apply to the Board to have the Board determine the royalties, terms and conditions applicable to the use. The Board's oversight serves as an important check on Collectives that are in monopoly or near-monopoly positions by virtue of the repertoires they represent and administer.

Also, there are some uses where direct licensing is impractical and inefficient and where mandatory Board oversight will have to be maintained. For example, it would be impractical and inefficient to require every owner of a bar, restaurant or retail establishment to negotiate the rights to publicly perform musical works and sound recordings for use as background music. The transactional costs involved would be disproportionate to the value of the use. Requiring SOCAN and Re:Sound to propose tariffs of general application for examination and certification by the Copyright Board ensures that every establishment has access to a licence with fair and reasonable terms and can clear the necessary rights simply by paying the applicable royalties and satisfying the other terms and conditions. There would be no public interest in giving collectives the ability to forego the Board process and unilaterally impose licences on individual users.

Those uses that lend themselves to direct licensing without mandatory Board intervention are those where the user is already required to directly negotiate a licence to clear an exclusive right to use the same subject-matter. For example, where a user needs both a licence to reproduce a musical work and a licence to publicly perform a musical work and is able to acquire the reproduction licence directly from the copyright owner, the user should not then be forced to wait for the Copyright Board to certify a tariff for the public performance of the same musical work if the copyright owner or SOCAN is willing to directly licence the public performance on reasonable terms. However, if the user is not able to come to terms on the public performance licence, she should still be able to ask the Board to intervene to determine the fair and reasonable royalty and other terms and conditions. If the Act is going to be amended to provide for more direct licensing, it is vitally important that the option to have the Board regulate the copyright owners' behaviour remains in place.

It is also important to note that direct licensing cannot be an option for the right to publicly perform published sound recordings of musical works. Performers and sound recording makers are not granted an exclusive public performance right under Act. They are only entitled to a right to equitable remuneration.²¹ They are also not granted a right to authorize the public performance of published sound recordings. Therefore, sound recording makers and performers are not legally in a position to licence the use of their repertoire since there is no “right” to licence. For that reason, the Copyright Board has to continue to examine and certify Re:Sound tariffs.

If the current option to file agreements with the Board is maintained, and the Commissioner of Competition can request the examination of an agreement by the Board,²² it is very important to note that in order to foster healthy and competitive markets, businesses must be able to keep their confidential business strategies confidential. Explicit measures need to be in place to protect the confidentiality of agreements.

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

8. Require proposed tariffs to be filed longer in advance of their effective dates

The BCBC has chosen to deal with items 7 and 8 in the Consultation Paper together.

As mentioned above, tariff rate retroactivity is highly damaging to both businesses and Collectives and should be eliminated. A number of different factors contribute to the extensive retroactive application of Board decisions. First, proposed tariffs can sit at the Board for several years before any action is taken to commence proceedings to examine the tariffs. This results in any examination dealing with tariffs the effective periods of which have expired. Second, some collectives filed proposed tariffs a single year at a time meaning the Board has to either have more frequent proceedings, which would strain the resources of the Board and participants, or alternatively wait until enough annual tariffs have been filed to constitute a reasonable tariff period to warrant a hearing, which results in extensive periods of retroactive application. Third, the long delays between the conclusion of hearings and when the Board issues its decisions result in decisions that extend back as much as 10 years.

²¹ *Copyright Act*, Section 19.

²² *Copyright Act*, Section 70.5.

One possible way to reduce or eliminate retroactivity is to require earlier filing dates for proposed tariffs. As it stands now, Collectives are required to file with the Copyright Board by no later than March 31 of each year proposed tariffs that will be effective on January 1 of the following calendar year. In other words, proposed tariffs are filed about 9 months before their effective date. By the time the proposed tariffs are published in the *Canada Gazette*, which typically occurs at least two months after filing, and the 60-day period for objections has expired, there is less than 6 months left before the tariffs are to come into effect. This means that it is unlikely that the Board could even commence examination proceedings before the date by which the proposed tariffs are to come into effect. As a result, almost all tariffs have a significant retroactive period. Coupled with the many years it can take the Board to start examination proceedings, tariffs are currently certified with retroactive periods of as long as 10 years. Obviously, certifying tariffs a decade after they were to come into effect, and sometimes several years after the tariff period has expired, leads to uncertainty in the market and creates a substantial barrier to innovation and new investment.

