

## **Recommendations for Reform of the Copyright Act, R.S.C., 1985, c. C-42**

### **By the Canadian Music Publishers Association and Canadian Musical Reproduction Rights Agency<sup>1</sup>**

#### **I. Introduction and Overview**

The Canadian Music Publishers Association (CMPA) and the Canadian Musical Reproduction Rights Agency Ltd. (CMRRA) look forward to the upcoming Parliamentary review of the *Copyright Act*, as mandated by section 92 of the Act.

CMPA and CMRRA urge the government to undertake a fulsome review of the Act with a view to ensuring that it serves the dual policy goals of promoting the public interest in the encouragement and dissemination of works of the arts and intellect, on one hand, and obtaining just rewards for rightsholders, on the other.<sup>2</sup> To that end, in the pages that follow, we set out and elaborate on the following specific recommendations:

- Extend the term of copyright in works to the life of the author plus 70 years, consistent with international standards.
- Amend the exceptions introduced in 2012 for backup copies (section 29.24), technological processes (section 30.71), ephemeral recordings for broadcast undertakings (s.30.9(6)), and hosting services (subsection 31.1(4)) to restore balance and address unintended consequences.
- Amend the *Copyright Act* to authorize a court, on application by a rightsholder, to grant a site-blocking or de-indexing injunction against an Internet intermediary, with worldwide effect, on a “no-fault” basis to the intermediary.
- Improve the efficiency of the Copyright Board’s processes, and the timeliness and predictability of its decisions, through a combination of legislative and regulatory changes.

We look forward to the opportunity to discuss these proposals, and other potential legislative and regulatory amendments, with government representatives throughout the review process.

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<sup>2</sup> *Théberge v. Galerie d’Art du Petit Champlain Inc.*, 2002 SCC 34, 2 SCR 336, at para. 30.

## II. Copyright Term Extension

***Proposal: Extend the term of copyright in works to the life of the author plus 70 years, consistent with international standards.***

### A. Overview

CMPA and CMRRA support the extension of the term of copyright in works – that is, musical, literary, dramatic, and artistic works – to the international standard of the life of the author plus 70 years.

The current term of copyright protection for works in Canada, the life of the author plus 50 years, is out of step with modern copyright law. Apart from achieving consistency with international norms, extending the term of copyright in works will promote the underlying purposes of copyright law, and provide tangible economic benefits, by increasing the resources available to music publishers to invest in the creation of new musical works for domestic and international exploitation.

### B. *Extending the Term of Copyright Will Benefit Canada in International Trade*

Most of Canada's major trading partners, including the vast majority of the members of the Organization for Economic Co-operation and Development (OECD), protect copyright for longer than the life of the author plus 50 years.<sup>3</sup> At least 75 countries worldwide, including the United States, Australia, and the entire European Union, have embraced an international standard of the life of the author plus 70 years, with a few exceptions that recognize either slightly shorter or even longer terms.<sup>4</sup> A 2017 study by Circum Network Inc. determined that two-thirds of the revenues of Canadian music publishers came from foreign territories – most from territories with terms of life plus 70 or longer.

The inconsistency in copyright protection between Canada and its major trading partners is counterproductive to international rights administration and trade. These differing copyright regimes give rise to uncertainty and additional costs for rightsholders and users alike, often forcing them to investigate the terms of protection in multiple territories before they can license or use particular works. The inconsistencies hinder the achievement of optimal efficiency in both licensing and enforcement.

Indeed, legal harmonization is a key element in the creation of a productive international trade environment. This is particularly true for intellectual property rights in the digital age, since copyright-protected works are so easily distributed across borders via the Internet. As a result, the harmonization of intellectual property laws, including terms of protection, has become a key aspect of contemporary trade agreements such as the Trans-Pacific Partnership and the Australia-US Free Trade Agreement.

In order to ensure a productive international trade environment, both for domestic rightsholders and for foreign rightsholders who seek to exploit their works here, Canada should harmonize its term of copyright protection with the standard that has emerged with its major trade partners. Canada has recognized this in

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<sup>3</sup> All OECD member nations, except Canada, Japan, and New Zealand, offer copyright terms of life plus 70.

<sup>4</sup> India and Venezuela recognize copyright terms of life of the author plus 60 years. Colombia has adopted a term of life plus 80 years, while Mexico has adopted life plus 100 years.

part by extending the term of protection afforded to sound recordings and the performers' performances they contain.<sup>5</sup> It should now finish the job by extending term of protection in works to the life of the author plus 70 years. Doing so would ease global licensing of musical works by providing consistency across major territories, while also providing access to the longer term for Canadian works in foreign markets.<sup>6</sup>

### C. A Longer Term is Consistent with the Intention of the Berne Convention

Canada's term of copyright protection complies with the *minimum* term of protection required under the *Berne Convention* for literary and artistic works.<sup>7</sup> However, *Berne* explicitly permits signatory nations to allow for longer terms of copyright,<sup>8</sup> as Canada's top trading partners have done. They have done so for good reason: a longer term is demonstrably consistent with the spirit and intention of that treaty.

In 1993, the European Union adopted a directive recommending that copyright protection be extended to the life of the author plus 70 years throughout all EU nations.<sup>9</sup> The directive observed that the minimum term of life plus 50 years under the *Berne Convention* was "intended to provide protection for the author and the first two generations of his descendants," and that "the average lifespan in the [EU] has grown longer, to the point where *this term is no longer sufficient to cover two generations.*"<sup>10</sup> Indeed, the EU observed that the underlying basis for the minimum standard of copyright protection under the *Berne Convention* had fallen out of line with contemporary advancements in medicine and life expectancy as early as 1993.

Following the recommendations set out in the directive, various EU member states extended their respective terms of copyright protection to the life of the author plus 70 years.<sup>11</sup> In 2006, the EU formally adopted and codified the directive, which all EU member states are required to effect in their respective domestic legislation.

The same considerations apply in Canada. Canada joined the *Berne Convention* in 1928, which coincided with the adoption of the life plus 50 term requirement. At that time, the average life expectancy for Canadians was about 60 years.<sup>12</sup> By 2009, it had risen to about 81 years.<sup>13</sup> As a result, the term of protection currently

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<sup>5</sup> *Economic Action Plan 2015 Act, No. 1, S.C. 2015, c. 36, Part 3, Div. 5, ss. 81 and 82, amending Copyright Act, ss. 23(1)(b) and 23(1.1).*

<sup>6</sup> Pursuant to the *Berne Convention's* "rule of the shortest term", under which foreign works that have shorter protection durations may not receive the benefit of longer terms in other countries. See *World Intellectual Property Organization. Berne Convention for the Protection of Literary and Artistic Works* (as amended September 28, 1979) (the "*Berne Convention*"), Article 7(8), available online at: <[http://www.wipo.int/wipolex/en/treaties/text.jsp?file\\_id=283698#P127\\_220000](http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=283698#P127_220000)>

<sup>7</sup> Canada's current term of copyright protection was implemented by way of the *Copyright Act, 1921*, which came into force in 1924 and was modeled after the UK's *Copyright Act 1911*. In turn, the UK's *Copyright Act 1911* implemented the *Berne Convention* into UK law following the first revision of the Convention in 1908.

<sup>8</sup> *Berne Convention*, Article 7(6).

<sup>9</sup> Council Directive 93/98/EEC of October 29, 1993 (the "EU Copyright Duration Directive"). The directive was adopted following an extensive review process undertaken in the 1990s.

<sup>10</sup> EU Copyright Term Directive, preamble, para 5 (emphasis added).

<sup>11</sup> Belgium adopted the life plus 70 term in 1994. The UK, Germany, the Netherlands, Spain, and Ireland followed suit in 1995, Italy in 1996, and France in 1997.

<sup>12</sup> See <<http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/gbleco2a-eng.htm>>.

afforded by our *Copyright Act* is out of step with the goals of the *Berne Convention*: it is insufficient to cover two generations of descendants of a songwriter. The situation is exacerbated when a songwriter dies prematurely, leaving a young family financially reliant on the revenue generated by the writer's existing catalogue.

#### **D. A Longer Term Promotes Investment in Creativity**

By paying publishing advances to songwriters and making other direct and indirect financial contributions to the songwriting process, music publishers play a critical role in the creation of new music. The discovery, support, and development of songwriters is made possible by the reinvestment of royalties generated from the exploitation of existing works. The calculation is simple: the longer an older song remains protected by copyright, the more revenue it contributes to support the creation of new songs.

The EU Commission arrived at a similar conclusion when studying the impact of a proposed term extension for sound recordings. After thorough consultation, it found in 2008 that term extension had a direct long-term impact on cultural reinvestment by rightsholders:

*... overall, the extended term should have a positive impact on consumer choice and cultural diversity. In the long run, this is because **a term extension will benefit cultural diversity by ensuring the availability of resources to fund and develop new talent.***<sup>14</sup>

By contrast, many of Canada's major trading partners have explicitly *rejected* the theory that an extension of the term of copyright will have a negative impact on users. That theory posits that a term extension is detrimental to the public because it delays works from entering the public domain without generating any additional incentive for new creativity. In the same 2008 study, however, the EU Commission concluded that, "in analyzing the impact of copyright or related rights on prices ... it is fair to say that there is no clear evidence that prices will increase due to term extension."<sup>15</sup>

Indeed, as more and more music consumption migrates to flat-rate subscription and free-to-the-user streaming models, it is highly unlikely that term extension will result in higher prices to end users. The benefit of a shorter term of protection in Canada will continue to accrue only to the benefit of the providers of those services, who profit handsomely from the ability to make classic songs available to their customers without having to pay for them.

By contrast, the additional income generated by a longer term of copyright protection would help finance music publishers' ongoing efforts to discover and develop new and emerging talent. Longer terms of protection in a market also increase incentives for foreign companies to invest in repertoire in that market. In other words, providing for a longer term of copyright protection in Canada will strengthen both domestic

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<sup>13</sup> *Ibid.*

<sup>14</sup> "Summary of the Impact Assessment on the Legal and Economic Situation of Performers and Record Producers in the European Union," COM(2008) 464 final, SEC(2008) 2287. (Emphasis added.)

<sup>15</sup> *Ibid.*

reinvestment in cultural development and diversity and foreign investment in Canada's renowned local talent.

## **G. Conclusion**

In 2015 and 2016 alone, musical works by such songwriters as Cole Porter, Sam Cooke, Nat King Cole, Bud Powell, Jim Reeves, and Henry Cowell entered the public domain in Canada. In 2018, this list will expand to include works by Woody Guthrie, Otis Redding, and Billy Strayhorn. While those works will remain protected by copyright in other territories, Canadian rightsholders will no longer benefit from those copyrights. The significant royalties that are generated by those extensive catalogues each year will be lost to the Canadian music economy and consequently cease to be reinvested in Canada's cultural industries.

Canada's copyright laws are out of step with those of its major trading partners as well as the underlying rationale for the structure of our own copyright regime. This is an unreasonable cost to existing Canadian talent in royalties from abroad, as well as to emerging artists who rely on support from rightsholders through reinvestment. Canada should follow the lead of other like-minded nations and expand the protections afforded to our artists and the industry more broadly by extending the term of copyright for musical works to the life of the author plus 70 years.

