

# COPYRIGHT BOARD MODERNIZES ROYALTY TARIFF-SETTING PROCEDURES FOR USERS

Posted on May 24, 2023

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In May 2023, the Copyright Board of Canada (the “**Board**”) announced its completion of Phase 1 of its Modernization Initiative.<sup>[1]</sup> Particularly, Phase 1 had included the Board’s implementation of the new Rules of Practice and Procedure (the “**Rules**”) aimed at creating a more efficient royalty tariff-setting procedure for collective societies<sup>[2]</sup> and copyright users, which came into effect on March 1, 2023.<sup>[3]</sup> The Rules reflect the Board’s commitment towards improving the expeditiousness of the tariff-setting process, increasing transparency on Board engagement, and enhancing access to justice for users, all of which constitute key parts of the Board’s Modernization Initiative.

The new Rules come as a welcomed change designed to improve the current backlog of tariff decisions before the Board. The promised efficiency in the Rules also benefit more complex proceedings that can include discovery of the issues through a lengthy and convoluted interrogatory process.<sup>[4]</sup> The new Rules facilitate the interrogatory discovery process in several ways, such as through requiring case management, setting the parameters for interrogatories, and requiring a concise statement of issues.<sup>[5]</sup> Altogether, signs are pointing in the direction of the Board catching up to speed in increasingly certifying tariffs before the tariff period at issue begins or at least before the tariff period concludes.<sup>[6]</sup>

## The Board’s Mandate in Tariff-Setting Proceedings

The Board is an independent administrative tribunal and economic regulator within Canada’s copyright market. The Board’s mandate balances promoting fair remuneration for copyright holders with enabling effective access to content for copyright users.

In order to implement this mandate, the Board performs the following key duties:

- a. approving tariffs for content whose rights are managed by collective societies;
- b. arbitrating royalty rates between collective societies and users; and
- c. granting licences for the use of content when the copyright owners cannot be located.<sup>[7]</sup>

In terms of the mechanics, collective societies file their tariff proposals with the Board for a minimum period of

three years and then the Board assesses these proposals for potential tariff certification. The Board regulates pricing and sets the conditions for use of music performance and reproduction rights.

Participants in the Board's proceedings include major online music services, online audiovisual services, television and broadcasting networks, social media platforms, satellite radio, educational institutions and gyms.

### **The Board's Modernization Initiative Steers Regulatory Changes**

The Minister of Innovation, Science and Industry announced in its 2023-2024 Departmental Plan the Board's continued advancement of its Modernization Initiative.<sup>[8]</sup> The Modernization Initiative has three overarching aims that inform the Copyright Board's new Rules, which are being implemented through two different phases:

- a. reducing the backlog of proposed tariffs that requires substantial retroactive payments from users including through favouring written hearings and submissions over oral hearings, subject to exceptional circumstances;
- b. engaging with stakeholders on ways to more effectively deliver the Board's mandate including through launching a public consultation on an arbitration regime that offers a more targeted option for collective societies and user groups who want access to the Board's expertise to facilitate their negotiations and settle complex copyright questions; and
- c. implementing the Board's regulatory framework and related tools including a user guide and a new filing portal with online forms.<sup>[9]</sup>

### **Enacting Regulatory Requirements to Increase Accessibility and Efficiency of Procedures for Users**

The Rules require collective societies and copyright users' adherence to certain tariff-setting practices and procedures concerning the following key areas:

- a. Filing of Proposed Tariffs and Objections

The Board seeks to streamline and improve early information exchange between prospective parties and the Board to better understand the likely scope and complexity of proceedings.

Collective societies are required to submit a detailed Notice of Grounds seven days after filing a proposed tariff, which describes the uses covered under the proposed tariff and explains the basis for the proposed royalty rate.<sup>[10]</sup> This provides potential users of the proposed tariff with baseline information upon which to inform their intervention or objection prior to the objection period.

In response, users of a proposed tariff or their representative must file an Objection to a Proposed Tariff within 30 days after the Board has published the proposed tariff.<sup>[11]</sup> Next, users must file the Notice of Grounds for

Objection that sets out the grounds for why the Board should not approve the proposed tariff and the grounds for objection to the proposed tariff.<sup>[12]</sup>

Collective societies that intend to file a reply to an objection must do so within 14 days after which the day on which it receives the Notice of Grounds for Objection.<sup>[13]</sup>

b. Standardizing the Conduct of Written and Oral Hearings

i. Filing of Statement of Issues and Integrating Case Management Practices

Copyright proceedings involve numerous parties offering diverse service offerings with varying usages throughout different periods. This means that parties' interests in proceedings can align, conflict or otherwise differ annually within a single tariff period proceeding.