This problem is exacerbated by the period of two or more years it can take the Board to issue its decisions once the proceedings have concluded. In order to mitigate this problem, Collectives could be required to file proposed tariffs 21 months prior to the effective date and could be required to file tariffs for at least a three-year period, and ideally for a five-year period. Extending the time between the date of filing of a proposed tariff and the effective date of that tariff will reduce the retroactive period for the tariffs. Along with other measures proposed in the Consultation Paper and by the BCBC, this should greatly reduce the amount of retroactivity in Board certified tariffs and could result in the elimination of retroactivity with little or no prejudice to parties.

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

Currently, where a Board-certified tariff expires, it automatically remains in effect as an interim tariff pending the certification of the new tariff for the subsequent period.²³ When the new, final tariff is certified it takes the place of the interim tariff and any changes to the royalties are retroactive to the start of the effective date of the final tariff. This allows users to continue to use

²³ *Copyright Act*, sections 68.2(3) and 70.18.

copyright-protected subject matter after a tariff has expired and before a new tariff has been certified. It also ensures that rights owners continue to receive royalty payments pursuant to the interim tariff.

Where there is no previously certified tariff, the Board has the discretionary authority to make interim decisions.²⁴ Therefore, no changes are necessary since the Act already provides for the use of copyright content and the collection of royalties. For greater certainty, it might be advisable to amend section 66.51 to make it clear that the Board's authority to make interim decisions includes the authority to certify an interim tariff on application by either a collective or a prospective user.

10. Codify and clarify specific Board procedures through regulation

The Board should continue to have the flexibility to vary its procedures to suit the particular circumstances of individual proceedings. However, it might be useful to have the Governor-in-Council issue regulations dealing with the appointment and conduct of case managers, requiring that the obligation on parties to produce documents in response to interrogatories is reasonable, balanced and proportionate, and to require the Board to commence proceedings within one year of a proposed tariff being published in the *Canada Gazette*.

The BCBC does agree with many of the specific suggestions for Board procedures set out in the Consultation Paper, including the requirement to develop a statement of issues and give the Board more control over the scope and scale of the interrogatory process, which is currently a significant barrier to participation in Board proceedings. The BCBC agrees that it would be beneficial to require the Board to adopt these procedural measures in its processes.

Another new regulatory measure that would be beneficial is permitting some prospective users to participate in Board proceedings without the obligation to undertake all of the burdens normally imposed on a party, including the requirement to respond to interrogatories and the expectation of filing costly expert evidence and retaining legal counsel. The creation of a new class of participant with fewer burdensome obligations will reduce barriers to those businesses, copyright owners, collectives or members of the public who want to be involved and informed in the Board's deliberations without the high cost of full participation as a party or intervenor in a

²⁴ *Copyright Act*, section 66.51.

proceeding. Currently, members of the public are permitted to comment on Board proceedings, but are not involved in the proceedings in any meaningful way beyond that. As master of its own procedures, the Board already has the power to create this level of involvement, but explicit direction through Governor-in-Council regulations would be helpful.

It would also be beneficial to require the Board to consolidate the examination of any tariffs that apply to the same uses. For example, where a user reproduces and publicly performs musical works and also publicly performs published sound recordings, the proceedings to examine those tariffs should be consolidated. Such consolidation could enable the parties to significantly reduce their costs, as the same expert evidence would often be useful in the hearing of more than one tariff covering the same activity. The Board currently has the power to do this, and sometimes does, but often does not. However, it is important for the Board to maintain the discretion to bifurcate hearings if consolidation would be unfair to any party or would unduly complicate and delay the process.

11. Stipulate a mandate for the Board in the Act

The mandate of the Board is already clear from the specific duties and responsibilities assigned to it by the Act. While amending the Act to include a specific mandate statement will not directly address either the efficiency of Board procedures or the time it takes for the Board to issue its decisions, it would be useful to establish in the Act that part of the Board's mandate is to ensure that its procedures do not impose a disproportionate burden on parties and that its proceedings are managed as efficiently and expeditiously as possible. The BCBC recommends adopting an approach that is similar to the approach taken in the UK, as discussed above.