## **III. Restoring Balance to Copyright Exceptions**

*Proposal: Amend the exceptions introduced in 2012 for backup copies (section 29.24), technological processes (section 30.71), and hosting services (subsection 31.1(4)) to restore balance and address unintended consequences.*

### **A. Introduction**

CMPA and CMRRA propose changes to certain copyright exceptions that were introduced or amended as part of the *Copyright Modernization Act* in 2012.

The exceptions have had broad, unintended consequences on the Canadian music publishing industry. Among other things, they have drastically reduced the royalties paid by profitable commercial entities for the right to reproduce musical works – including the royalties payable by commercial radio stations, which are now subject to potential royalty discounts of greater than 50%. The exceptions have also contributed to the refusal by ad-supported online platforms, which host and stream copyright protected content uploaded by their users, to pay a fair share of royalties, resulting in a “value gap”: a massive reallocation of economic value from rightsholders to those platforms.

Although ever-increasing volumes of music are being consumed, compensation for rightsholders has not kept pace with the growth of the services who profit from the use of their work. That disparity represents an unprecedented and unjustified windfall to commercial copyright users, entirely at the expense of the rightsholders who have nourished the creation of that music through investments of time, money and creativity.

## B. Overview of the Copyright Board's 2016 Commercial Radio Decision

To appreciate the impact of certain new exceptions, it is important to briefly review the April 2016 decision of the Copyright Board of Canada, fixing the royalties to be paid by radio stations for the right to reproduce musical works, among other things (the “**Commercial Radio Decision**”).<sup>16</sup>

The Copyright Board concluded that certain types of copies made by radio stations were exempt, or could potentially be exempt, from copyright liability under the new exceptions, some of which are discussed in further detail below. Notably:

- The Copyright Board reduced the total royalty rate payable by commercial radio stations by **23.31%** on account of the new backup copies exception in section 29.24 of the *Copyright Act*.<sup>17</sup>
- The Commercial Radio Decision entitles radio stations to claim additional discounts of up to **27.8%** under the ephemeral reproductions exception in section 30.9, the scope of which was expanded in 2012.<sup>18</sup>
- Therefore, the Commercial Radio Decision imposed total potential discounts exceeding 50% of the royalties that would otherwise be payable.
- By the Copyright Board's calculations, the potential discounts could cost rightsholders more than \$12.5 million in lost royalties per year.<sup>19</sup>
- The effective royalty rate paid by commercial radio stations to all music rightsholders for the use of music is **less than 6%** of their total gross revenues, even before the potential section 30.9 discounts are applied.<sup>20</sup> The effective rate would likely be much lower if the additional discounts were applied.<sup>21</sup>
- By contrast, music use accounts for **80%** of commercial radio programming,<sup>22</sup> demonstrating a gross disparity between the importance of music to radio stations and the revenues that they return to the creative community.

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<sup>16</sup> *Commercial Radio Tariff: SOCAN (2011-2013); Re:Sound (2012-2014); CSI (2012-2013); Connect/SOPROQ (2012-2017); Artisti (2012-2014)*, Decision of the Board, April 21, 2016, online at <<http://www.cb-cda.gc.ca/decisions/2016/DEC-2016-04-21.pdf>> (“2016 Commercial Radio Decision”), at para. 172.

<sup>17</sup> The discount of 23.31% is in relation to the right to reproduce musical works. In relation to the right to reproduce sound recordings, the discount is 23.66%

<sup>18</sup> The discount of 27.8% is in relation to the right to reproduce musical works. In relation to the right to reproduce sound recordings, the discount is 26.76%.

<sup>19</sup> 2016 Commercial Radio Decision, para. 370. The general discount for backup copies results in a total discount of \$5.6 million, while the additional discount available under section 30.9 could lead to a further discount of up to \$7 million.

<sup>20</sup> 2016 Commercial Radio Decision, at para. 371. See also: News Release of the Board dated April 21, 2016 (“2016 News Release”), online at <<http://www.cb-cda.gc.ca/decisions/2016/NEW-2016-04-21-EN.pdf>>.

<sup>21</sup> As noted at footnote 19, the additional discounts could lead to a further discount of \$7 million.

<sup>22</sup> *Commercial Radio Tariff: SOCAN (2008-2010); Re:Sound (2008-2011); CSI (2008-2012); AVLA/SOPROQ (2008-2011); Artisti (2009-2011)*, Decision of the Board, July 9, 2010, online at <<http://www.cb-cda.gc.ca/decisions/2010/20100709.pdf>> (the “2010 Commercial Radio Decision”), at paras. 22, 49 and 210, citing separate studies commissioned by SOCAN and by the Commercial Association of Broadcasters.

- The new discounts imposed by the Copyright Board come at a time of increased profits for commercial radio stations,<sup>23</sup> at least some of which is attributable to the cost savings realized from their use of copy-dependent automation technology.

### C. Backup Copies, s. 29.24

#### (i) The Dilemma

Under the backup copies exception, introduced to the *Copyright Act* in 2012, it is not an infringement of copyright for a person who owns or has a licence to use a copy of a musical work or other subject matter to make a backup copy of the work, subject to certain conditions. The backup copy is to be used only for backup purposes, in case the source copy is lost, damaged or otherwise rendered unusable.

As drafted, the exception applies whether the backup copies are made for private or for commercial purposes, including by large-scale, profit-driven organizations. As a result, the exception has had the unintended consequence of depriving rightsholders of *any* compensation for the substantial number of backup copies made by commercial users, even though those users derive significant value from the backups they make.

That consequence is apparent in the Commercial Radio Decision. In the decision, there was no dispute that radio stations made significant numbers of backup copies of musical works, that they consider those copies to be highly useful (if not essential) to their broadcast operations, and that those copies therefore have significant economic value. Indeed, the Copyright Board concluded that the economic value of the backup copies represented 23.31% of the total value of *all* copies made by radio stations in the course of their broadcasting activities – an unequivocal confirmation of the economic significance of backup copies to commercial radio stations.

Nevertheless, the Board determined that these backups met the requirements of section 29.24 and that it therefore was constrained by section 29.24 to deduct *the entire economic value of backup copies* from the reproduction royalties that would otherwise be payable by radio stations. It therefore reduced the royalty rate by a full 23.31% on account of backup copies, depriving rightsholders of any share of the value of those copies.

Although the mandate of the Copyright Board is to set fair and equitable rates for the use of music, it is difficult to see what is either fair or equitable about excusing commercial radio stations, or other commercial users, from any obligation to pay for copies of music from which they derive enormous economic value.<sup>24</sup>

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<sup>23</sup> According to the most recent CRTC Communications Monitoring Report, profits before interest and taxes (PBIT) for the commercial radio industry as a whole increased from 18.5% in 2014 to 18.9% in 2015. See: Communications Monitoring Report 2016, CRTC, at §4.0(i), online at <http://www.crtc.gc.ca/eng/publications/reports/policymonitoring/2016/cm4.htm#a41i>.

<sup>24</sup> Arguably, an exception that deprives rightsholders of compensation for economically-valuable copies made for clearly commercial purposes, for which rightsholders have previously been paid, also interferes unjustifiably with the normal exploitation of musical works. This is contrary to the “three-part test” for permissible exceptions under the

**(ii) Proposed Amendment**

CMPA and CMRRA propose that the backup copies exception be amended to provide that it does not apply to backup copies made for commercial purposes.

There is no fair or equitable reason to permit commercial users who derive significant economic benefits from the making of backup copies to retain that full economic value, to the detriment of the rightsholders whose works are copied. The CMPA-CMRRA proposal would ensure that the full economic benefit of these copies is instead allocated fairly and equitably between rightsholders and commercial users, either by the Copyright Board or in private negotiations.

The CMPA-CMRRA proposal would also have no impact on backup copies made for non-commercial purposes. In that way, the exception would be made consistent with other exceptions introduced in 2012. In addition to the backup copies exception, the *Copyright Modernization Act* introduced exceptions for non-commercial user generated content (section 29.21), copies made for an individual's private purposes (section 29.22), and copies made for time-shifting purposes (section 29.23). Each of these exceptions applies only to copies made for non-commercial purposes.<sup>25</sup>

CMPA and CMRRA respectfully submit that the backup copies exception should also be limited to copies made for non-commercial purposes. Amending the exception in this way would introduce badly-needed balance to the provision and to avoid the unintended consequence of transferring the entire economic benefit of valuable copies to commercial users, entirely at the expense of rightsholders.

**D. Temporary Reproductions for Technological Processes, s. 30.71**

**(i) The Dilemma**

Section 30.71 is drafted in vague terms that have resulted in costly and unnecessary litigation over the scope and meaning of the exception.

The exception provides that it is not an infringement of copyright to make a reproduction of a work or other subject-matter if (a) the reproduction forms an essential part of a “technological process”; (b) the only purpose of the reproduction is to facilitate a use that is not an infringement of copyright; and (c) the reproduction exists only for the duration of the technological process. However, the term “technological process” is not defined. Further, the section does not specify what it means for a reproduction to exist only for “the duration” of the technological process.

Commercial copyright users have sought to take advantage of this ambiguity. In the proceeding that led to Commercial Radio Decision, the CAB argued that “*the entire process of program assembly performed by*

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*Berne Convention*, which contemplates exceptions that apply only “in certain special cases [that do] not conflict with a normal exploitation of the work and [do] not unreasonably prejudice the legitimate interests of the author.”

<sup>25</sup> Nothing in this submission should be taken as agreement by CMPA or CMRRA that an uncompensated exception for private copying (i.e., section 29.22) is appropriate or reflects a reasonable balance between the interests of rightsholders and other stakeholders.



commercial radio stations, from the gathering and creation of content to the communication of a radio signal to the public, is a technological process.”<sup>26</sup>

The Copyright Board correctly rejected that argument, holding that there was “nothing to suggest that the legislator’s intent was to provide such a wide-ranging exception.”<sup>27</sup> CMPA and CMRRA agree with the Copyright Board’s interpretation. However, a decision of the Copyright Board is not binding on the civil courts, or even on the Copyright Board itself. As a result, it is likely that copyright users across various industries will continue to assert an overly broad interpretation of section 30.71, as currently drafted, resulting in more unnecessary and costly litigation.

**(ii) Proposal**

CMPA and CMRRA propose that section 30.71 be amended to clarify the meaning of a “technological process” and the requirement that a reproduction made under that exception exists only for “the duration” of the technological process. In particular, CMPA and CMRRA propose that the section be amended to stipulate that

- a technological process must have no human input between the initiation and the termination of the process; and
- the temporary reproduction must be made, used, and deleted *automatically*, as part of the technological process itself and without human intervention.

The proposed amendments appear consistent with the intentions of Parliament as expressed in publications released with Bill C-11 when tabled. In one such publication, the government explained that the bill would “make it clear that automatic, technical and incidental reproductions are not a violation of copyright.”<sup>28</sup> The Copyright Board cited that publication in the Commercial Radio Decision, noting as well that the language of the exception “likely suggests that the destruction of such reproduction is likely to be automatic, as a result of the technology used.”<sup>29</sup> The proposed amendments would therefore confirm the intentions of Parliament, as interpreted by the Board.