Under the Rules, parties (other than interveners) are encouraged to file a new Joint Statement of Issues on specific issues for the Board's consideration during a proceeding where parties can reach agreement in advance.<sup>[14]</sup> The Joint Statement of Issues must be filed within 90 days after the day on which the proceeding is commenced or as otherwise prescribed by the Board or case manager.<sup>[15]</sup>

However, where the parties cannot agree on the issues, then the parties are required to file individual Statements of Issues within the same period.<sup>[16]</sup>

Additionally, the Rules allow the Chair of the Board to appoint a formal case manager in proceedings where oral hearings are required. The case manager is authorized to issue orders, convene case management conferences (e.g., on issues of setting parameters surrounding expert testimony) and resolve issues of procedure.<sup>[17]</sup>

ii. Simplifying Discovery through the Interrogatory Process

The interrogatory process can oftentimes lead to lengthy and complex exchanges between parties and the Board. This can create a disproportionate burden on certain parties to produce extensive information within short timeframes and therefore, may deter certain users from participating in proceedings. To address this challenge, under the Rules the Board can require a Joint Statement of Issues and can assign a case manager to set the parameters of interrogatories, including their number, type, scope and form, as well as their time limits for submission.<sup>[18]</sup>

c. Designating Confidential Evidence in Proceedings

Parties typically file confidential sales, usage and licensing information within the Board's tariff-setting process, which is highly sensitive to their commercial operations. The Board authorizes parties to file a request for a

confidentiality order and once granted, parties have discretion to designate their information filed with the Board in the proceeding as confidential or highly confidential.<sup>[19]</sup>

However, the Board must balance protecting parties' confidential information with publicly disclosing information on the public record. Accordingly, the Rules specify that by default any document filed with the Board within a proceeding is placed on the public record, unless the document has been designated as confidential or highly confidential.<sup>[20]</sup>

#### d. Intervening in Proceedings

In addition to the roles of collective societies and objectors, the Board will also consider requests to participate in a proceeding as an intervener.<sup>[21]</sup> An intervener is not required to participate in the thorough interrogatory process of information gathering, however the Board usually grants an intervener other limited forms of participatory rights within a proceeding.

The Board will evaluate such requests based on whether the prospective intervener has sufficient interest in the proceeding, and whether they will present information or submissions that are useful and different from the other parties.<sup>[22]</sup> Further, the Board will consider whether the intervention would prejudice any party to the proceeding or interfere with its fair and expeditious conduct.<sup>[23]</sup>

[1] Copyright Board of Canada, [Modernizing the Copyright Board](#): Status Update (May 2023).

[2] A collective society administers the rights of certain copyright owners. For example, the Society of Composers, Authors and Music Publishers of Canada (SOCAN) is a collective society that administers performing rights in musical works on behalf of Canadian composers, authors and publishers, as well as affiliated societies representing foreign composers, authors and publishers.

[3] Copyright Board Rules of Practice and Procedure, SOR/2023-24 [the "Rules"].

[4] Copyright Board of Canada "[Rules of Practice and Procedure – Part 4: Conduct of Proceedings](#)" (last accessed May 9, 2023).

[5] Copyright Board of Canada "[Rules of Practice and Procedure – Part 4: Conduct of Proceedings](#)" (last accessed May 9, 2023).

[6] For example, the following three contested tariffs were certified prospectively in part by the Board in 2022: [SOCAN Tariff 3.A – Cabarets, Cafes, Clubs, Cocktail Bars, Dining Rooms, Lounges, Restaurants, Roadhouses, Taverns, and Similar Establishments - Live Music \(2018-2024\)](#); [SOCAN Tariff 3.B – Cabarets, Cafes, Clubs, Cocktail Bars, Dining Rooms, Lounges, Restaurants, Roadhouses, Taverns and Similar Establishments - Recorded Music Accompanying Live Entertainment \(2018-2025\)](#); and [SOCAN Tariff 5.A – Exhibitions and Fairs \(2018-2024\)](#).

[7] Copyright Board Canada, "[Mandate, Jurisdiction & Role](#)", (accessed March 31, 2023).

[8] Copyright Board Canada, "[2023-2024 – Departmental Plan](#)", (accessed March 31, 2023).

[9] Copyright Board Canada, "[2023-2024 – Departmental Plan](#)", (accessed March 31, 2023).

[10] Rules at sections 15-16. The Board's [Practice Notice on Filing of Grounds for Proposed Tariff](#) was recently amended on March 1, 2023.

[11] Copyright Act, RSC, 1985, c. C-42 at subsection 68.3(2).

[12] Rules at sections 18-19. Also, the Board's [Practice Notice on the Filing of Grounds for Objection](#) was recently amended on March 1, 2023.

[13] Rules at section 21.

[14] Rules at subsection 24(1).

[15] Rules at subsection 24(2).

[16] Rules at section 26.

[17] Rules at sections 28-31.

[18] Rules at section 34.

[19] Rules at subsections 46(1) and 46(4).

[20] Rules at subsection 46(6).

[21] Rules at subsection 52(1).

[22] Rules at subsections 52(5)(a) and (b).

[23] Rules at subsections 52(5)(c) and (d).

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### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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