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

This option should be rejected as unnecessary and potentially harmful. There is no need for the Act to be amended to introduce specific decision-making criteria. First, the methodology used by the Board to establish the value of licences has absolutely no bearing on the time it takes the Board to issue its decisions or on the efficiency and expediency of the Board's processes. It is therefore far outside the scope of the review initiated by the Consultation Paper. Second, and more importantly, parties that are advocating for the inclusion of decision-making criteria are responding to a particular Board decision with which those parties disagree.

It would be extremely short-sighted to amend the Act to impose restrictions on the Board's substantive decision-making methodology in response to one decision, particularly when that decision has been upheld on judicial review by the Federal Court of Appeal. It is unreasonable to expect that every time the Board issues a decision with which a party disagrees, that Parliament will amend the *Copyright Act* to force a different outcome in subsequent examinations of the same tariff. The Board is an independent, expert tribunal established for the purpose of establishing the value of the use of copyright protected subject-matter within its mandate. It would be an attack on the Board's independence to interfere in the Board's process by mandating any particular methodological approach, especially if the attack is in response to a demand by a single group of stakeholders.

The Board already recognizes that market prices may provide a reliable benchmark to set royalty rates and often bases its decisions on those prices. However, there is sometimes not a corresponding market from which prices can be observed or the evidence of the market prices is insufficient or unreliable.²⁵ In those circumstances, the Board has to adopt alternative methodologies such as using as benchmarks other certified tariffs for similar uses, which is a well-established methodology also used in other jurisdictions.²⁶ Establishing specific decision-making criteria will do nothing more than force parties to contrive evidence of "market prices" rather than putting forward the best available evidence in support of a reasonable and cogent valuation theory.

There is no indication from any of the Federal Court's decisions judicially reviewing Board decisions to suggest that establishing specific criteria is necessary. Furthermore, establishing such criteria will do nothing to expedite Board proceedings nor improve the time it takes for the Board to issue its decisions, which is the purpose of this consultation.

13. Harmonize the tariff-setting regimes of the Act

While there may be some benefit to harmonizing the tariff-setting regimes, the BCBC does not think that such harmonization will improve the efficiency of the Board's process or expedite its decision-making process. Each of the various regimes described in the Consultation Paper are

²⁵ See e.g. *Re:Sound v. Canadian Association of Broadcasters*, 2017 FCA 138 at paras. 53 to 62.

²⁶ See for example United Kingdom *Copyright Designs and Patents Act, 1988* at sections 129-135.

intended to deal with different types of licences with varying policy objectives. The “SOCAN regime” is intended to reduce the transactional costs of acquiring a licence to publicly perform musical works and to make sure that a licence is readily available to any prospective user on the same terms and conditions as the licence available to that user’s competitors. This requires a public process and regulatory oversight by the Board to make sure that access to the repertoire is provided on fair and reasonable terms. One modification that does make sense is to modify the Act so that a user that requires one licence to use a particular work or subject matter, is able to acquire other licences for that same work or subject-matter without the lengthy delay or uncertainty of a Board hearing. For example, a user that needs a licence to reproduce a musical work should be able to negotiate a licence to publicly perform that same musical work without having to engage in a Board proceeding that could take several years.

Conclusion

The members of the BCBC appreciate the opportunity to submit these comments to the Consultation Paper. They agree that measures need to be taken to reduce the amount of time it takes for the Copyright Board to issue its decisions and to minimize the extent to which tariffs apply retroactively. Furthermore, Board processes should be modified to make Board proceedings as efficient and cost-effective as possible, including measures to reduce the burden of responding to interrogatories. Copyright owners and users should be given more freedom to enter into direct licences where Board intervention provides no benefit and there is no public interest in Board supervision. However, where parties are unable to agree on reasonable terms for a licence they should always have the option of applying to the Board to set those terms. Finally, demands to establish mandatory rate-setting criteria should be ignored. The Board’s substantive approach to setting rates has nothing to do with the timeliness of its decision or the efficacy of its processes.

APPENDIX “A”

BCBC Members

Bell Canada

Canadian Cable Systems Alliance

Cogeco Communications Inc.

Google Inc.

Québecor Média Inc.

Rogers Communications Canada Inc.

Spotify AB

TELUS Communications Inc.