

Consultation on Options for Reform to the Copyright Board of Canada
CBC/Radio-Canada position paper

PURPOSE

CBC/Radio-Canada thanks the Government of Canada for the opportunity to be part of the consultation process on reforming the Copyright Board of Canada. As a key player in the creation of cultural content and dissemination of copyrighted content of all kinds, CBC/Radio-Canada supports the main objectives proposed by the government to make rights management and royalty payment more predictable, simpler and faster, for both users and rights holders.

In joining this consultation process, CBC/Radio-Canada wishes to comment on and elaborate on those proposals that it deems most relevant and worthwhile for furthering the goals of the reform, and to examine more closely the proposal to consolidate tariffs.

BACKGROUND

The fundamental changes affecting cultural industries, and the speed at which they are occurring, necessitate changes to the way in which the Commission and the various stakeholders have thus far addressed questions regarding the evolution of the fair and reasonable value of copyrights.

Recent years have seen ultra-fragmentation of rights and a multiplication of collective societies, which have been subdivided according to linguistic markets and into as many types of rights as are recognized in the *Copyright Act*. This fragmentation of rights inevitably leads to some complexity, causing a multiplication of the associated reporting requirements and administrative tasks. Presently, CBC/Radio-Canada must apply many tariffs and agreements, involving at least six collective societies, in conducting its affairs as a traditional broadcaster and a broadcaster for the digital age.

To address the rapid pace of change and the innovations that have emerged both in terms of technology and business models, simplified mechanisms must be developed that are less reliant on systems based on contradictory debates.

PROPOSALS

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

CBC/Radio-Canada supports the government's proposal to require more information from parties at the commencement of tariff proceedings with an eye to ensuring clearer explanations about proposed tariffs and about the reasons for objections, in so doing expediting the process. CBC/Radio-Canada recommends adding the following clarification.

When filing proposed tariffs, the collective societies should provide information that is detailed enough to allow potential users to grasp the implications and the bases of the proposed tariffs. CBC/Radio-Canada agrees with the list of elements proposed by the government in the

discussion paper, but recommends adding a further element: that collective societies provide a summary of the economic theory behind the royalty rates they are proposing. Having all of this information in hand would enable users to make informed decisions as to whether to object, intervene or comment in proceedings.

In the current process, collective societies file their proposed tariffs with no explanation of the economic and legal bases for the tariff and rates being proposed, thus preventing the Board from reframing the scope of the file around the relevant questions before the parties file their statements of case; i.e., very late in the proceedings.

At the same time, objectors should also be required to provide more information in support of their objection than is currently required, so as to confine the discussion to the essentials. CBC/Radio-Canada also agrees with the list of elements proposed by the government in its discussion paper.

The government's proposal, with this additional element, would thus enable the Board and the parties to focus on the relevant matters much earlier in the tariff proceedings.

2. Length of tariff periods, deadlines for filing proposed tariffs and objections

In line with the government's suggestions, CBC/Radio-Canada also recommends that the minimum lengths of tariffs' effective periods be longer, and that the deadlines for production of documents by parties be reorganized, and adds the following comments.

Currently, proposed tariffs filed with the Board must specify that the requested royalties are to be effective for a period of at least one year. Permitting the filing of a different proposed tariff every year increases the administrative burden for the Board and for users, and generates few benefits for collective societies.

In CBC/Radio-Canada's opinion, a more reasonable and efficient solution would be to require a minimum effective period of three years, as suggested in the government's discussion paper. This would eliminate annual filings, reduce the number of proposed tariffs brought before the Board every year and lighten the resulting administrative burden for the Board, users and the collective societies.

To compensate for the additional information that parties would be required to provide (as proposed in Section 1 of the present document), the deadlines set out in the *Copyright Act* for filing proposed tariffs as well as for filing statements of objection should be modified.

A reasonable modification might be to require that a proposed tariff be filed on or before January 31 (instead of March 31) of the year in which the previous tariff is due to expire, in the case of a renewal, or January 31 of the year preceding the requested effective year, in the case of a new tariff. A longer period should also be granted for filing an objection, to allow users time to transmit all of the additional information relating to their objection. That extension

could be up to 120 days (instead of the current 60 days) with no impact on the current window of time within which the proposed tariff and objections must be filed with the Board.

3. Restricting retroactivity

The government is proposing to limit or prevent tariff retroactivity, among other things by requiring that proposed tariffs be filed longer in advance of their effective dates, or by allowing the use of the copyrighted works and collection of royalties before certification of the tariff. CBC/Radio-Canada supports this proposal and wishes to add the following comments.

Tariff retroactivity creates economic uncertainty for users as to what royalty rates will be payable, owing especially to the fact that the time between filing of a tariff and its certification can take several years. This issue is particularly important in the case of tariffs for new uses, since there is no precedent.

To reduce that economic uncertainty, retroactivity should be limited, especially for proposed tariffs applicable to new uses of copyrighted content not covered by an existing tariff. In such cases, retroactive application should not be automatic. Collective societies should be required to demonstrate to the Board the reasons that would justify a tariff's retroactive application.

Currently, in all cases involving review of an existing tariff, said tariff remains in application until certification of the new tariff which will be effective retroactively to the beginning of the year covered by the new tariff. CBC/Radio-Canada proposes that collective societies be required to justify retroactive application of increases to existing fees beyond a certain threshold (e.g., the relevant inflation rate).