The European Union has also taken a similar approach, introducing Article 5(1) of Directive 2001/29/EC (commonly known as the “InfoSoc Directive”) to exempt temporary, technical reproductions from copyright infringement. A recital to the InfoSoc Directive explains that the exception applies to acts that enable browsing and caching to take place,<sup>30</sup> which the European Court of Justice (ECJ) has since described as acts that are “by definition, created and deleted automatically and without human intervention.”<sup>31</sup> The ECJ has

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<sup>26</sup> 2016 Commercial Radio Decision, *supra* note 16 at para. 177, citing the Written Submissions of the CAB (Exhibit CAB-11) dated February 14, 2014 at para. 37 (emphasis added).

<sup>27</sup> 2016 Commercial Radio Decision, *supra* note 16 at para. 178.

<sup>28</sup> 2016 Commercial Radio Decision, *supra* note 16 at para. 179.

<sup>29</sup> 2016 Commercial Radio Decision, *supra* note 16 at para. 181.

<sup>30</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, online at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>> (the “InfoSoc Directive”), Recital 33.

<sup>31</sup> *Infopaq v. Danske Dagblades*, ECJ C-5/08, Judgment of 16 July 2009 [2009] ECR I-06569, online at <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=72482&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=564699>> (“*Infopaq I*”).

also acknowledged that, while a technological process may be “manually” activated,<sup>32</sup> a temporary reproduction must be “carried out entirely in the context of the implementation of the technological process and, therefore, [is] not to be carried out, fully or partially, outside of such a process.”<sup>33</sup>

There is good reason for the temporary reproduction to be deleted automatically, as opposed to being dependent on human intervention. As the ECJ has noted, legal certainty for rightsholders requires automatic deletion: if left to the discretion of the user, “[t]here is no guarantee that... the person will actually delete the reproduction created or, in any event, that he will delete it once its existence is no longer justified by its function of enabling the completion of a technological process.”<sup>34</sup>

## **E. Ephemeral Recordings Made by Broadcast Undertakings, s. 30.9**

### **(i) Overview**

Radio stations frequently make copies of musical works for various purposes. Copies that are intended to exist for no more than 30 days are sometimes known as ‘ephemeral copies’. The Supreme Court has recognized these copies as uses of the reproduction right that require authorization from rightsholders.<sup>35</sup> With the advent of digital technologies, radio stations rely increasingly on these types of reproductions to generate valuable efficiencies in their operations. The resultant savings have led directly to increased profits.

Prior to 2012, an exception to copyright for those ephemeral copies effectively addressed the concerns of both rightsholders, who wanted to be compensated for the reproduction of their works, and broadcasters, who wanted to minimize the onerous task of seeking licences from countless individual rights holders. The exception, first introduced to the *Copyright Act* in 1997, was subject to detailed requirements to ensure that exempt copies were truly “ephemeral” – and, crucially, did not apply where a licence to make these copies was available from a collective society. In this form, the exception could be said to meet Canada’s obligations regarding the introduction of exceptions to copyright<sup>36</sup> under the Berne Convention<sup>37</sup> and the TRIPS agreement<sup>38</sup>.

The balance achieved in the 1997 amendments allowed rightsholders a critical opportunity to realize the economic value of their reproduction rights. Radio broadcasters, for their part, were able to obtain licences to extensive repertoires of musical works and sound recordings simply by complying with the certified tariffs and paying royalties to the applicable collective societies.

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<sup>32</sup> Case C-302/10 *Infopaq International A/S v. Danske Dagblades Forening*, 17 January 2012, online at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CO0302:EN:HTML>> (“*Infopaq II*”), at paras. 32 and 36.

<sup>33</sup> *Infopaq II*, para. 30

<sup>34</sup> *PRCA v. NLA (Meltwater)*, [2013] UKSC 18, [2013] 2 All ER 852, online at <<http://www.bailii.org/uk/cases/UKSC/2013/18.html>> (“*Meltwater*”) at paras. 12-13 & 31-33; *Infopaq I* at para. 62.

<sup>35</sup> *Bishop v Stevens* [1990] 2 SCR 467

<sup>36</sup> See note 24, citations below.

<sup>37</sup> Berne Convention, Article 9(2)

<sup>38</sup> TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994), Article 13

However, following lobbying from broadcasters, s. 30.9 was further amended in 2012, expanding the scope of its application to include all copies made ‘solely for the purpose of their broadcasting’<sup>39</sup> and repealing s. 30.9(6), the collective licensing restriction.<sup>40</sup> As a result, a much wider variety of ephemeral copies is now eligible for the exemption, regardless of their function in the broadcaster’s operations or whether a licence is available from a collective society.

**(ii) The Dilemma**

As a result of the 2012 amendments, the Copyright Board in the Commercial Radio Decision assessed the value of the various types of copies that it determined were eligible for the exception<sup>41</sup> and reduced the royalties payable for those copies by up to an additional 27.8% (worth up to \$7 million per year<sup>42</sup>), provided that broadcasters could prove, somehow, they met the conditions of the exception. The Board noted in its decision that there was “insufficient evidence to conclude that some or all of the types of reproduction [made by broadcasters] qualify for the broadcast ephemeral copies exception,” and recognized that broadcasters required guidance as to the steps that would be necessary to demonstrate compliance.<sup>43</sup>

Despite that recognition, the Board in fact declined to establish any mechanism for broadcasters to prove their compliance. Furthermore, while the Board acknowledged that introducing a discount structure “would represent an administrative burden,” it observed that “the greatest part of such burden would stem from the statutory provision itself, over which the Board has no control.”<sup>44</sup>

In practice, the discount structure in the tariff certified by the Board has proven unworkable for and by both rightsholders and users. Aspects of the decision were stayed in part by the Federal Court of Appeal<sup>45</sup> while the parties negotiated a settlement agreement to replace the tariff imposed by the Board with a simplified licence structure.<sup>46</sup> However, even that simplified structure, which is now under consideration by the Board, results in a dramatic – and wholly unwarranted – royalty reduction for rightsholders.

By expanding the ephemeral recordings exception in 2012, Canada eliminated a recognized and monetized exclusive right under copyright. Doing so both contravened its international copyright obligations<sup>47</sup> and deprived rightsholders of compensation that they had come to rely on. Radio stations continue to derive the same (or greater) economic value from ephemeral copies as before; they just pay much less for the right to make them.

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<sup>39</sup> *Copyright Modernization Act*, S.C. 2012, c. 20, s.34(1). Prior to the amendment, the exception was available only for copies made “solely for the purpose of transferring [a sound recording, or a performer’s performance or work embodied in a sound recording] to a format appropriate for broadcasting.”

<sup>40</sup> *Ibid*, s. 34(3).

<sup>41</sup> Ingest copies (16.9%), voice tracking copies (9.46%), and live performance copies (1.44%). See 2016 Commercial Radio Decision, Appendix A, table 3.

<sup>42</sup> 2016 Commercial Radio Decision, para. 370.

<sup>43</sup> 2016 Commercial Radio Decision, paras. 136-137.

<sup>44</sup> 2016 Commercial Radio Decision, para 208.

<sup>45</sup> *CMRRA-SODRAC Inc. et al. v Canadian Association of Broadcasters and Artisti* (17 August 2016), Ottawa, A-166-16 (FCA).

<sup>46</sup> Letter from Casey M. Chisick to the Copyright Board of Canada (15 September 2016), online: <<http://cb-cda.gc.ca/avis-notice/2017/CB-CDA-2017-121-a.pdf>> (last accessed 5 July 2018).

<sup>47</sup> *Supra* notes 24 and 36-38.

**(iii) Proposal**

There is no reason why commercial broadcasters should not compensate rightsholders when they themselves benefit so greatly from the use of ephemeral copies. CMRRA and CMPA recommend that s. 30.9(6) be reintroduced, in keeping with the original intention – to provide relief to broadcasters from the burden of obtaining licences from countless individual rightsholders, while recognizing that the right is fully compensable where collective licences are available to eliminate that burden.

**F. The Exception for Hosting Services, s. 31.1(4)****(i) Overview**

In 2012, the *Copyright Modernization Act* introduced a statutory regime to limit the copyright liability of Internet intermediaries, introducing broad exceptions for network services (i.e., ISPs<sup>48</sup> and hosting providers<sup>49</sup>) and “information location tools” (i.e, search engines or “ILTs”<sup>50</sup>) and establishing the so-called “notice and notice” regime.<sup>51</sup>

As discussed below in Part V of this submission, the regime suffers from several shortcomings, which deprive rightsholders of the tools necessary to protect and exploit their valuable rights.<sup>52</sup> In that section, CMPA and CMRRA propose that the shortcomings related to ISPs and ILTs be resolved, in part, by amending the *Copyright Act* to authorize courts to grant site-blocking injunctions and de-indexing orders, respectively.

However, a further unintended consequence of the hosting services exception has been the expansion of what has come to be known as the “value gap”: a massive reallocation of economic value from copyright owners to ad-supported online platforms that purport to qualify for the hosting exception while effectively functioning as online music streaming services. These platforms avail themselves of the regime to seek to avoid paying a fair share of royalties for their hosting of a vast amount of copyright-protected content, which is uploaded by their users and which the services stream to the public. The result is yet another gross disparity between the amount of music consumed and the revenues returned to the creative community.

CMPA and CMRRA support amendments to the *Copyright Act* that would help bridge the value gap and ensure a fair allocation of economic value between copyright owners and Internet intermediaries. In particular, CMPA and CMRRA propose that section 31.1(4) of the *Copyright Act* be amended to specifically exclude from the hosting services exception any service that plays an active role in making available to the

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<sup>48</sup> Exceptions are available for persons who provide any means for the telecommunication or the reproduction of a work or other subject-matter through the Internet, and any such person who caches a work or other subject matter, or does any similar act in relation to the work, to make the telecommunication more efficient. See: *Copyright Act*, ss. 31.1(1) and 31.1(2).

<sup>49</sup> *Copyright Act*, s. 31.1(4).

<sup>50</sup> *Copyright Act*, s. 41.27.

<sup>51</sup> *Copyright Act*, s. 41.27.

<sup>52</sup> As discussed in Part V of this submission, (1) the regime provides broad exceptions that exempt network services, such as ISPs and hosting providers, from copyright infringement solely for providing the technical means for the infringement to occur; (2) unlike in other jurisdictions, where a copyright owner delivers a notice of alleged infringement, a network service is not required to take down or de-index the impugned content; (3) unlike in other jurisdictions, the operation of the broad copyright exceptions are not conditional upon the compliance by a network service with its obligations under the “notice and notice” regime (save for a narrow carve-out to the exception pertaining to search engines).

public the content that is uploaded by its users, including by providing functions such as categorization, recommendations, playlists, or the ability to share content.<sup>53</sup>

**(ii) The Dilemma**

The hosting service exception provides that a person who, for the purpose of allowing the telecommunication of a work or other subject matter through the Internet or another digital network, provides digital memory in which another person stores the work or other subject matter does not, “by virtue of that act alone,” infringe copyright in the work or other subject matter.<sup>54</sup>

The primary dilemma arising from the exception is a lack of clarity as to the meaning of the phrase “by virtue of that act alone.” CMPA and CMRRA understand the phrase to mean that a hosting service may avail itself of the exception only if its operations are entirely passive and content-neutral. However, absent legislative guidance, online platforms that play an *active* role in streaming content that is uploaded by their users often try to claim the benefit of the exception. They do so even though they offer features that are intended to enhance the user experience, such as categorizing works, offering recommended playlists, and providing “auto-complete” search functions, all while deriving significant advertising revenues as visits to their services increase.

