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30th Annual NCRC - June 2010
host station Gabriola Radio
Gabriola Island, BC

Dear Industry Minister Tony Clement and Canadian Heritage Minister James Moore,

The National Campus and Community Radio Association (NCRA) is a non-profit, national association of organizations and individuals committed to volunteer-based, community-oriented radio broadcasting. The NCRA represents 70 radio stations across Canada.

Non-commercial, campus, and community-based (c/c) broadcasters are largely volunteer-run, not-for-profit organizations, which are nonetheless subject to the current Canadian copyright regime. These organizations are largely underfunded (some stations operate on budgets of less than \$20,000 per year) and are therefore particularly vulnerable to changes in the law that would increase their cost of doing business. It is for this reason that the NCRA takes a great interest in proposed changes to Canadian copyright legislation that could have a disastrous impact on its members' viability.

Our member stations are locally owned and operated; serve an important educational function by offering free training to individuals wishing to involve themselves in radio; and strive to achieve balanced programming that presents a wide variety of perspectives, especially underrepresented voices and content. Our member stations are especially important in providing opportunities for emerging and local artists to bring their works to a larger audience. It is no exaggeration to say that many commercially successful Canadian artists owe their start to community and campus radio stations. Because these stations are non-commercial, they can afford to take the risk of playing works by unknown artists who would otherwise not have their works heard on the radio. Canadian artists, the Canadian music industry, and the Canadian public all derive great benefit from the support provided by c/c broadcasters to foster the creativity of Canadian artists.

Despite the important function of c/c stations, these stations are not earning revenue from the use of copyrighted materials and must fundraise in order to pay tariffs. This brings the sector in line with educational users of copyrighted material who have similar concerns about tariffs being applied to them. C/c radio is also separated quite clearly from commercial users who basically pay a portion of their profits to the copyright collectives for the privilege of using their copyrighted material in order to earn revenue. Given these stations have no financial motive of gain, one possible legislative

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remedy would be to expand section 29.3 of the current act to include "community systems" such as c/c radio as being exempt from paying tariffs.

Tariffs

It is important to highlight, at the outset, that the Canadian government has already made adjustments to Canadian copyright law to protect c/c broadcasters. Recognizing both the importance and vulnerability of c/c broadcasters, the Canadian government enacted section 68.1 of the *Copyright Act*, which carves out an exception for c/c stations, providing a maximum cap on tariffs for the performance in public or the communication to the public by telecommunication of performer's performances of musical works or sound recordings. Tariff section 68.1 refers to tariffs from the Neighbouring Rights Copyright Collective (NRCC) only, and the sector is additionally subject to tariffs by the Canadian Mechanical Reproduction Rights Agency (CMRRA) and the Society of Composers, Authors and Music Publishers of Canada (SOCAN - tariffs 1B and 22) that do not have a tariff cap in place.

Section 68.1 has not prevented copyright collectives from seeking to introduce new tariffs that affect c/c stations. The result of these new tariffs is that copyright collectives are proposing to charge c/c stations multiple tariffs for use of the same broadcast material. If approved by the Copyright Board, these multiple tariffs cannot help but have a chilling effect on the activities of c/c broadcasters, either by restricting their ability to embrace new technologies or by threatening their survival.

In order to ensure that Canadians continue to reap the benefits of a strong c/c broadcasting industry, the NCRA supports the expansion of section 68.1 to introduce reasonable caps on all copyright tariffs that apply to c/c broadcasters. These caps would ensure that Canadian artists receive a reasonable compensation for the use of their works while protecting the existence of c/c broadcasters.

The NCRA also supports the introduction of a clause limiting not-for-profit broadcasting tariffs to current and future years only, so that stations cannot be charged retroactive tariffs for years past. Because they represent costs which cannot reasonably be anticipated; retroactive tariffs can have a devastating impact on small broadcasters, which do not have the resources to accommodate sudden changes in expenses. The NCRA feels that this amendment to the *Copyright Act* is a reasonable measure designed to protect an industry that the government has already recognized as being deserving of special protection.

The Copyright Board

The current tariff approval system under Canada's *Copyright Act* is an adversarial process wherein copyright collectives propose tariffs that can then be objected to by prospective users. The Copyright Board then considers the submission in light of the objections and any supplemental submissions made by the parties before making its decision. In making its decisions, the Copyright Board is guided by three specific factors set out in section 68(2)(a) of the *Copyright Act*, namely, whether the tariff is *prima facie* valid, whether the tariff would result in a financial disadvantage to Canadian broadcasters, given the linguistic and content requirements under section 3 of the *Broadcasting Act*; and payments are to be made in a single payment. In addition, section 68(2)(b) permits the Board to take into account any factor that it considers appropriate.

The NCRA believes that the direction provided to the Board in subsection 68(2)(a) is insufficient. This section must be expanded to direct the Board to consider the potential impact that the tariff will have on users. Under the current system, absent objections from user groups, tariffs could theoretically be set at any limit. While section 68(2)(b)

does permit the Board to take other factors into account, the NCRA believes that formal direction should be provided to the Board that its decisions should, at a minimum, take into account the impact the proposed tariff will have on the affected users and should not impose unreasonable financial hardship on vulnerable or emerging industries.

Similarly, the Copyright Board needs to take into account the existing copyright tariffs already in place when they make their decisions. Under the current regime, any number of copyright collectives may come into existence and propose new tariffs for similar uses of the same copyrighted material. As long as new proposals fall within the requirements for acceptable tariffs, they will be certified. The Copyright Board needs to consider the financial hardship that increased and increasing tariffs place on non-profit entities such as c/c radio stations and no matter how reasonable each individual tariff may be, and deny any new tariffs on that basis. If the amount of tariffs being levied on an organization are so great the organization can no longer function, the copyright tariff system is not working.