4. Limiting scope of interrogatories

Another of the government's proposals aims at a greater framework of the interrogatory process. CBC/Radio-Canada also supports this proposal, which would ease the process for parties and reduce the amount of research needed to provide additional information.

The interrogatory process is long and expensive for all parties involved and, because the issues involved are not identified at a preliminary stage, it is both difficult for objectors to determine what information is pertinent when providing their answers, and difficult for the Board to determine the relevance of these interrogatories when required.

To reduce the difficulties and the costs of interrogatories, their focus should be narrowed to include only the issues stated in the proposed tariff or in the objection. The parties should be required to respond only to interrogatories that are consistent with the position of the information requestor, and that are relevant to resolving the issues at hand. This change could be effected by amending the Board's Model Directive on Procedure.

5. Licensing agreements

Currently, the *Copyright Act* requires some collective societies to file proposed tariffs with the Board without the ability to conclude independent private agreements with users. The government is opening the door to allowing all collective societies to establish such private licensing agreements with individual users. CBC/Radio-Canada supports this idea; in its proposal, however, the government addresses the possibility of requiring mandatory filing of such agreements with the Board, and suggests that they be made publicly available. CBC/Radio-Canada wishes to express some reservations regarding this aspect of the proposal.

Although “one-size-fits-all” tariffs may be appropriate for certain types of copyright licensing (in particular for public performance rights), some types of rights granted by collective societies are more nuanced and/or market-based, and will depend on the particular use of the copyrighted content by a specific user.

With no apparent benefit to the parties, CBC/Radio-Canada believes that mandatory automatic filing of private agreements may lead parties to worry that these private and confidential agreements could serve as benchmarks for the Board during future tariff or arbitration proceedings without the necessary nuances being established (regardless of whether they are parties to the procedure) or that they could be made public without the consent of the parties. Such preoccupations would have a negative impact on the negotiations between the parties and on the likelihood of their arriving at an independently negotiated agreement, especially if the confidentiality of those private agreements were to be lost.

6. Costs

The government proposes giving the Board the legislative authority to award costs between parties so as to improve the efficiency of proceedings. While this proposal is useful, CBC/Radio-Canada believes that this avenue might best be considered in a second phase, after experimenting with the renewed process and only if it fails to deliver the hoped-for outcomes in terms of reducing delays.

7. Requirement to consolidate tariffs by activity

The government touches on the idea of consolidating tariffs, but does not expand very much on this point in its discussion paper. CBC/Radio-Canada believes that grouping the tariff-setting process by activity would be an important avenue to consider. CBC/Radio-Canada therefore supports this proposal and wishes to further expand on it.

Currently, when launching new services, users are unable to predict the legal and economic impacts of tariffs before their certification, because of uncertainty as to their area of application and the royalty rates that the Board may eventually set, which are normally applied retroactively. Also contributing to that uncertainty is the fact that different and/or

contradictory tariffs may be proposed by multiple collective societies for the same or similar activities.

To resolve these issues and optimize the Board's decision-making process as well as implementation of its decisions, tariffs covering identical or similar activities should be grouped into a single tariff-setting procedure and encompass all of the rights holders (work, recording, performance) concerned by the activity. Such consolidation would alleviate problems and concerns of users, and would prevent base rate issues before application of the tariffs while ensuring greater consistency. It is these different rate bases, among other things, that make reporting requirements more complicated.

Although the Board could probably impose consolidation of tariffs covering similar or identical activities on the collective societies under its current authority to govern the process, as it has done for certain agreements (e.g., the case of commercial radio stations), it should be given statutory authority to consolidate tariffs, and should impose consolidation proactively so as to reduce the number of hearings held separately regarding the same activity. A collective society objecting to a consolidation should be required to persuade the Board that such consolidation would be unjust or ineffective.

One of the goals of grouping proposed tariffs for the same activity is to fix the economic value of the rights comprised in that activity (and therefore the total cost to the user), for all of the rights involved, in one and the same process. This would eliminate an overlapping of tariffs that could result in unforeseen increases in the global value to be shared. It would also enable settling of the conflicts over repertoire that regularly occurs, as part of the hearing process.

The first step in the process ought to be determination of the global value to be shared for a given activity. The subsequent apportioning between the various collective societies should be left to the societies themselves, based on their respective repertoires and the rights that they manage, the Board could intervene to facilitate that sharing if need be. Indeed, this approach has proven successful in some files, such as the one covering royalties for retransmission of distant signals.

The Board should also have the authority to intervene with collective societies to further the standardization of tariff models and avoid, for example, the case of a single activity being governed simultaneously by a regime based on number of views and another based on revenues, with, on top of that, different rates for the same right. In that sense, proposed tariffs should be more technologically neutral.

CONCLUSION

In the absence of innovative rights-management solutions that would drive gains for content creators as well as users, our industries—which are underpinned by creation of intellectual property, by technological innovation—and by the valuing and safeguarding of copyrights, will continue to be hampered by uncertainty and unpredictability surrounding tariffs.

To advance the priorities announced by the government, namely, technological development and innovation, it is important to ensure that the costs associated with these developments be made known to innovative companies in a timely manner. Uncertainty has always been an impediment to innovation, and the Board must play a key role in dispelling that uncertainty in the creative industries. A Copyright Board equipped with improved tools and authority to become more effective and efficient is one of the solutions for ensuring Canada remains an innovation leader in the cultural sphere—something that is vital to the continued flourishing of Canadian culture at home and abroad.