The lack of clarity as to the scope of the exception puts copyright owners at a significant disadvantage when attempting to negotiate licences for the right to reproduce musical works. Very often, services refuse to pay a fair share of royalties, claiming to be hosting services that are exempt from any copyright liability whatsoever for making copies of musical works and other content. Although CMPA and CMRRA believe that position to be unfounded in most cases, it remains a stumbling block in many negotiations.

The need for clarity in the language of the exception is underscored by the recent decision of the Copyright Board of Canada, fixing the royalties payable by online music services for the performance and reproduction of musical works.<sup>55</sup> Although the Board did not certify a tariff for cloud-based hosting services, it nonetheless suggested that it would have adopted a broad interpretation of the phrase “by virtue of that act alone” in the hosting exception. In particular, the Board indicated that it was “not convinced that the mere offering of other features” beyond the provision of the digital memory by hosting services, “creates a real risk that the [hosting exception] provision is no longer applicable.”<sup>56</sup> On that basis, the Board suggested “there is a real likelihood that many such services could benefit from” the hosting exception.<sup>57</sup>

The decision of the Board demonstrates the need for greater clarity in the language of the hosting exception to ensure that it is available only to services that are entirely passive and content-neutral. If the Board’s reasoning were adopted by a court, it would deprive rightsholders of reasonable compensation for valuable uses of their music. It would also create an uneven playing field between services that host and stream

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<sup>53</sup> E.U. Commission Staff Working Document, *Impact Assessment on the modernisation of EU copyright rules*, Accompanying the document: *Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market*, Brussels 14.9.2016 SWD(2016) 301 at 138.

<sup>54</sup> *Copyright Act*, s. 31.1(4).

<sup>55</sup> *Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)*, Decision of the Board, August 25, 2017, online at <<http://www.cb-cda.gc.ca/decisions/2017/DEC-2017-SAT-25082017.pdf>> (“2017 Online Music Decision”).

<sup>56</sup> *Ibid* at para. 172.

<sup>57</sup> *Ibid* at para. 178.

content uploaded by their users, on one hand, and “traditional” online music streaming services, on the other.

### (iii) *International Initiatives*

Legislative initiatives are underway internationally to reconsider exceptions that apply broadly to hosting services, including those that appear to act as more than passive hosts or conduits.

In the EU, the European Commission has recently issued a Proposal for a Directive on copyright.<sup>58</sup> The proposed directive followed a study that recognized that “rightsholders have no or limited control over the use and the remuneration for the use of their content by services storing and giving access to large amounts of protected content uploaded by their users.”<sup>59</sup> The study also noted that these services “provide functionalities such as categorization, recommendations, playlists, or the ability to share content,” that they have “*de facto* become major actors of online content distribution,” and that “rightsholders are not necessarily able to enter into agreements with them for the use of their content.”<sup>60</sup>

Therefore, a recital to the proposed directive, discussing the types of services that ought to benefit from an exception<sup>61</sup> for hosting services, states as follows: “[I]t is necessary to verify whether the service provider plays an active role, including by optimising the presentation of the uploaded works or subject matter or promoting them, irrespective of the nature of the means used therefor.”<sup>62</sup>

Similarly, the United States Congress is now holding hearings on whether to amend the safe harbour provisions of the *Digital Millennium Copyright Act*. The Notice of the hearings explains that, at the time that the DMCA was enacted, “it was likely difficult to anticipate the online world as we now know it – where, each day, users post hundreds of millions of photos, videos and other items...”<sup>63</sup> Therefore, one of the issues being considered is whether and how the DMCA’s limitations on liability for online service providers have affected the protection and value of copyright-protected works, including licensing markets for those works.<sup>64</sup>

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<sup>58</sup> Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, Brussels, 14.9.2016, COM(2016) 593, online at <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0593>>

<sup>59</sup> E.U. Commission Staff Working Document, *Impact Assessment on the modernisation of EU copyright rules*, Accompanying the document: *Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market*, Brussels 14.9.2016 SWD(2016) 301 at 137.

<sup>60</sup> *Ibid* at 138.

<sup>61</sup> The exception is contained in Article 14 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, online at <<http://eur-lex.europa.eu/eli/dir/2000/31/oj>>. Note that the exception requires a service to act expeditiously to take down impugned content upon obtaining knowledge or awareness of infringing activity. A service that fails to comply with that requirement will lose the benefit of the exception – unlike the situation in Canada under the notice and notice regime.

<sup>62</sup> Recital 38, Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, Brussels, 14.9.2016, COM(2016) 593, online at <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0593>>

<sup>63</sup> U.S. Copyright Office, *Section 512 Study: Notice and Request for Public Comment*, December 31, 2015, available online <<https://www.federalregister.gov/documents/2015/12/31/2015-32973/section-512-study-notice-and-request-for-public-comment>>

<sup>64</sup> *Ibid*, question #4

**(iv) Proposal**

CMPA and CMRRA propose that the hosting exception in subsection 31.1(4) be amended to make clear that it does not apply to a hosting service that acts as a *content provider*, and not as a mere conduit for the storage of data for the purpose of allowing a telecommunication. Specifically, the exception should not apply to a service that plays any active role in the communication to the public of the works or other subject matter that other persons store within its digital memory.

As amended, the exception would not apply to a service that promotes or optimizes the presentation of works that it makes available to the public, whether by categorizing works by genre, style, or the like, creating recommended playlists, providing an “auto-complete” search function, or the like. However, hosting services that are truly passive intermediaries would continue to receive the full protection of the existing exception as well as the protections afforded under the notice and notice regime.

There is support for this proposal in a 2004 decision of the Supreme Court of Canada that interpreted paragraph 2.4(1)(b) of the *Copyright Act*, which contains an exception for persons whose sole act in communicating works or other subject matter to the public consists of providing the necessary means of telecommunication.<sup>65</sup> Among other things, the Court held in that case that the exception applies only to a service that acts as a mere “conduit,” and not to services that “engage in acts relating to the content of the communication.”<sup>66</sup> Clearly, that exception, like the hosting exception, is not intended to exempt services that play an active role in the communication of works to the public.

**IV. Site-Blocking and De-Indexing Injunctions to Combat Online Piracy**

***Proposal: Amend the Copyright Act to authorize a court, on application by a rightsholder, to grant a site-blocking or de-indexing injunction against an Internet intermediary, with worldwide effect, on a “no-fault” basis to the intermediary.***

**A. Introduction**

Internet intermediaries, such as ISPs, hosting providers, and search engines, are best placed to prevent or limit large-scale commercial infringement of copyright on the Internet.

However, the *Copyright Act* does not specifically authorize Canadian courts to grant injunctive orders to require an ISP or hosting service to block access to an infringing website (often referred to as a “site blocking order”), or require a search engine to prevent an infringing site from showing up in its search results (a “de-indexing order”), without risk of liability. Moreover, the notice-and-notice regime established in 2012 gives intermediaries little incentive to help combat online piracy.

As a result, rightsholders typically have no recourse but to commence legal proceedings against the commercial infringers. Those proceedings often resemble costly and futile games of whack-a-mole, with infringing content popping up elsewhere on the Internet almost as soon as it is removed from another location.

In this way, the *Copyright Act* is out of step with the law of many other countries, including the United Kingdom, various member states of the European Union, Australia, and Singapore. That discrepancy is

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<sup>65</sup> *SOCAN v. CAIP*, 2004 SCC 45.

<sup>66</sup> *Ibid*, para. 92.

contrary to Parliament's acknowledgement that, in the digital era, copyright protection is enhanced when international efforts are coordinated.<sup>67</sup>

CMPA and CMRRA therefore propose that the *Copyright Act* be amended to authorize a court, on application by a rightsholder, to grant a site blocking or de-indexing injunction, with worldwide effect, on a "no fault" basis to the Internet intermediary.

## **B. The Canadian Dilemma**

### **(i) Large-Scale Commercial Infringement on the Internet**

Canadian rightsholders are harmed by services that facilitate and profit from the large-scale commercial infringement of copyright on the Internet. Those services include torrent portals, such as the infamous Pirate Bay website, and cyberlockers that host copyright-protected material that may be shared with other users. Such services are designed to capitalize on the infringement of copyright: they typically permit anonymous users to upload content at no charge, host the content free of charge, reward users that post popular content (even if pirated), and derive more advertising revenue the more users visit the site.<sup>68</sup>

Infringement of this type harms the creative industries. The Digital Citizens Alliance suggests that "ad-supported content theft has become a big business and harms a wide range of players in the digital economy and threatens the future of a free and open Internet."<sup>69</sup> The European Union Intellectual Property Office estimated that, in 2014 alone, digital piracy resulted in €170 million in lost revenue across the European Union.<sup>70</sup>

### **(ii) The Copyright Act Does Not Provide Sufficient Tools to Prevent This Conduct**

Due to their technical capabilities and the role that they play in hosting, locating, and delivering content, Internet intermediaries are best placed to prevent and mitigate large-scale commercial infringement of copyright.<sup>71</sup> Indeed, it is not often feasible for a copyright owner to enforce its rights directly against infringing services, which are typically sophisticated, able to conceal their identities and locations.<sup>72</sup> Even if a service removes infringing content in response to a user request, the content is often reposted quickly on

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<sup>67</sup> *Copyright Modernization Act*, S.C. 2012, c. 20, preamble provisions.

<sup>68</sup> Paul Doda, "Distinguishing 'Common Carriers' from 'Common Thieves': Requiring Notice and Stay Down for 'Structurally Infringing' Host Sites that Discourage Legitimate Electronic Storage, Incentivize Copyright Infringement, and Exploit the DMCA 512(c) Safe Harbor", 63:1 *Journal of the Copyright Society of the USA*, 515 at 517.

<sup>69</sup> Digital Citizens Alliance, "Good Money Gone Bad: Digital Thieves and the Hijacking of the Online Ad Business: A Report on the Profitability of Ad-Supported Content Theft" (2014), online at <<http://www.digitalcitizensalliance.org/clientuploads/directory/Reports/good-money-gone-bad.pdf>>.

<sup>70</sup> European Union Intellectual Property Office, "The Economic Cost of IPR Infringement in the Recorded Music Industry" (2016) at p. 14, online at <[https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/resources/research-and-studies/ip\\_infringement/study7/Music\\_industry\\_en.pdf](https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/resources/research-and-studies/ip_infringement/study7/Music_industry_en.pdf)>.

<sup>71</sup> InfoSoc Directive, *supra* note 30, at Recital 59.

<sup>72</sup> For example, see Kevin Meehan, "The Continuing Conundrum of International Internet Jurisdiction", (2008) 31 *BC Int'l & Comp L Rev* 345 at 349, cited with approval in *Equustek Solutions Inc. v. Jack*, 2014 BCSC 1063 at para. 37.



another website of the service.<sup>73</sup> And many infringing services are located outside Canada, immune from the jurisdiction of Canadian courts.

