

March 6, 2015

VIA EMAIL

Copyright Board Canada
56 Sparks Street
Suite 800
Ottawa, ON K1P 0C9

Attention: Mr. Claude Majeau

Dear Mr. Majeau:

Re: Discussion Paper on Procedural Issues

We filed these submissions on behalf of our client, SOCAN, in response to the Copyright Board's call for comments from its stakeholders on matters addressed in the *Discussion Paper on Two Procedural Issues*, dated February 4, 2015. The Discussion Paper addresses the following two issues: (1) the identification and disclosure of issues to be addressed during a tariff proceeding, and (2) the interrogatory process.

SOCAN's submissions will focus upon the recommendations in regards to publicizing proposed tariffs, over and above what is legally required under the *Copyright Act*, the idea that collectives provide early explanations of the content of proposed new tariffs (or material changes to existing tariffs) and objectors provide more fulsome statements of objection, and the various recommendations related to the interrogatory process.

Identification and disclosure of issues to be addressed during a tariff proceeding

A. Publicizing proposed tariffs

SOCAN is not convinced that the current notice requirements are insufficient. Most existing licensees are well aware of the need to obtain a licence for the use of copyright protected works and they know where and when to obtain information about proposed tariffs. Even amongst potential licensees, most users of music are businesses operating in regulated environments. It is the responsibility of an entity carrying on business to know or to learn what licences it requires and the regulations under which it operates, whether they be health regulations, fire and safety, employment law, or income tax. The Copyright Board's website is easy to navigate and proposed tariffs are easy to find.

That having been said, if the Board concludes that additional publicity of proposed tariffs is necessary, SOCAN submits that this could be done by posting a notice on the collective's website, with a link to the Board's site, when tariffs are published in the *Canada Gazette*. SOCAN is also

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agreeable to communicating with key industry associations that represent a significant percentage of the potential licensees under a particular tariff.

SOCAN is concerned about the amount of effort that would be required to attempt to communicate directly, even through email, with tens of thousands of existing licensees but is prepared to explore communicating through other avenues such as publicizing the fact that new tariffs have been proposed on the various social media platforms where SOCAN has a presence (Facebook, Twitter and on SOCAN's YouTube channel). A great many of SOCAN's existing licensees know that new tariffs are filed each year on or about March 31st. SOCAN believes that posting the proposed tariffs on SOCAN's website, together with alerts to this through social media, should be sufficient to bring the proposed tariffs to users' attention.

B. Early explanation by collectives of the content of a proposed tariff

The Board contemplates requiring collectives, when filing their tariffs on or before March 31st in each year, to include an explanation of any tariffs of first impression or of material changes to existing tariffs. At the discretion of the Board, the explanation may be published in the *Canada Gazette* along with the tariff, or (if the information provided is too long to accompany the notice published with the proposed tariff) an overview of the explanations with a link to where the full information could be found.

The Board accepted SOCAN's concerns about forcing a collective to disclose their detailed reasoning (and perhaps litigation strategy) too early in the process and about making such explanations binding. Recognizing that a detailed explanation may disclose a collective's case long before it files its statement of case, the Board recommends only a general outline of the tariff approach needs to be filed with the proposed tariff, that users should not be entitled to detailed disclosure at the filing stage, and that any explanations provided should be on a without prejudice basis so that the collective can adjust its reasoning (and potentially its tariff too) as it gets more information through the interrogatory process. SOCAN agrees with the Board's recommendation that collectives be required to provide a general explanation of the tariffs they file.

The Board further recommends that collectives should be required to alert existing licensees, who are paying pursuant to an existing tariff, whenever the collective proposes significant changes to the tariff. SOCAN is not opposed to publicizing the general explanation of its tariffs along with the proposed tariffs, as discussed above.

C. Early explanation by objectors of the purpose of their objections

To further focus and streamline the process, the Board recommends that the objectors explain the basis of their objections to the tariffs. The Board similarly recommends that an objector who intends to challenge the *status quo* or challenge an earlier finding of the Board must advise the Board and the other parties as soon as possible.

Requiring objectors to explain their objections allows the collectives to prepare a more targeted statement of case, largely aware of the objectors' views and objections to a proposed tariff. SOCAN agrees with this recommendation emphasizing that collectives will no longer be positioned to "guess" and interpret the objectors' views from data obtained during the interrogatory process.

