



Reforming the Copyright Board of Canada

**Access Copyright's
Submissions**
on the Consultation on Options
for Reform to the
Copyright Board of Canada

September 28, 2017

Introduction

Access Copyright welcomes the opportunity to provide comments to the Department of Innovation, Science and Economic Development, the Department of Canadian Heritage and the Copyright Board of Canada (“Board”) on potential changes to the legislative and regulatory framework of the Board's powers and procedures and the tariff-setting regimes. We commend the efforts made and fully support the goals of improving the efficiency and productivity of the Board’s operations. This will mean more money for creators and users and less money being spent on legal fees.

Access Copyright is a copyright collective that represents over 600 Canadian publishers and more than 12,000 authors and visual artists. We facilitate the reuse and sharing of content by licensing the copying of books, magazines, newspapers and journals to schools, universities, colleges, governments and businesses. Access Copyright negotiates licences and files tariffs with the Copyright Board when licences cannot be voluntarily negotiated.

In these submissions, we have focused on areas where Access Copyright has a recommendation to improve the predictability, efficiency and ultimate value of the tariff setting regime. Access Copyright has evaluated and prioritized the needs of the creators and publishers it represents and has identified three main issues it would like addressed which would significantly improve its involvement in the tariff regime:

1. Options 3, 10 – The Procedures

Access Copyright would like to see the introduction of new tariff hearing procedures that would set clear rules and timelines for various steps and would include new proactive case management rules and the appointment of a Case Manager(s).

2. Options 8, 9 – Retroactivity

Filing proposed tariffs earlier in the year and allowing the continuation provisions under the *Copyright Act* [Act]¹ to apply in order to allow all parties to bridge the gap caused between the time a tariff is proposed and the time it is certified.

3. Option 13 – Harmonization of the Remedies

As a right is only as valuable as a party’s ability to enforce it, all copyright Collectives should have the same ability to enforce rights. All Collectives should be able to claim statutory damages under s. 38.1(4) of the *Act* when seeking the enforcement of rights. Doing so constitutes sound public policy that will benefit many more than just the collective societies.

1. Options 3, 10 – The Procedures

By and large, all parties involved in Copyright Board proceedings are seeking the most efficient and just proceeding. There are times, however, when the procedure is unclear or the parties cannot agree on the scope or the applicability of a procedure and must turn to the Board for a determination. These administrative steps can eat up a considerable amount of time in a

¹ *Copyright Act*, RSC 1985, c C-4 [Act], ss 68.2(3) and 70.18.

proceeding. When the Board is required to rule on procedural issues, this is yet another act that requires the Board's administrative time as opposed to their subject matter expertise.

Access Copyright supports two ways to ameliorate this process:

- (1) To set new case management rules and appoint experienced Case Manager(s) that will allow for early involvement in identifying principal issues and work with the parties to plan and manage the proceedings to achieve a fair, timely and cost effective decision; and
- (2) Set clear rules of procedure and timelines applicable to the parties (which include case management rules), which may be codified in the Regulations.

Option 3 – Implement case management of Board proceedings

A case management process would be one where a Case Manager (supported by case management rules) is given sufficient latitude to make procedural decisions, to clarify the issues, streamline and expedite the proceedings, without ultimately preventing the parties from putting forth any evidence or the case they see fit and are entitled to advance.

Access Copyright agrees that the Case Manager would:

- clarify, simplify or eliminate issues in dispute;
- schedule the various steps of the proceeding, including when interrogatories are to be exchanged and completed, when pleadings and evidence are to be filed and when and for how long the hearing, if any, is to occur;
- identify the information and documents in the possession of any party that it ought to produce in order to address issues in dispute, including the resolution of related confidentiality concerns;
- advise as to whether to seek a pre-hearing determination of a question of law;
- identify evidence to be filed, including both fact and expert evidence and identify to the parties the evidence the Board will require at the hearing to make its decision; and
- consolidate tariff proceedings involving the same or similar uses, including hearing the cases together or consecutively, having regard to considerations of efficiency and fairness.

Access Copyright also supports the proposal that the Case Manager be empowered to issue orders following case management conferences which should be held on a regular basis set by the Case Manager at different milestones in the process, and established at the beginning of the process.

It is worth noting that this new position would require a person with very pertinent case management experience and the role should be independent of the other functions performed by the Copyright Board staff. The creation of this role would of course require additional financial support for the Board.

Option 10 - Codify and clarify specific Board procedures through regulation

Setting out clear rules of procedures including new case management rules, along with their corresponding timelines would help achieve the goal of improving the efficiency and timeliness of Board decisions. These procedures could be codified in regulations or otherwise. Access Copyright is of the view that such procedures and timelines may be shortened or dispensed with by the Case Manager if the situation lends itself to this (eg. an unopposed tariff) or if the parties agree.