Internet intermediaries benefit greatly from the availability of high-quality content, whether licensed or not, through their facilities. Properly calibrated, the *Copyright Act* would enlist intermediaries as partners in ensuring that content is made available only with rightsholder consent. The most effective way to do that is by helping to prevent Canadians from accessing content through infringing means. Unfortunately, the Act does not do enough to encourage intermediaries to block or de-index websites that make infringing content available.

**(iii) Broad Exemption for Network Services**

Under the *Copyright Act*, “network services,” such as ISPs and hosting services, are exempt from liability for copyright infringement solely for providing the technical means for the infringement to occur.<sup>74</sup> As a result, Internet intermediaries have no direct incentive to prevent third parties from using their services to infringe copyright.

**(iv) No Real Consequences Under the “Notice and Notice” Regime**

The notice and notice regime does not do enough to prevent or limit large-scale commercial infringement of copyright on the Internet. Where a copyright owner delivers a notice of claimed infringement, a network service is required only to forward the notice to the appropriate person (such as its subscriber) and to retain certain records in case a rightsholder chooses to initiate litigation against the alleged infringer.<sup>75</sup> Unlike in other jurisdictions, the service is not required to take down or de-index the content.

There are also no real consequences for a network service that fails to comply with those minimum requirements. A non-compliant network service will continue to be immune from infringement liability under the broad exemption described above. The only potential consequence is a potential award of statutory damages in a nominal amount.<sup>76</sup> This is unlike other jurisdictions, such as the U.S., where a non-compliant intermediary loses the broad immunity offered under the “safe harbour” laws.<sup>77</sup>

The regime applies slightly differently to search engines. The *Copyright Act* limits the relief available against a search engine to injunctive relief, so long as the search engine has made only passive and automated reproductions of the copyrighted material, and subject to certain other conditions.<sup>78</sup> However, that relief

<sup>73</sup> For example, see: *Equustek Solutions Inc. v. Jack*, 2014 BCSC 1063, para. 72, and *Equustek Solutions Inc. v. Google Inc.*, 2015 BCCA 265, para. 25.

<sup>74</sup> That exemption is subject to certain limited exceptions that are not relevant to the issue canvassed in this submission. See *Copyright Act*, ss. 2.4(1), s.31.1

<sup>75</sup> *Copyright Act*, s. 41.26(1). Even if litigation is commenced, the rightsholder is not necessarily entitled to receive the information so preserved; it must obtain a Norwich order to require the intermediary to hand it over. See, e.g., *BMG Canada v. Doe*, 2005 FCA 193, and *Voltage Pictures LLC v. Doe*, 2014 DC 161.

<sup>76</sup> “A claimant’s only remedy against a person who fails to perform his or her obligations under subsection (1) is statutory damages in an amount that the court considers just, but not less than \$5,000 and not more than \$10,000.” *Copyright Act*, s.41.26(3).

<sup>77</sup> §512(c)(1)(C), Title 17, US Code.

<sup>78</sup> Among other things, if an infringing work has been taken down, the search engine must remove any cached copies within 30 days of receiving a notice of claimed infringement, or it will lose the limitation on relief. See *Copyright Act*, s. 41.27(1)-(3).

misses the mark by requiring the rightsholder to take legal action, and prove infringement, *against the search engine itself*, rather than by permitting a rightsholder to seek an order requiring the search engine, on a no-fault basis, to block or de-index sites that make infringing content available. Only the latter option would ensure that the resources of both litigants and courts are properly focused on the practical issue of preventing and limiting online copyright infringement by large scale, commercial services.

**(v) Online Enablers Escape the Jurisdiction of Canadian Courts**

In 2012, Parliament attempted to target entities that facilitate online infringement by introducing a new form of secondary infringement that targets so-called “online enablers” – services that are provided “primarily for the purpose of enabling acts of copyright infringement.”<sup>79</sup> But the applicable provisions, however well-intentioned, fall short of a complete solution. For one thing, they impose upon a rightsholder the onerous burden of proving that an *actual* infringement of copyright has occurred by means of the service, as opposed to establishing general knowledge that infringing activity is occurring. For another, they appear to apply only to entities located in Canada, thus excluding the vast majority of infringing torrent sites and cyberlockers, which operate outside Canadian borders. By allowing foreign enablers to escape the jurisdiction of Canadian courts, the regime thus makes it all too easy for Canadians to continue to access infringing content through sites and services that would be illegal if located in Canada.

Clear, predictable, and fair legislation providing for site-blocking injunctions would provide necessary certainty for all stakeholders,<sup>80</sup> thereby avoiding unnecessary and costly litigation. It would close an egregious loophole in the *Copyright Act* that allows foreign sites and services to trample on the rights of copyright owners and encourages Canadians to use those sites and services to access infringing content.

**C. Support from the Supreme Court of Canada**

The authority of Canadian courts to issue broad de-indexing injunctions has now been recognized by the Supreme Court of Canada in the recent decision of *Google Inc. v Equustek Solutions Inc.*<sup>81</sup> CMPA and CMRRA now propose that the *Copyright Act* be amended to provide “clear, predictable and fair rules” – an objective that Parliament recognized as desirable in the preamble to the *Copyright Modernization Act*<sup>82</sup> – in relation to the issuance of both site-blocking and de-indexing injunctions in cases of copyright infringement.

In *Equustek*, the Supreme Court upheld a decision of the British Columbia Court of Appeal granting a global interim de-indexing injunction, requiring Google to de-index various web pages from its search results, with worldwide effect. In doing so, the Supreme Court acknowledged that it may be necessary, in certain circumstances, to grant an injunction enjoining conduct anywhere in the world. The Court reasoned that the only way to ensure that the injunction attained its objective was to have it apply where Google operates: globally.

The *Equustek* decision provides support for the proposition that global site-blocking and de-indexing orders against Internet intermediaries are the natural evolution of a court’s inherent jurisdiction. It also recognizes that the issuance of an injunction against an intermediary is often the only practical solution to prevent or

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<sup>79</sup> *Copyright Act*, s. 27(2.3).

<sup>80</sup> Melville B. Nimmer et al, *International Copyright Law and Practice* (New York, NY: LexisNexis, 2016) (loose-leaf rel. 28-12/2016, Pub 399) at UK-159, footnote 427.

<sup>81</sup> 2017 SCC 34

<sup>82</sup> *Copyright Modernization Act*, preamble

limit large-scale commercial infringement by others who rely on the intermediary's services and facilities to achieve their commercial goals. As the Supreme Court recognized, an injunction was necessary in *Equustek* to address the irreparable harm that flowed from the infringement of the plaintiff's valuable intellectual property – misconduct that would be commercially impossible without Google's facilitation. Although *Equustek* arose out of a dispute over trade secrets, the reasoning of the Court is no less apt in relation to online copyright infringement.

#### **D. International Solutions**

Many of Canada's major trading partners have enacted legislation that expressly permits courts to issue site-blocking injunctions with worldwide effect.

##### **(i) European Union**

In 2001, the EU adopted the InfoSoc Directive, discussed above,<sup>83</sup> to harmonize and adapt the copyright law of member states to technological developments.<sup>84</sup> The InfoSoc Directive acknowledges that, "in many cases [Internet] intermediaries are best placed to bring ... infringing activities to an end."<sup>85</sup> Thus, article 8(3) of the Directive instructs member states to "ensure rightsholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right."<sup>86</sup>

All member states are required to adopt the Directive into domestic law. A number of member states have since implemented article 8(3) into their national laws, including Austria, Greece, Latvia, and Belgium,<sup>87</sup> while the laws of other member states already included such provisions.<sup>88</sup>

##### **(ii) United Kingdom**

Applications for site blocking injunctions are now common in the U.K. and often proceed in writing, without a formal hearing.<sup>89</sup> Article 8(3) of the Directive is embodied in section 97A of the U.K. *Copyright, Designs and Patents Act 1988*,<sup>90</sup> which authorizes courts to grant a site blocking injunction against a service provider that is aware that another person is using the service to infringe copyright.<sup>91</sup>

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<sup>83</sup> *Supra* note 30 and accompanying text.

<sup>84</sup> Access to European Law, "Copyright and Related Rights in the Information Society", online at <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3A126053>>.

<sup>85</sup> InfoSoc Directive, *supra* note 30, Recital 59.

<sup>86</sup> InfoSoc Directive, *supra* note 30, Article 8(3).

<sup>87</sup> Commission of the European Communities, "Commission Staff Working Document: Report to the Council, the European Parliament and the Economic and Social Committee on the application of Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society" (2007) at p. 9, online at <[http://ec.europa.eu/internal\\_market/copyright/docs/copyright-infso/application-report\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/application-report_en.pdf)>.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Twentieth Century Fox Film Corporation v Sky UK Limited* [2014] EWHC 1082 (Cth) per Birss J. at paras. 3-5, citing Arnold. J in *Cartier*, *aff'd* by *Cartier* 2.

<sup>90</sup> *Dramatico Entertainment Ltd. v. British Sky Broadcasting Ltd.*, [2012] 3 C.M.L.R. 14 at para. 37 ("Pirate Bay").

<sup>91</sup> *Copyright, Designs and Patents Act 1988* c. 48 ("CDPA") at s. 97A(1).

The knowledge requirement is not to be “interpreted too restrictively.”<sup>92</sup> A service provider is not required to know the exact person who is using their services to infringe copyright, but instead may only have knowledge that infringement is occurring in general.<sup>93</sup> Knowledge may be inferred where a rightsholder has provided a notice of infringement.<sup>94</sup> Moreover, a rightsholder is not required to name as a party to a section 97A application the person or organization that is responsible for the infringement.<sup>95</sup> This is logical and practical, given that these infringers often take deliberate steps to conceal their identities and locations.

Site blocking in the U.K. has resulted in significant reductions to the activity levels on some of the most popular websites for accessing and distributing infringing content. A study on the efficacy of site blocking injunctions found that, between March 2012 and August 2014, site blocking resulted on average in a 73.2% decrease in activity on targeted websites. The study found as well that the decrease remained consistent over time.<sup>96</sup>

### **(iii) Australia**

The Australian *Copyright Act 1968* was amended in 2015 to introduce section 115A. That section permits the Federal Court of Australia to issue an injunction requiring an ISP or other “carriage service provider” to take reasonable steps to disable access to online locations outside Australia that have the primary purpose of infringing or facilitating the infringement of copyright in Australia or elsewhere.<sup>97</sup> Notably, this is a “no fault” remedy, meaning that the party seeking the injunction is not required to show that the service provider itself committed or encouraged copyright infringement.<sup>98</sup> In addition, the party seeking the injunction is not required to include the operator of the online location as a party to the proceeding unless that person asks to be joined.<sup>99</sup>

These amendments appear to have resulted in a significant reduction in traffic to blocked websites. A preliminary study on the results of site-blocking injunctions since December 2016 showed a 71.7% decrease in the overall usage of the blocked sites from within Australia.<sup>100</sup> These results mirror those in the U.K., as referenced above, and stand as further evidence of the efficacy of site blocking as a potent tool for rightsholders to combat widespread copyright infringement.

### **(iv) Singapore**

In 2014, Singapore amended its *Copyright Act* (Chapter 63) to authorize a court to order an injunction “requiring the network service provider to take reasonable steps to disable” an online location that is being

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<sup>92</sup> *Twentieth Century Fox Film Corp. v. British Telecommunications Plc.*, [2011] R. P. C. 28 at para. H26 (“*Newzbin2*”).