The Board further encourages that objectors suggest alternatives to the proposed rate or terms they find objectionable. SOCAN endorses this recommendation.

D. The collective's reply

The Board is proposing that the collective's reply become mandatory, rather than optional. SOCAN is not opposed to the mandatory filing of replies so long as the objections that are filed are meaningful and articulate.

E. Publicizing tariff explanations, objections and replies

The Board proposes that collectives' explanations of their proposed tariffs, the objections thereto, the explanations for the objections, and the collectives' replies should be made available to the public. At the same time, the Board recognizes that there are privacy concerns with respect to objections filed by individuals, and there are confidentiality concerns with respect to information submitted by collectives or objectives.

SOCAN commends the Board's undertaking to look into measures that will allow the widest possible dissemination of information while respecting the privacy of objectors, and invites a similar undertaking with respect to preserving the confidentiality concerns of objectors and collectives alike.

The Interrogatory Process

While recognising that interrogatories are the preferred form of discovery, the Board makes recommendations to change the process in an effort to minimize the burden on the parties, to streamline and shorten the process of dealing with the interrogatories, to reduce disputes among parties and to remove potential bars to participation. The Board also confirms that anyone who is allowed to file evidence or to cross-examine witnesses should be subject to being asked interrogatories.

The Board suggests that, in some cases, it may be appropriate to exchange preliminary statements of issues to help focus the debate and define relevance for the purpose of asking and answering interrogatories. And that in some cases, the Board should convene a preparatory meeting between the parties and the Board after the collective has replied to objections and before interrogatories are exchanged.

SOCAN agrees with the Board's recommendation that a preparatory meeting between the parties and the Board could be convened but suggests that this be done only when requested by the parties. Such a meeting would be unnecessary in cases where there is a limited number of parties, where the issues are familiar to the parties, or where the parties can work out the issues of relevance amongst themselves, as is often the case with SOCAN's longstanding tariffs. Convening a meeting in these cases would unduly burden the Board with issues that can be easily resolved amongst the participants in the proceedings.

SOCAN welcomes the Board's recommendations regarding the changes to the Directive on Procedure concerning the filing of motions on objections to interrogatories. The Board's suggestion to add one additional step: the party who has objected to the interrogatory should be given the right

to reply to the requesting party's motion to compel an answer, does not unduly add to the parties' burden. In addition, having the objecting party file the motion materials with the Board with a complete set of all relevant documentation will result in a more useful, precedent-setting, decision from the Board, once the Board rules on the interrogatories.

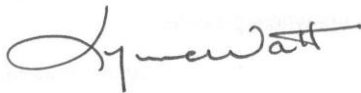
Lastly, SOCAN supports the Board's recommendations with respect to curtailing excessive filing of responses to interrogatories with statements of case. The Board expressed its dissatisfaction with the parties often filing, as part of their statements of case, more than the evidence that they intend to rely upon, quite frequently all interrogatory responses, in case they later decide they need them. The Board recognized the lack of consensus among the members of the Committee on whether and to what extent a party should be able to use an interrogatories response in cross-examination even if the party did not file it as part of its case.

SOCAN is comfortable with the Board's current directive that a party file, as part of its statement of case, only those interrogatories responses that the party intends to rely upon in support of its case. The Board further recommends that a party should not be precluded from using the interrogatory responses in cross-examination simply because that party did not file a particular interrogatory response with its statement of case. SOCAN endorses this idea but submits that it not be limited only to cross-examination. There may be instances where a particular interrogatory response or document produced as part of an interrogatory response only becomes relevant at some later stage of the hearing in which case the party should be free to use the relevant information so long as it provides notice at the earliest possible moment, i.e. as soon as it becomes apparent that the information has become relevant.

Conclusion

SOCAN commends the Board for undertaking this review of the operations, procedures and processes for proceedings before the Copyright Board and appreciates the opportunity to contribute in shaping these procedures in an effort to achieve a more efficient and more productive operation of the Board. SOCAN and its counsel look forward to continuing to work with the Board on this important initiative.

Yours very truly,



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c.c. Society of Composers, Authors and Music Publishers of Canada