

Submission in Response to the Consultation on Reforming the Copyright Board

September 29, 2017

CAPACOA submits the following comments in response to the *Consultation on Reforming the Copyright Board*. These considerations are not based on expert advice or on exhaustive research. They are rest exclusively on CAPACOA's four-year experience in negotiating tariffs with Re:Sound, and are humbly submitted as such.

Clarify the Board's framework, mandate and decision-making processes

For industry stakeholders, objecting to a tariff proposal and engaging with proceedings can be a daunting task. Although we hold precious knowledge on the use copyrighted content by our members, we lack expertise about Board procedures and about the criteria upon which tariffs are assessed, notably with regard to jurisprudence.

Therefore, CAPACOA agrees with all proposals under the "Clarify the Board's framework, mandate and decision-making processes." In particular, we strongly agree with option 12, **Specify decision-making criteria that the Board is to consider**. We would however submit that these criteria should be codified in regulation rather than in legislation, so as to make it easier to implement amendments as jurisprudence evolves.

Prevent the retroactivity of tariffs or limit the impact of retroactivity

Retroactive enforcement of tariff is a major source incomprehension, frustration and push back by copyrighted content users. It initiates confrontational relationships with collective societies, and it ultimately leads to a culture of non-compliance. Consequently, retroactive application should be avoided by all possible means, including most options under other categories.

CAPACOA is supportive of both options under this category. In particular, we strongly believe the Copyright Board should **allow for copyrighted content use and royalty collection pending the approval of a tariff in all cases**.

Better enable the Board to deal with matters expeditiously

Short of the right expertise to fully understand every aspect of a proceeding, **implementation of case management** would help industry stakeholder navigate more easily through the process. Pre-hearing mediation would also help set the tone for constructive rather than adversarial negotiations.

Awarding costs does not appear to be a good option in our opinion. The risks associated with this could be a deterrent to filing an objection.

We see certain advantages to requiring parties to provide more information at the commencement of tariff proceedings. Certainly greater clarity as to the positions and rationales of each party would help set the tone for open and honest negotiations. This being said, setting the requirements too high may have undesirable effects. For copyright collectives, it places a greater administrative burden for the filing of a tariff proposal. For potential objectors, it may simply discourage them to file an objection. If case management was implemented, additional clarity could be sought from each party during the pre-hearing mediation phase.

Our knowledge of the Board's decision-making is insufficient for us to comment on the streamlining options.

Reducing the Number of Matters Coming Before the Board Annually

From CAPACOA's perspective the most valuable option for reducing the number of matters coming before the Board isn't explored in the discussion paper. In the live events sector, we have witnessed a proliferation of tariffs for similar uses of music. The consequence of this practice is not only a high volume of matters before the board, but also a greater complexity and administrative burden upon multiple tariff users. Consequently, the Board should consider a regulatory measure to incentivize **tariff consolidation** wherever possible.

We have mixed feelings with regards to permitting collective societies to enter into licensing agreements of overriding effect with users. This can be a valid interim solution for ensuring immediate royalties collection while a more elaborate and robust tariff proposal is designed. However, it would be bound to create inequitable situations in which a given segment of an industry would voluntarily enter into agreement, while another would refuse and avoid paying any royalties at all for the use of copyrighted content. Moreover, absent a filing and publishing scheme, it would be very hard for industry associations to assess if an agreement proposal is reasonable in comparison to other agreements in similar industries. For the public interest, the certification tariffs that apply equally to all parties (and that are available to serve as benchmark for the design of other tariffs) remains a better option than individual agreements.

Changing the time requirements to more than one year appears at first sight to be a logical option. However, collective societies themselves benefit from a lower administrative burden when they file multi-year tariffs and are de facto incentivized to do so. Yet there may be instances – for example, for the purpose of consolidating tariffs – where filing for a shorter duration may be necessary. Consequently, while longer time requirements may be encouraged, they should perhaps not be required.

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