<sup>93</sup> *Newzbin2*, *ibid.* at paras. H27-28.

<sup>94</sup> CDPA, *supra* note 91 at s. 97A.

<sup>95</sup> *Pirate Bay* at paras. 9-12.

<sup>96</sup> INCOPRO, “Site blocking efficacy study, United Kingdom” (13 November 2014) at p. 4, available online: <http://www.incoproip.com/resources-news-events/case-studies-reports/>.

<sup>97</sup> *Roadshow Films Pty Ltd. v. Telstra Corporation Ltd.*, [2016] FCA 1503 (2016) at para 25 (“*Roadshow Films*”), citing *Copyright Act 1968*, No. 63, 1968 as am.

<sup>98</sup> *Roadshow Films* at para. 30.

<sup>99</sup> Australia’s *Copyright Act 1968* at ss 115A(3)(c).

<sup>100</sup> See <<https://securitybrief.com.au/story/creative-content-australia-lauds-court-mandated-blocks-against-pirate-sites/>>.

used to “flagrantly commit or facilitate infringement of copyright.”<sup>101</sup> The legislation prescribes certain factors to be considered by the court in determining whether a website is being used for such purposes.<sup>102</sup> The party seeking a site-blocking injunction is not required to name the operator of the online location as a party to the proceeding; it is required only to give notice of the proceeding to that person. Moreover, the court may dispense with the notice requirement if satisfied that the plaintiff, despite reasonable efforts, has been unable to determine the identity or address of that operator.<sup>103</sup>

## E. Conclusion

The decision of the Supreme Court of Canada in *Equustek* provides welcome confirmation that de-indexing injunctions are available in Canada, in appropriate cases, and that they are often the only practical way to put a stop to online infringement. Nevertheless, it is vital that the *Copyright Act* be amended to make clear that Canadian courts are empowered to require ISPs, hosting services, and search engines to block access to infringing content that is hosted outside Canada by issuing site-blocking and de-indexing injunctions.

Canada can, and should, draw on the experience of its major trading partners, including those discussed above, in crafting a balanced regime with an appropriate standard of proof for rightsholders, reasonable knowledge requirements for infringing services, and appropriate safeguards to insulate intermediaries from liability for blocking access to infringing content. CMPA and CMRRA believe that a clear, predictable, and fair path to site-blocking and de-indexing orders, in appropriate circumstances, is the best way to give Canadian rightsholders the tools they need to fight the ongoing problem of online piracy.

At the same time, Parliament should amend section 27(2.3) of the *Copyright Act* to reduce the burden of proof on rightsholders when attempting to establish secondary liability against an online enabler. Like in other jurisdictions, general knowledge of infringing activity should be sufficient; if a service is provided primarily for the purpose of enabling copyright infringement,<sup>104</sup> it should not be necessary to establish that “an actual infringement of copyright” has occurred as a result of the use of the service.

## V. Copyright Board of Canada: Process and Operational Challenges

***Proposal: Through a combination of legislative and regulatory changes, improve the efficiency of the Copyright Board's processes and the timeliness and predictability of its decisions.***

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<sup>101</sup> *Copyright (Amendment) Act 2014* (No. 22 of 2014), ss. 193DDA-193DDB, online at <http://statutes.agc.gov.sg/aol/search/display/view.w3p;ident=82692306-346f-4693-b293-da1ec27a3c23;page=0;query=DocId%3Ae20124e1-6616-4dc5-865f-c83553293ed3%20Depth%3A0%20Status%3Ainforce;rec=0> (“*Singapore Copyright Amendment*”).

<sup>102</sup> *Singapore Copyright Amendment* at ss. 193DDA(2)(a)-(f).

<sup>103</sup> *Ibid* at s. 193DDB(1)-(4).

<sup>104</sup> This is established in accordance with the factors set out in s. 27(2.4), which mirror similar requirements in the legislation and jurisprudence of other countries; see, for example, the decision of the Supreme Court of the United States in *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

## A. Overview

The Copyright Board of Canada plays an integral role in the Canadian creative industries, particularly the music industry. It is mandated to establish, either mandatorily or at the request of an interested party, the royalties to be paid for the use of copyright-protected works that are administered by a copyright collective society and may also supervise agreements between licensing bodies and users. The Board estimates that \$434 million in royalties are generated each year by the tariffs that it certifies.<sup>105</sup>

However, various challenges regarding the process and operations of the Board have led to dangerous uncertainty in the markets that it regulates. That uncertainty has been detrimental to rightsholders, users, and the public.

CMPA and CMRRA believe that, by taking immediate steps to modify and modernize the Board's processes and operations, the government can help to restore certainty and predictability to the market for copyright-protected works, and thereby to foster innovation, investment and growth in the Canadian music industry. To that end, they applaud the decision of the Minister of Innovation, Science, and Economic Development (ISED) and the Minister of Canadian Heritage to study the operations of the Copyright Board of Canada and intend to participate fully in that process.

CMPA and CMRRA applaud the funds already designated for case management at the Copyright Board under ISED's recently announced Intellectual Property Strategy.<sup>106</sup>

The submission of CMRRA in response to the consultation paper released by the Ministers on August 9, 2017 is attached as Appendix B and is fully endorsed by CMPA. Summarized briefly, CMRRA and CMPA propose regulatory and legislative changes to:

- Require that the Board release decisions and certify tariffs within no more than one year after the end of a timely hearing or before the effective date of a proposed tariff, whichever is later;
- Expedite the period of time from the filing of a proposed tariff to the certification of the tariff, including case management;
- Prescribe a specific economic standard, or a set of economic criteria to be applied by the Board in fixing the royalty rates to be paid by users of copyright-protected works;
- Adopt formal rules of procedure to ensure a fair, consistent, and predictable process for all proceedings before the Board;
- Require that the Board decide matters before it on the basis of the arguments and evidence presented by the parties to a proceeding;
- Require that a certain number of Board members have a minimum level of subject-matter expertise in either copyright law or economics;
- Permit all collective societies to enter into licensing agreements of overriding effect with users, independently of the Board; and

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<sup>105</sup> <http://www.cb-cda.gc.ca/about-a-propos/speeches-discours/PRE-2016-11-03-EN.pdf> para. 10; Fox on Canadian Law of Copyright and Industrial Designs 26:1; [http://publications.gc.ca/collections/collection\\_2015/pc-ch/CH44-155-2015-eng.pdf](http://publications.gc.ca/collections/collection_2015/pc-ch/CH44-155-2015-eng.pdf)

<sup>106</sup> <[https://www.ic.gc.ca/eic/site/108.nsf/eng/home?open&WT.mc\\_id=WorldIPDay\\_canada.ca-Business\\_carousel\\_fr](https://www.ic.gc.ca/eic/site/108.nsf/eng/home?open&WT.mc_id=WorldIPDay_canada.ca-Business_carousel_fr)>

- Extend to all collective societies the benefit of subsection 38.1(4) of the *Copyright Act*, which provides for statutory damages of three to 10 times the licence fees owed under a certified tariff when a user fails to pay those fees as required.
- Permit a collective society to withdraw a proposed tariff, provided that it does so prior to the effective date of the tariff.

CMPA and CMRRA also urge the government to act quickly and decisively to solidify the resources of the Board by appointing five full-time members, as permitted by the *Copyright Act*, rather than the current complement of one full-time member, who is also the chief executive officer of the Board, and two part-time members, one of whom is the chairman.

## Appendix A

## Key Features of Foreign Extended Collective Licensing Regimes

	Specific Use	“Opt-out” Option	Fairness to Non-Members	Monies Reverting to the Crown	Requirements for CMO ECL Administration
<b>Nordic Countries</b>	Varies from country to country	Most Nordic countries, not all.	Yes	No	Yes
<b>United Kingdom</b>	No	Yes	Yes	No	Yes
<b>Czech Republic</b>	Yes - Libraries	N/A	N/A	N/A	N/A
<b>European Union</b>	Yes - Cable Retransmissions of Broadcasts	Yes	N/A	N/A	N/A
<b>China</b>	Specific mention of karaoke systems	Yes	Yes	CMOs in China are state-controlled entities.	N/A



## Appendix B

### Submission of CMRRA to the Department of Innovation, Science and Economic Development and the Department of Canadian Heritage, dated September 29, 2017

September 29, 2017

VIA EMAIL: [cbconsultations@canada.ca](mailto:cbconsultations@canada.ca)

Department of Innovation, Science and Economic Development  
Department of Canadian Heritage  
Copyright Board of Canada

To Whom It May Concern:

#### Re: Copyright Board Consultations

Canadian Musical Reproduction Rights Agency Ltd. (CMRRA) applauds the decision of the Minister of Canadian Heritage and the Minister of Innovation, Science, and Economic Development to assess the operations of the Copyright Board of Canada via consultation with stakeholders. The purpose of this submission is to offer an initial outline of CMRRA's proposals to improve the efficiency of the Board's processes and the timeliness and predictability of its decisions.

The Board is supposed to play an integral role in the Canadian creative industries, particularly the music industry. However, various challenges regarding the process and operations of the Board have led to dangerous uncertainty in the markets that it regulates. That uncertainty has been detrimental to rightsholders, users, and the public.

CMRRA believes that the modifications to the Board's processes and operations described below may help to restore certainty and predictability to the market for copyright-protected works, and thereby to foster innovation, investment and growth in the Canadian music industry.

#### 1) *Issues with Board Timelines for Proceedings and Decisions*

##### (i) *The Challenge*

While the stakeholders whose businesses are affected by Board decisions may not agree on much, they do agree on this: the time it takes the Board to examine a proposed tariff and render a decision is an extremely serious problem.<sup>107</sup>

By way of example, the increasing lengths of time required for the Board to set tariffs for digital uses of music shows that the Board is ill-equipped to handle the needs of an increasingly sophisticated and fast-paced market. CMRRA files tariffs before the Board to set the royalties payable for certain reproductions of musical works, including by online music services and commercial radio broadcasters. The Board certified

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<sup>107</sup> Senate Standing Committee on Banking, Trade and Commerce, *Copyright Board: A Rationale for Urgent Review* (Ottawa, 2016) [Senate Report].

CSI's<sup>108</sup> first *Commercial Radio Tariff* in March 2003, some 11 months after a hearing that began in April 2002, at a time when radio stations were beginning to copy musical works onto servers rather than broadcasting music from the compact discs on which the music was recorded. In March 2007, the Board certified CSI's first *Online Music Services Tariff* following a hearing that began only seven months, earlier in September 2006, at a time when the market was dominated by the iTunes store.

Since those initial proceedings, however, the Board's ability to render timely decisions following each hearing has diminished severely. The *CSI Online Music Services Tariff* for the years 2011-2013 was initially filed in March 2010, the hearing before the Board concluded in November 2013, and oral arguments were made to the Board in March 2014. However, the Board delivered its decision on this tariff only very recently, on August 25, 2017, more than 45 months since the beginning of the hearing. Given that this was the first proposed tariff to require webcasting services to pay royalties for the right to reproduce musical works, the result has been great uncertainty in the entire streaming industry in Canada for a retroactive period going back to 2011.