The Interrogatory Process

Interrogatories are an integral component of tariff proceedings and remain the appropriate form of discovery before the Board. Access Copyright agrees that interrogatories must be proportionate to the nature and complexity of the disputes and the positions of all parties. Access Copyright wishes to highlight that it is often difficult at this stage of the proceedings, for parties that have not yet had a chance to consider and analyze the information received through interrogatories, to significantly restrict their cases and seek joint positions not yet established.

In addition, maintaining interrogatories prior to the filing of the statement of case is an important step that allows the Collectives to obtain pertinent information regarding the users and the use of the Collective's works which they otherwise would not have access to. This information enables a Collective to more concisely set out its case. Without the information gained from this stage, the Collectives would have to make broad claims in their statement of cases in order to capture that which they do not yet know.

Simplified Procedures

Access Copyright agrees that a simplified procedure would be appropriate in instances such as where no objection has been filed in respect of a proposed tariff and it is not substantially different from a previously certified tariff that the proposed tariff is sought to renew. A simplified procedure could also be considered by the Board where all parties request such a proceeding or where there are few relatively simple issues. The opportunity to proceed by way of written evidence in cases where there are objectors but the case is otherwise straightforward is also supported by Access Copyright.

Evidence

There are efficiencies to be gained if the parties can participate in filing joint evidence or if expert evidence can be restricted to specific issues. This is true as long as the process required to get the parties to agree on that evidence does not become cumbersome and does not merely displace the efficiencies gained at the Board to the parties.

Access Copyright firmly believes that any and all evidence relied upon by the Board should be presented during the course of the proceeding and up until the hearing has taken place, to ensure that all parties can examine and cross examine that evidence. No further evidence should be adduced after the hearing has ended. The Case Manager should provide guidance to the parties on the types of evidence the Board is likely to require prior to the commencement of the hearing.

Access Copyright does not believe that the Board, as the adjudicator, should be permitted to appoint independent experts to enquire into and report on any issue relevant to the proceeding.

Although it is recognized that the Board may wish to have internal expert(s) to interpret and consider the sometimes highly technical evidence presented by the parties' expert witnesses, that would not include allowing those same Board experts from adducing their own evidence, making representations or the Board seeking outside evidence on its own. If such procedures were to be allowed, which it does not agree with, Access Copyright believes that all parties should be entitled to question that evidence and rebut it with its own evidence prior to the close of the hearing.

2. Options 8 and 9 - Retroactivity

Option 8 – Require proposed tariffs to be filed longer in advance of their effective dates

Access Copyright supports the option of requiring the Collectives to file a proposed tariff earlier in the year (rather than March 31) immediately prior to the expiry date of a previous tariff sought to be renewed or the proposed effective date where there is no previous tariff, as applicable.

Collectives should not be required to file a tariff for more than one year in advance of its applicability. Given the ever changing and fast paced world in which we find ourselves, uses and technologies evolve and change quickly and longer delays would increase the likelihood that those proposed tariffs would be out of date before they are even approved. In order to remain relevant, the tariffs should not be proposed too far in advance of their intended applicability.

Option 9 – Allow for the use of the copyrighted content at issue and the collection of royalties pending the approval of tariffs in all Board proceedings

In order to limit the impact of tariff retroactivity on both parties, Access Copyright supports extending the continuation provisions under the *Act*² to allow prospective licensees to make uses and allow Collectives that have filed a proposed tariff, to collect royalties under its previously certified tariff or an interim tariff, until the proposed tariff is approved.

² Ibid at ss 68.2(3) and 70.18.

3. Option 13: Harmonization – The Remedies

The object of this consultation is to improve the efficiency of the Board's operations and tariff approval process. However, any improvements will be rendered moot if Collectives lack enforcement provisions to apply those tariffs. The need to provide all collective societies with effective remedies to ensure general compliance is required.

Statutory Damages – Sound Public Policy

Prior to the introduction of statutory damages, parties seeking to enforce their rights under the *Act* were faced with several problems. At that time, damages under the *Act* were difficult to readily ascertain. In order to do so, the parties and the Courts had to expend a considerable amount of time and resources to determine the damage amounts. This was not an efficient use of judicial resources. In addition, the lack of clarity of the amounts at stake meant that non-compliant users were not aware of any quantifiable downside to non-compliance and thus, the damages provided little to no meaningful deterrence to parties violating rights under the *Act*.

In order to counter these issues, in 1997, statutory damages were introduced in the *Act*³. These new provisions constituted sound public policy in that they sought to:

1. Act as a deterrent to infringement and non-compliance with the *Act*;
2. Promote settlement discussions and keep the parties out of the Courts; and
3. Streamline and effectively utilize judicial resources.

