

**Canadian Radio-television and Telecommunications Commission
SUBMISSION TO PUBLIC CONSULTATIONS
ON COPYRIGHT REFORM**

SEPTEMBER 11, 2009

INTRODUCTION

The Canadian Radio-television and Telecommunications Commission (CRTC) is pleased to make a submission to the public consultations on copyright reform. Given its particular role within the communications sector, the CRTC is providing proposals for copyright reform that will help position Canada as a leader in the digital economy.

The CRTC is an independent public authority that regulates and supervises the Canadian broadcasting and telecommunications systems. It is mandated pursuant to the objectives set out in section 3 of the *Broadcasting Act* and section 7 of the *Telecommunications Act* to ensure that both the broadcasting and telecommunication sectors contribute to economic, cultural and social prosperity in Canada. The CRTC uses the policy objectives set out in the *Broadcasting Act* and the *Telecommunications Act* to guide its decision-making. These objectives include Canadian ownership and control, reliable and affordable services, and programming that reflects our diversity, bilingual character and draws on Canadian talent.

Telecommunications and broadcasting take place in an increasingly digital context, creating new challenges and opportunities for an increasingly converged communications sector. The CRTC has called for a comprehensive national strategy that would allow Canada to maintain a competitive advantage and secure its digital future in a global environment. A key component of such a strategy is the establishment of modern legal frameworks that allow for creation, innovation and competition by the Canadian broadcasting and telecommunication sectors. Such legal frameworks would include clear rules that foster innovation, encourage investment, and establish efficient processes at a reasonable cost.

Canada's current copyright regime challenges entities that are regulated by the CRTC. Through its regulations, policies and decisions, the CRTC requires regulated entities to contribute to the fulfillment of the objectives set out in the *Broadcasting Act*. These requirements include an obligation to give priority to Canadian programming, an obligation to broadcast local programming, including local news, as well as the establishment of regulatory mechanisms to ensure the continued vitality of the Canadian independent production sector. Growing copyright fees should not put into question broadcasters' ability to meet these requirements in support of legislated policy objectives.

Further, barriers to consumption of copyright works that may be created through uncertain rules for private users may impair the development of new business models that create opportunities to strengthen the broadcasting system as a whole.

Clearly reforming the Copyright Act will be of benefit to all Canadians. Given the CRTC's specific regulatory mandate, this submission only focuses on reforms that may have a significant impact on the sector under its regulatory authority.

ANALYSIS AND RECOMMENDATIONS

1. A SINGLE TARIFF-SETTING PROCESS FOR RADIO

Under the *Copyright Act*, the Board establishes the value of various uses of copyright material. The Board is an independent regulatory body that establishes the fair market value of uses of copyright material based on the evidence presented to it. As such, the Board is a rate-setting body, rather than a policy-setting body¹.

Commercial radio stations currently pay royalties to a number of rights holders (authors/composers, performers and makers of sound recordings/producers) for the right to communicate and reproduce musical content. Until the late 1990s, those radio stations paid only one collective for the right to communicate musical works. Moreover, there are three additional proposed tariffs awaiting certification by the Board for the reproduction of sound recordings and performers' performances by commercial radio stations. Since this is the first time that these tariffs will be certified, the final amount of new royalties is not known.

The CRTC is of the view that the number of Copyright Board certified tariffs is becoming increasingly burdensome in an environment of networked, digitally-driven communications.

The system of collective administration of copyright regulated by the Board is intended to provide efficient and fair access to copyright works in circumstances where transactional licensing with individual rights owners is not practical for all parties. Yet, this system has become unwieldy in Canada with the growth of new rights and new uses across digital platforms.

This can be addressed by changing the tariff certification regimes in the *Copyright Act*. The current regime should be eliminated and replaced with a new regime that results in a single tariff regime that is custom designed and technology-neutral for the use of musical content by commercial radio stations². Such a single tariff regime would include the setting of a fair value for transfer of format and ephemeral recordings. This approach would have the advantage of requiring the Board to assess that evidence based on the use of musical content by radio stations as a whole while also ensuring Canada's continued compliance with the *Berne Convention for the Protection of Literary and Artistic Works*.

¹ Speech given by the Honourable Justice William J. Vancise, Chairman of the Copyright Board of Canada at the 2008 Broadcasting Invitational Summit, Cambridge, Ontario, June 20, 2008.

² This approach has a precedent in the retransmission regime, which was added to the Copyright Act in 1988 to allow it to establish the "value" of the new retransmission right and set a single tariff to be divided between many different collectives. Similarly, in 1997, the private copying regime was specially designed to require the Board to set one levy that would be divided among three different categories of rights holders: composers, performers and recording companies.