	Tariff period	Start of public tariff hearing	Date of tariff decision	Number of months to render decision following start of public hearing
<b>CSI Commercial Radio Tariffs</b>	2001-2004	April 2002	March 2003	11
	2005-2006	n/a	March 2006	n/a
	2007	n/a	February 2007	n/a
	2008-2012	December 2008	July 2010	18
	2013	October 2013	April 2016	30
	2014-2017	TBD	TBD	TBD
<b>CSI Online Music Services Tariffs</b>	2005-2007	September 2006	March 2007	6
	2008-2010	June 2010	October 2012	28
	2011-2013	November 2013	August 2017	45
	2014-2017	TBD	TBD	TBD

The time it takes for the Board to render decisions may have been exacerbated to some degree by changes in Canada's legal framework for copyright in the past decade. More often than not, Board

<sup>108</sup> A joint venture between CMRRA and La société du droit de reproduction des auteurs, compositeurs et éditeurs au Canada (SODRAC) to jointly license certain types of music users.

proceedings raise legal issues of first impression, including most recently the initial interpretation of new rights and exceptions introduced in the November 2012 amendments to the Copyright Act. In dealing with these novel issues, the Board is also grappling with new principles of interpretation established by the Supreme Court of Canada in a series of seminal copyright decisions rendered since 2012. This has substantially increased the Board's workload and underlines the need for specialized expertise in determining the value of copyrighted works as used by a growing number of different stakeholders in a rapidly changing market.

Meanwhile, the digital marketplace has remained anything but stagnant. Indeed, the Board's apparent inability to render decisions has coincided with a period of significant expansion and change in the music industry. A host of new online business models have emerged since the initial CSI Online Music Services Tariff was certified. On-demand music subscription services such as Spotify, Google Play, and Apple Music have become significant players within the music industry, and have gradually replaced downloads as the predominant model for consumption. Each of these services only emerged in Canada since the close of the last tariff proceeding in the spring of 2014.

While awaiting the Board's decision, CMRRA has had the advantage of being able to privately negotiate licensing agreements with services. As the administrator of an exclusive right, CMRRA is able to enter into private agreements and is not required to appear before the Board. Historically, it has chosen to file tariffs because it has been advantageous for the Canadian marketplace as a whole. Sometimes users deny that they are using the reproduction right – or even that the right exists at all. Other times, users seek unacceptably low rates or negotiate in bad faith. In these scenarios, the Board has been a valuable resource by setting tariffs of first impression that outline the rates payable for certain types of activities in Canada. Without these types of decisions, rightsholders would be forced to turn to other means of enforcement such as lengthy court proceedings, which would antagonize licensees – particularly new and innovative ones – and send the wrong message about doing business in Canada.

The ability to negotiate directly has allowed CMRRA to work with music users to find solutions that benefit all stakeholders in a balanced way, using the guidance of existing rate structures set by the Board. Without the flexibility to negotiate privately (and it is important to note that not all collectives have this ability), the Board's pace could destroy the Canadian marketplace. As it is, by failing to provide domestic guidance on the value of music in a timely manner, the Board threatens to cause Canada's music industry to become either stunted or driven by decisions and developments in other territories.

In an optimal setting, CMRRA would be able to privately negotiate deals with services using established models and rate categories, and the Board would primarily assess the value of new types of uses. Instead, CSI has been put at a severe disadvantage while awaiting the recently released *Online Music Services Tariff* for 2011-2013. Without a tariff of first impression to set baseline rates for webcasting services in Canada, CSI has faced difficulties in negotiating direct deals with those services, some of whom have attempted to use the absence of a certified tariff to push for royalty rates that do not reflect the true value of music. Other services have simply chosen not to enter the territory, which is not beneficial to anyone. And all types of services have been hesitant to license without any guidance on the status or value of the making-available right, and what impact it might have on existing rate structures.<sup>109</sup>

Now that the Board's online music decisions have finally been released, the resulting tariffs are woefully inadequate and absurd. The Board made unpredictable and unwarranted changes – which were not

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<sup>109</sup> The making-available right was the subject of a parallel proceeding that was conducted by the Board on a paper record in mid-2013 but did not result in a decision until August 25, 2017, the same day the Online Music Services decision was released.

proposed by any party – to a market that has developed by necessity in the absence of the Board’s guidance, relying on established royalty rates. The certified tariff broke with past precedents by drastically and retroactively cutting the royalties payable by the dominant online music services operating in 2017. The Board’s decision is divorced from reality, which is unsurprising when it is considered that the evidence was heard almost four years before the decision was rendered. The result will be further delays and uncertainty in the marketplace as the parties seek badly-needed clarity from the Federal Court of Appeal.

In summary, the market uncertainty created by the Board’s inefficient process and unpredictable decisions stymies the Canadian music industry in a number of ways. To list just a few:

- Rightsholders may be without revenue for lengthy periods of time while tariffs are pending.
- Some rightsholders are able to enter into licensing agreements with music services while a tariff is pending, but the lack of a certified tariff can put rightsholders at a disadvantage in negotiating the appropriate royalty rate.
- Market uncertainty in the face of pending tariffs can prevent some new music services from operating in Canada at all. Such services are fearful of entering the market without certainty regarding the costs associated with doing so, especially in the case of rights that cannot be privately licensed and depend on tariffs set by the Board. Rightsholders, services, and the public all lose out in these cases.
- When tariffs are certified after their effective dates, or even after their expiration dates, those tariffs have retroactive effect and may also apply prospectively on an interim basis until new tariffs are set. Retroactive and interim tariffs leave rightsholders and users uncertain of their legal rights and frustrate their ability to forecast their financial rights and obligations. This creates unnecessary legal and administrative costs for all parties, squandering the reductions in transaction costs that normally characterize collective administration.

**(ii) CMRRA Proposal**

CMRRA proposes that either the *Copyright Act* be amended or regulations be adopted to require that the Board release decisions and certify a tariff within no more than one year after the end of a timely hearing or before the effective date of the proposed tariff, whichever is later. All of this should additionally be subject to expedient pre-hearing case management, as further discussed below.

To impose mandatory decision-making timelines would be consistent with international practices. For example, in the United States, the Copyright Royalty Board is mandated to render decisions within 11 months of a mandatory settlement conference between the participants and in no event later than 15 days before the expiration of the then-current royalty rates and terms.<sup>110</sup>

CMRRA also supports modifications to the Board’s procedures to expedite the period of time from the filing of a proposed tariff to the certification of the tariff, including mandatory mediation and optional case management. Case management can be a valuable tool for efficiency that helps focus and narrow the issues, and push the parties to accelerate the overall tariff process. It can help to ensure a proceeding is not delayed by the obfuscation of a party, and ensure that the matter is not unnecessarily weighed down by issues that are not material to the setting of the tariff. Overall, case management is a method of achieving efficiency by pushing the parties to work with the best interests of the administration of justice, typically under the direction of a judge or prothonotary. While the specific nature of those procedures may require

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<sup>110</sup> US, 17 USC § 803. Available online: <https://www.copyright.gov/title17/92chap8.html>

further consultation, models for mandatory mediation and for optional case management may be found in the *Ontario Rules of Civil Procedure*<sup>111</sup> and the *Federal Court Rules*, respectively.<sup>112</sup> CMRRA notes that the Governor in Council is authorized to give policy directions to the Board,<sup>113</sup> which could incorporate the proposals set out above.

The Copyright Board could fulfill an integral role in establishing the inherent value of music, and it is a vital institution to the survival of the music publishing industry in Canada. CMRRA's music publisher clients would like to see an independent and properly resourced Copyright Board that can nimbly deal with the constant changes in our technological landscape. This currently is not our reality. The delays in rate setting have introduced a great deal of uncertainty for domestic and foreign businesses in recent years, and we believe that uncertainty has influenced their decision to refrain from offering their services in Canada. When rates are finally set after long delay it leads to disruption in the market as rightsholders and users scramble to reevaluate their operations and expectations in light of unexpected results. The situation is detrimental to music rightsholders and users alike.

## **2) The Board Lacks Clear Guidance for Making Decisions**

### **(i) The Challenge**

The Board is an economic regulatory body with a statutory mandate to set tariffs for Canada's cultural sector. However, despite that important role for guiding and fostering domestic marketplaces, the Board is mandated only to fix tariffs that are "fair and equitable,"<sup>114</sup> and even that standard only applies explicitly to the private copying regime,<sup>115</sup> not to the general or performing rights regimes.<sup>116</sup> This standard does not appear to have provided enough substantive guidance for the Board to fulfil its role.

The lack of a specific economic standard, or specific criteria to be considered, contributes to a lack of predictability in Board decisions. That unpredictability often increases the costs required for parties to participate in a Board proceeding, as the parties' expert economists are effectively forced to propose and respond to various economic models for determining the inherent value of music in the absence of clear guidelines or economic criteria. In effect, the parties are left guessing as to what approach the Board will take, and how that approach will be justified, from one case to the next.

It is also not uncommon for the Board to reject the economic models proposed by the parties' experts in favour of its own precedents or its own staff's economic analysis. In such circumstances, the parties may not have had the opportunity to consider or comment upon the economic model ultimately accepted by the Board. When this occurs, parties are often left with the impression that the significant cost and effort that has gone into the development of their economic evidence has gone entirely to waste. This is

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<sup>111</sup> *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 24.1.01. Available online: <<http://canlii.ca/t/t8m>>

<sup>112</sup> *Federal Courts Rules*, SOR/98-106, Rules 383 – 385. Available online: <<http://canlii.ca/t/80ps>>

<sup>113</sup> *Copyright Act*, s.66.91.

<sup>114</sup> *Copyright Act*, s.66.91.

<sup>115</sup> *Copyright Act*, s. 83(9).

<sup>116</sup> Although section 66.91 of the Act allows the Governor in Council to give directions to the Board concerning "general criteria to be applied by the Board or to which the Board must have regard in establishing fair and equitable royalties to be paid pursuant to this Act," that standard is not actually prescribed in the Act as applicable to the general or performing rights regime.

particularly true for the owners and administrators of exclusive rights that are not required to go before the Board to seek tariffs, and may instead be privately negotiated. For such rightsholders – including collectives like CMRRA – the uncertainty and costs involved in Board hearings make the entire process an unappetizing risk.

In addition to these substantive issues, the Board also lacks a sufficient procedural framework for how matters before it are to transpire before, during, and after hearings. At present there is no mandatory procedure for hearings before the Board, nor are there any statutory or regulated rules of procedure. Procedure before the Board is dictated only by a Model Directive on Procedure that the Board is free to modify, or even to dispense with entirely, in its sole discretion. This flexibility has worked well in some ways, but it also seems to have contributed to the extraordinary delays that are now standard fare in Board proceedings.

**(ii) CMRRA's Proposal**

CMRRA recommends that the *Copyright Act* or its regulations prescribe a specific economic standard, or a set of economic criteria to be applied by the Board in fixing the royalty rates to be paid by users of copyright-protected works. CMRRA notes that specific economic standards or criteria are utilized in other jurisdictions. For example, the U.S. Copyright Royalty Board is required to establish royalty rates and terms for certain uses of certain subject matter based upon a “willing buyer/willing seller” standard.<sup>117</sup> CMRRA does not support a particular economic standard at this time and acknowledges that further consultations would likely be necessary to determine what would be appropriate for Canada.