With regard to communication of works to the public by telecommunication, the Board should be encouraged to weigh proposed tariffs in light of the entirety of section 3 of the *Broadcasting Act*, which promotes a strong diversity of voices in broadcasting. Specific exceptions or caps should be considered for vulnerable and non-commercial industries, such as c/c broadcasters. Given that the balance of power in the tariff approval process clearly favours the copyright collectives, it is only reasonable that the Copyright Board be required to act in the public interest

Digital Media

In the past few years, new tariffs have been proposed and awarded for internet streaming, podcasting, and archiving. Unlike analog broadcasting technology, which is essentially ephemeral and generally results in no fixation of the broadcast, digital broadcasting technologies require a fixed copy of the broadcast. This allows users the flexibility to listen to broadcasts and/or podcasts whenever and wherever they wish. To the c/c radio sector, internet streaming, podcasting and archiving are essentially the same activity: broadcasting. Unfortunately, the impact of the new tariffs is that non-profit radio stations are being penalized for embracing modern technology.

For example, c/c stations that have begun webcasting or podcasting in order to reach a broader audience may soon be subject to several proposed tariffs for these activities, even though the content of the webcast or podcast is an exact duplicate of their radio broadcast, for which they have already paid several tariffs, often to the same collectives. SOCAN Tariff 22 involves a flat rate of \$200 per month for radio stations to use music in their internet broadcasts, which are identical copies of their radio broadcasts for which tariffs have already been paid. While this may seem like a relatively small amount, as mentioned earlier, some c/c stations operate on budgets of less than \$20,000 per year. To such stations, a tariff of \$200 per month represents more than 10% of those stations' revenue placing online activities out of their financial reach. In many cases, c/c stations will be forced to cease providing digital broadcasting services if tariffs continue to increase because these stations derive no commercial revenue from their services to cover the costs of the tariffs. As digital broadcasting services become more and more prevalent, high tariffs will effectively bar c/c stations from participation, making it increasingly difficult for them to compete with commercial stations for advertising revenue. This problem is further compounded as c/c stations have little potential to generate online revenue to support their online activities due to relatively low traffic to their websites.

The CRTC has expressed disappointment that c/c stations have not been engaging more with digital media as stations play an important role in serving linguistic minority groups in Canada. In its 2009 *Report to the Governor*

in Council on English- and French-language broadcasting services in English and French linguistic minority communities in Canada, the CRTC noted:

The Commission considers it urgent that the federal government recognize that new media can play a major role in promoting the cultures of official-language minority communities and that the government incite these communities to adopt these new technologies as soon as possible.

However, the current copyright scheme actually prohibits c/c stations from participating in the new media environment due to high tariffs and the possibility of new and/or retroactive tariffs being imposed. In order to fully participate in the new media environment, amendments to the Copyright Act are necessary to cap tariffs relating to podcasting and webcasting for c/c radio stations and to minimize or prevent multiple tariffs for these activities.

Archiving

Related to issues of digital broadcasting is the question of archived copies of works. Stations are now subject to an additional tariff for keeping digital copies of sound recordings beyond 30 days. The only way to avoid this tariff is to obtain all music on CD; refrain from making any copies or archiving programs; and to delete all digital logs at the end of the mandatory 30-day CTRC logging requirement. This interferes with stations' abilities to keep pace with technological advancement and penalizes them for introducing more effective internal operations while using the material for non-commercial purposes. Furthermore, independent and emerging artists are increasingly choosing to distribute music digitally rather than on CD, preventing stations from avoiding this tariff.

C/C stations cannot continue to pay additional tariffs in order to archive and store material for internal radio station use. Exceptions to the *Copyright Act* should be introduced, either capping tariffs for archiving broadcasts at a reasonable rate or permitting archiving of copies for the purpose of broadcasting for c/c stations.

Circumvention of Digital Protection Measures

One particular point of concern with regard to the proposed changes introduced in Bill C-61 was the prohibition on circumventing digital protection measures (defined in Bill C-61 as "technological measures"). Bill C-61 did contain new section 41.17 which created an exception to the prohibition for broadcasting undertakings which circumvented technological measures for the purposes of making an ephemeral reproduction of a work. However, as discussed above, digital broadcasting services require the use of reproductions of works that are more than ephemeral.

There are practical reasons why a radio station would need to circumvent digital locks in order to fully use copyright materials (particularly music) in both analogue and digital formats. A station running on automation during the late night would need to digitize a CD so it could be played, which would not be possible without breaking any locks in place on the CD. Likewise, investigative journalism can necessitate the circumvention of digital locks. If the Government of Canada decides to introduce a prohibition on circumvention of digital protection measures, the NCRA supports the introduction of exceptions for non-commercial and/or non-infringing purposes as well as industry-specific exceptions such as proposed section 41.17 of Bill C-61. However, such exceptions should go beyond allowing mere ephemeral reproductions and should take into account the realities of industry practice.

Conclusion

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The NCRA completely agrees that artists are entitled to fair and reasonable compensation for their efforts and appreciates that the tariff system is necessary to enable cost-effective distribution of funds to artists. The NCRA's members provide important services to musicians, record labels, copyright collectives and the Canadian public. These stations promote and encourage Canadian culture and add an important diversity of voices to our nation's airwaves. If Canadians wish to continue to benefit from c/c broadcasters, which we strongly believe that they do, then some protection must be extended in the Copyright Act to prevent aggressive tariffs from threatening the very existence of these organizations.

Respectfully submitted,

National Campus/Community Radio Association of Canada (NCRA/ANREC)