- **The CRTC recommends that the Copyright Act be changed to require the Board to certify a single tariff for the use of musical content by commercial radio stations, establishing in a technology-neutral fashion the value of the reproduction and communication rights for musical works, sound recordings and performers' performances in a single proceeding.**

2. OBLIGATIONS AND POWERS TO STREAMLINE PROCEEDINGS

The tariff certification process creates significant uncertainty for all parties during the period between the filing of a proposed tariff and the certification of the tariff by the Board. During this time, rights holders are entitled to collect royalties, if any, in accordance with the terms of a previously certified tariff. Once a new tariff is certified, rights holders are entitled to collect the royalties specified in the new tariff for the period specified in that tariff. Given that the periods specified in the new tariffs often relate to years which have since past, users must set aside significant funds in anticipation of the royalties to be set by the Board. At the same time, rights-holders do not receive appropriate royalties in a timely manner.

As the digital economy grows, the many uses of copyright content and its just and efficient compensation will become increasingly important. In this context, the need for timely decisions will become greater.

In light of the above, the CRTC considers that amending the *Copyright Act* to provide the Board with additional procedural powers would provide incentives for parties to cooperate in meeting more expedient deadlines. The Board could be empowered to award costs and determine whether tariffs will be certified for the time period proposed, or some later date. Criteria could be established related to the application of those powers, including for example, the reasonableness of proposed tariffs, and the timely filing of evidence. In addition, establishing timelines by which the Board will certify a tariff would assist in reducing industry-wide uncertainty associated with delays in certification. Other tribunals, like the Canadian International Trade Tribunal, make no less difficult decisions under rigorous time limits without any negative impact on due process, fairness or quality of decision.

The CRTC understands that the Board is entrusted with an increasingly complex mandate which implies the assessment of numerous technological and economic issues. As a result, implementing these recommendations would necessitate appropriate funding for the Copyright Board to ensure that it has the resources necessary to fulfill its mandate within timelines that do not disadvantage the parties before it.

- **The CRTC recommends that the *Copyright Act* be amended to streamline the tariff certification process of the Board. These amendments would include providing the Board with the power to**

determine the most appropriate effective date of a tariff and the power to award costs. In addition, establishing timelines by which the Board will certify a tariff would offer stakeholders a more expedient and certain outcome.

3. COPYING FOR PRIVATE USE

A key issue in copyright reform is how to address widespread activities that most Canadians believe are quite legal, but are not because they infringe copyright. Digital technology has changed rapidly and profoundly how Canadians consume copyright protected material such as movies, music and video games.

The *Copyright Act* largely predates technological changes such as those that enable consumers to time-shift and format-shift near perfect digital copies of works. For example, transferring the contents of a CD onto other devices, in copyright terms, involves making a reproduction – an act that requires the authorization of the copyright owner. A levy created in 1997 to compensate copyright owners for the private copying of music enables consumers to legally copy music for personal, non-commercial use onto blank audio recording media. The proceeds from the levy are distributed to eligible authors, eligible performers and eligible makers of sound recordings.

This regime is now under pressure, given technological developments and consumer practices, and the uncertainty that has resulted from the application of private copying provisions in a manner that is not technologically neutral. In 2008 the Federal Court of Appeal decided that the levy does not apply to digital audio players such as the Apple iPod.³ With respect to time-shifting, since the introduction of the videocassette recorder over 25 years ago, Canadians have recorded programs for later use, thereby possibly infringing copyright. The CRTC believes that the Copyright Act should be amended to recognize the profound technological changes that have taken place and provide Canadians with a clear legal ability to time shift programs and make private copies of copyright works in certain circumstances.

There are different approaches to bring clarity and certainty to copyright law. One is to amend the fair dealing provision in the *Act* to be an illustrative rather than an exhaustive list of permitted exceptions to copyright, to allow consumers to make uses that are “fair.” This approach would require the public to apply a series of factors laid down by the Supreme Court in a landmark 2004 decision interpreting fair dealing.⁴ However, this approach would not provide the clarity and certainty that is needed. Determining whether a use is “fair” is subjective and would require consumers to know and apply the six factors established by the Supreme Court. The result would be continued uncertainty, not clarity.

³ Apple v. CPCC, Federal Court of Appeal, January 10, 2008, <http://decisions.fca-caf.gc.ca/en/2008/2008fca9/2008fca9.html>

⁴ CCH *Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339. The factors are set out in paragraph 53: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work.

A better approach is to provide users with clear rights to do specified acts, while retaining a more general fair dealing exception.

The CRTC recommends that the Copyright Act should be changed to provide clearly defined exceptions, distinct from fair dealing, for consumers to:

- **time-shift radio and television programs;**
- **format-shift copyright material they own from one device to another for private use; and,**
- **make copies of copyright material they own for private use.**

CONCLUSION

The CRTC notes that this consultation on copyright reform takes place in the context of momentum in Government, industry, and civil society toward the launch of a “whole-of government” digital strategy. Copyright is a key instrument enabling the digital knowledge economy. For it to withstand the test of time, the *Copyright Act* should be reformed in a manner that defies a silo based approach – and includes considerations of related issues such as the extension of access to next generation networks, appropriate funding for the production and digitization of Canadian cultural content, and efforts to encourage research, development and innovation in the communications industries.

The CRTC appreciates this opportunity to contribute to the public consultation process by making recommendations in respect of issues that may have an impact on the sector under its regulatory authority.