CMRRA recommends that rules of procedure be adopted, just as they have for other comparable administrative bodies in Canada, to ensure a fair, consistent, and predictable process for all proceedings before the Board. Rules of procedure would also help ensure that proceedings transpire within a reasonable time and in accordance with a set timetable that is likely to promote timely and efficient decisions. We can learn from other jurisdictions to some extent, but we can and should also learn from the experiences of other Canadian tribunals, all the while focusing on any unique aspects of proceedings before the Board in particular.

Finally, CMRRA recommends that the Board be required to decide matters put before it on the basis of the arguments and economic evidence presented at hearing by the parties to the proceeding. Legal experts have noted that this is the case in other jurisdictions, such as in the United States, where the Copyright Royalty Board decides on rate-setting matters based entirely on the evidence and arguments presented at hearings.<sup>118</sup> It is unacceptable that parties before the Board must undertake such lengthy and costly proceedings without any ability to predict how the decisions might turn out, at times years after the

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<sup>117</sup> US, 17 USC § 114(f)(2)(B). Available online: < <https://www.copyright.gov/title17/92chap1.html#114>>. Generally speaking, the willing buyer/willing seller standard applies to the fixing of compulsory licences for the performance of sound recordings by certain types of online music services, namely ad-supported, non-interactive webcasters. A different standard, which is based upon criteria enumerated by statute, applies to other types of online music services. See US, 17 USC § 801(b), available online: <<https://www.copyright.gov/title17/92chap8.html#801>>

<sup>118</sup> See Strickler, David R., “Royalty Rate Setting for Sound Recordings by the United States Copyright Royalty Board: The Judicial Need for Independent Scholarly Economic Analysis” (December 31, 2015), *Review of Economic Research on Copyright Issues*, 2015, 12(1/2), Abstract p.1., available online: <https://ssrn.com/abstract=2714784>, in which Judge Strickler of the US Copyright Royalty Board notes that “Judges, who set copyright royalty rates through litigation, like all trial Judges, are constrained by the evidence and testimony. Thus, we can only determine rates that are supported by the record.” See also 37 CFR §351.10 on the submission and admissibility of evidence at Copyright Royalty Board proceedings.

fact. In the most recent *Online Music Services Tariff*, the Board drastically reduced uncontested royalty rates for streaming with over a half-decade of retroactive effective.

### **3) The Board Lacks the Proper Resources and Subject-Matter Expertise**

#### **(i) The Challenge**

CMRRA is of the view that one of the main factors contributing to the delays in the Board's decision-making is that the resources available to the Board may not be commensurate with its mandate.

The Board should play an integral role in Canada's copyright regime. As detailed above, Board proceedings very frequently raise legal issues of first impression, including the initial interpretation of new rights and exceptions. The Board has also been called upon to apply new principles of interpretation established by the Supreme Court of Canada in a series of seminal copyright decisions rendered since 2012. The Board's primary role in an increasingly complex copyright regime has substantially increased its workload, straining its resources and presumably contributing to delays in its decision-making.

The Board's role also underlines the need for specialized expertise in the areas of copyright law and economics. As the Vice-Chair of the Board has recently explained, "decisions must be based on solid legal and economic principles [and] reflect a solid understanding of constantly evolving technologies."<sup>119</sup> It cannot be overstated how important it is for the Board to quickly and competently assess and respond to rapidly changing technologies, especially for the music industry when it has become so easy to distribute songs online. The negative consequences of the Board being ill-equipped to do so are evident in the submissions of CSI and SOCAN in relation to the judicial review of to the recent *Online Music Services Tariff*, as well as other matters that have been before the Board and reviewing courts. In order to fulfil its mandate, and provide sound and timely decisions, the Board must have access to the right mix of resources, including a minimum level of subject matter expertise in the areas of copyright law and economics amongst Board appointees.

#### **(ii) CMRRA's Proposal**

CMRRA recommends, generally, that the type of resources allocated to the Board be commensurate with its important mandate.

One concrete way to maximize the Board's limited resources, and to improve the timeliness of the Board's decisions, would be to require that a certain number of Board members have a minimum level of subject-matter expertise in either copyright law or economics. For example, in the United States, the U.S. Copyright Act prescribes the composition of the three-member Copyright Royalty Board. The Chief Copyright Royalty Judge must have at least five years of adjudicative experience, which mirrors the requirement in Canada that the chair of the Copyright Board be either a judge or a retired judge. Of the other two Copyright Royalty Judges in the U.S., one must have significant knowledge of copyright law, and the other must have significant knowledge of economics.<sup>120</sup> Introducing a similar requirement in Canada might serve to improve the quality and consistency of the Board's decisions, although it is again important to determine the best

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<sup>119</sup> Copyright Board of Canada, *Presentation delivered by Mr. Claude Majeau, Vice Chairman and Chief Executive Officer*, (Presentation to the Standing Senate Committee on Banking, Trade and Commerce) (Ottawa, November 3, 2016). Available online: <http://www.cb-cda.gc.ca/about-apropos/speeches-discours/PRE-2016-11-03-EN.pdf>

approach for Canada and the Board in particular. Although examples from other jurisdictions may provide guidance, Canada should also look to domestic models with comparable administrative bodies.

The important mandate of the Board might also warrant a greater expertise, and requires full-time, senior legal and specialized economic staff with proper technological expertise. Currently, the Board has only two economists and four lawyers on staff,<sup>121</sup> and there has not been a General Counsel at the Board since at least August 2015.<sup>122</sup> As an independent tribunal, the Board is unable to obtain support from lawyers in government departments, such as the Department of Justice, when additional support is needed.<sup>123</sup> The Board has noted that copyright tribunals in other jurisdictions receive support from government departments in their jurisdictions, such as the Library of Congress in the U.S., the Intellectual Property Office in the U.K., and the Federal Court in Australia.<sup>124</sup>

#### **4) All Collective Societies Should Be Able to Enter into Licensing Agreements**

Although it does not affect CMRRA directly, it nevertheless supports the recommendation that all collective societies should be permitted to enter into licensing agreements of overriding effect with users independently of the Board.

CMRRA is already able to enter into private agreements, as a collective that administers an exclusive right – the reproduction right – that can be negotiated in the absence of a tariff set by the Board. The fact that CMRRA has been able to do so has allowed it to continue to operate in the absence of guidance from the Board during the most significant years of growth in Canada’s online music marketplace, as private deals were struck to ensure that music users could operate with business certainty and rightsholders would be compensated.

However, when not all collectives are able to enter into private agreements, those collectives that do require tariffs from the Board force the entire market to wait before the affected services can operate with certainty. Although a service may be able to come to private terms with certain rightsholders – such as with CMRRA for the reproduction right – they may be forced to wait before entering into agreements with other collectives that require tariffs from the Board. In the absence of such licensing for other rights, those services may choose not to enter the Canadian market since they are effectively unable to know the full costs of their business until years after the fact. The licensing of other rights also affects collectives like CMRRA when there is uncertainty as to how those other rights might affect the reproduction right, as was the case for many years as rightsholders and users awaited the Board’s decision on – and valuation of – the making available right.<sup>125</sup> CMRRA believes that the inability of some collectives to enter into private

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<sup>121</sup> Minutes of the Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, October 17, 2016, per Member Majeau.

<sup>122</sup> Chantal Carbonneau held the position of Acting General Counsel from November 2014 through August 2015, and the last permanent General Counsel at the Board, Mario Bouchard, retired from the position in August 2013.

<sup>123</sup> Minutes of the Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, October 17, 2016, per Member Majeau.

<sup>124</sup> Minutes of the Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, October 17, 2016, per Member Majeau.

<sup>125</sup> The recent decisions of the Board have done little to alleviate that uncertainty, since the Board recognized in its decision on the scope of making available (available online <http://www.cb-cda.gc.ca/decisions/2017/DEC-2017-SCOPE-25082017.pdf>) that the right to communicate to the public applies to both downloads and streams, but declined in the Online Music Services tariff decision to certify royalties for the use



agreements, combined with the delays in the Board's decisions, have resulted in certain services choosing not to enter the territory and have stunted the growth of Canada's music industry.

In light of all of the foregoing, CMRRA believes it would be significantly beneficial to rightsholders and users alike for all collectives to be granted the ability to enter into private licensing agreements independently of the Board.

#### **5) All Collective Societies Should Have the Same Enforcement Remedies Available**

A right is only as valuable as the rightsholder's ability to enforce it, but unfortunately the remedies afforded to different collectives are not consistent under the *Copyright Act*. CMRRA proposes that all copyright collectives should have the same ability to enforce their tariffs, and more specifically that all collectives should have the right to claim statutory damages under s. 38.1(4) of the *Copyright Act*.

Presently, those collectives captured by the mandatory regime<sup>126</sup> are entitled to enforce their right to royalties by claiming statutory damages under section 38.1(4), which provides for damages of three to 10 times the licence fees owed under the tariff. Similarly, the private copying collecting body can resort to s.88(2) for non-payment of levies due,<sup>127</sup> and a court may order the payment of up to five times the amount of the levies owed. However, for collectives operating under the general regime,<sup>128</sup> the only remedy available in cases of unpaid royalties is the royalties themselves.

In applying the statutory damages in s.38.1(4), the Federal Court has noted that "[d]amages available to copyright holders under the *Copyright Act* serve an important function and should not be treated as just another cost of doing business."<sup>129</sup> The different remedies outlined above impart a different "value" on the rights of different collectives and also different deterrents to unauthorized use. For a user of a right administered by a collective operating under the general regime, the potential penalty for non-compliance may be no greater than the royalties that would have been owed under the tariff in any event, and only where the collective pursues enforcement of the tariff. There is a clear need to change the remedies so that users have a real deterrent to unauthorized use, and to ensure that different rights under the Act are treated evenhandedly.

Extending the deterrent in s.38.1(4) to all collectives is sound public policy. Among other things, it would establish that there are consequences to flouting the law that protects the rights and livelihood of all artists and their creations. All copyright owners should have equal access to the statutory damages remedies available to performing right collectives in s.38.1(4) of the Act because "...rights are only formalities if they cannot be exercised."<sup>130</sup> This deterrent measure should be designed to instill in all users a sense of respect for the advancement of creativity, the legislative process, and the collective administration of rights. It would also increase the efficiency of collective management, the important role of the Board, and the legitimacy of certified tariffs.

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<sup>126</sup> Pursuant to ss. 67 to 68.2 of the Act

<sup>127</sup> Pursuant to the private copying section of the Act, Part VIII,

<sup>128</sup> Under s. 70.1 of the Act

<sup>129</sup> *Society of Composer, Authors and Music Publishers of Canada v. IIC Enterprises Ltd. (Cheetah's Nightclub)*, 2011 FC 1088 at para 21.

<sup>130</sup> Axworthy, Thomas, "Justice delayed is justice denied," *The Toronto Star*, 17 April 2007, available online: [https://www.thestar.com/opinion/2007/04/17/justice\\_delayed\\_is\\_justice\\_denied.html](https://www.thestar.com/opinion/2007/04/17/justice_delayed_is_justice_denied.html)