

CANADIAN COPYRIGHT INSTITUTE

Established to promote a better understanding of copyright and to encourage its use in the public interest

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CANADIAN COPYRIGHT INSTITUTE SUBMISSION TO FEDERAL GOVERNMENT CONSULTATION ON OPTIONS FOR REFORM OF THE COPYRIGHT BOARD OF CANADA

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I am writing to you today on behalf of the Canadian Copyright Institute, an association of groups of individual creators, producers, publishers and distributors of copyright works. Founded in 1965, the Institute seeks to encourage a better understanding of the law of copyright.

For the past fifty years, members of CCI have made representation to various branches of government on changes to copyright law and the copyright landscape in Canada. In our view, the Copyright Board performs an essential function in balancing the rights of creators to fair compensation with easy access for users. To do so is in the public interest. Unfortunately, in recent years, we believe that the Board's effectiveness has been compromised. We are encouraged by the announcement that changes to the Copyright Board are being considered.

Copyright in Canada has been in a state of change since the 2012 amendments to the Copyright Act. While many of the amendments were positive, our members are particularly mindful of the dramatic reduction of revenue to creators and publishers since the inclusion of education as a "fair dealing" purpose. This prompted arbitrary, overly broad interpretations of this legislative change and enormously increased uncompensated copying of copyright material.

In order for the Board's objective of "establishing fair and equitable royalties" to be realized, the market relation between creators and consumers needs to be in balance. However, we think this balance has been badly disrupted.

As Minister Joly said recently, "The Government of Canada recognizes the invaluable contribution of Canadian creators to our economy and society and is committed to ensuring fair remuneration for artists. Through these consultations, we seek concrete improvements to the Copyright Board that enable creators to efficiently access new, diverse and stable streams of revenue."

We agree.

We have reviewed the suggestions for reform of the Board's decision-making processes detailed on the Board's website. In our view, there are three areas where, with modification, the Board's effectiveness can be improved.

At the moment, there is little incentive for the educational sector – both at the K-12 and post-secondary level – to negotiate seriously with copyright collective societies about the use of copyright materials. From their point of view, educators can simply decline to negotiate royalty agreements and delay the tariff-setting process of the Board, knowing that the worst case scenario would be that they will have to pay royalties retroactively.

We would particularly like to suggest three areas for change:

1. The average time for tariff decisions to be reached by the Board was calculated to be 3.5 years in a 2015 study and is now about 7 years from filing to decision. It is generally accepted that this time line is unacceptable.

Without sacrificing procedural fairness, this needs to be shortened to minimize the extent to which tariffs are likely to be retroactive. We support options 2.1.1(1) to explicitly require the Board to advance proceedings expeditiously, and 2.1.2(3) to implement case management. Although the issue of resources available to the Board is beyond the scope of this consultation, it should be noted that increasing the current number of Board members and adding specialist staff would certainly help.

2. Claims by the education community that payment of tariffs established by the Copyright Board are “voluntary” are, in our view, absurd. If they are indeed voluntary, then the education sector will, of course, not pay them. The Federal Court, in Access Copyright’s tariff enforcement case against York University, has determined that the tariffs are indeed mandatory, but this should be clarified.

3. We support option 2.4(13) to harmonize the tariff-setting regimes of the Copyright Act, but this principle should extend beyond tariff setting. All copyright collectives should have a clear right to recover damages greater than the applicable royalties owing - otherwise there is no incentive for users to pay royalties determined or approved by the Board, if their maximum penalty for non-payment of a tariff or infringement of copyright is likely to only be the amount owing. The effect of having no consequences for non-payment of tariffs is currently playing itself out in the education sector with respect to Access Copyright, which has been licensing educational institutions for the copying of the works of publishers, authors and visual artists since the early 1990’s. In the case of certain collectives (i.e. those that must file a tariff and, unlike Access Copyright, do not have the option of negotiating a royalty agreement), an award of statutory damages between 3 and 10 times the amount owing is provided. This seems to us a good remedy that should be clearly available to all collectives.

In conclusion, we affirm the critical importance of the Copyright Board in certifying tariffs – both setting tariffs and mediating disputes that arise in negotiations of royalty agreements between copyright collectives and educational institutions. However, we think that the effectiveness of the Board has been compromised, and we look forward to seeing progress on the issues on which we have focused.

Respectfully,

Bill Harnum
Chair, Canadian Copyright Institute