Statutory damages set out clear and quantifiable amounts when ascertaining damages while providing the Courts with factors to consider⁴ when exercising their discretion. With statutory damages, the process became simpler and easily quantifiable.

Remedies are not Harmonized

Unfortunately, the benefits of statutory damages were not extended to all collective societies. At this time, the remedies afforded the different collective regimes are not harmonized under the *Act*. Only those Collectives captured by the mandatory regime (ss. 67 to 68.2 of the *Act*) namely SOCAN and Re:Sound, are entitled to enforce their rights by claiming statutory damages under section 38.1(4). Under that section, SOCAN or Re:Sound can elect to recover, in place of other monetary remedies, an amount of statutory damages in a sum of not less than three and not more than ten times the amount of the applicable royalties owing - 3-10 x Royalties.

Under the private copying regime of the *Act* (Part VIII), the private copying collecting body can resort to section 88(2) for non-payment of levies due and a Court may order the payment of up to 5 x the amount of the Levies owed.

³ Ibid, at ss 38.1 and 88(2).

⁴ Ibid, at ss 38.1(5) and 88(4).

For Collectives operating under the general regime (s. 70.1) such as Access Copyright, SODRAC, CMRRA, etc. their only remedy in cases of unpaid royalties is one time the royalties - 1x royalties.

There is a need to harmonize the remedies so that all collective societies are afforded the same ability to enforce certified tariffs and to ensure that all users can easily ascertain their potential risks. Doing so will ensure that the public policy benefits of statutory damages go beyond merely the mandatory and the private copying regimes and benefit users, creators and everyone touched by these rights.

Public Policy Benefit #1: Deterrence

The different remedies also impart different deterrents to the users. Section 38.1(4), which only applies to the collective societies falling under the mandatory regime, provides a remedy with an important deterrent effect. In applying the statutory damages under s.38.1(4) the Federal Court has noted that “The substantial award should serve as sufficient deterrent to the Defendant, as well as to others, who seek to profit from the Plaintiff’s musical works with impunity. It will be a reminder to all licensees of the potentially serious consequences of non-compliance with the annual reporting requirements and non-payment of the applicable licence fees ...”.⁵ The remedy for failure to pay private copying levies in s.88(2) has a similar deterrent effect that applies only to the private copying regime.

For Collectives under the general regime, as there are “no-penalties” attached to non-payment, users gamble on the fact that the Collective will only ever be able to pursue enforcement against a small number of users. This completely undermines the effectiveness of the tariff regime and the legitimacy of the Board as a rate setting tribunal.

This forces s.70.1 Collectives to also factor in the costs of litigating users as a step in its licensing process – a cost that is borne by the rightsholders. This lack of downside to not paying emboldens users to resist paying as the risk associated with it is minimal (why pay now when I only *may* need to pay later the same amount?). This is likely one important factor why so many in the educational sector outside Quebec (all public elementary and secondary school boards and many post secondary institutions) have stopped paying the Access Copyright tariffs applicable to them notwithstanding a recent Federal Court decision confirming that approved tariffs are compulsory.⁶

When Parliament enacted sections 38.1(4) and 88(2) of the *Act* it had the intention to create a deterrent to users of copyrighted works who seek to profit illegally and with impunity on the backs of copyright owners in musical works and sound recordings of music. In the case of music users, such a deterrent was meant to stand as an incentive to comply with the reporting requirements and adhere to payment of the applicable licence fees under the tariffs set through the hearing procedures of the Board.

⁵ *Society of Composers, Authors & Music Publishers of Canada v. IIC Enterprises Ltd.* 2011 CarswellNat 3810, 2011 CarswellNat 4613, 2011 FC 1088, 2011 CF 1088 *Copyright Act* (R.S.C., 1985, c. C-42), 207 A.C.W.S. (3d) 220, 397 F.T.R. 156 at para. 21.

⁶ *Canadian Copyright Licensing Agency v. York University* 2017 CarswellNat 3226; 2017 CarswellNat 3757; 2017 FC 669; 2017 CF 669 (T.D.) [York].

The principle that established that a performing rights collective is entitled to s.38.1(4) statutory damages is equally applicable to all other Collectives that administer rights associated with musical, literary, dramatic and artistic works.

Extending s. 38.1(4) to all Collectives is sound public policy that establishes that there are consequences to flouting the law. All Collectives should have equal access to the statutory damages remedies available to performing rights collectives in s.38.1(4) of the *Act* because “...rights are only formalities if they cannot be exercised.”⁷

Public Policy Benefit #2: Promotes Settlement Negotiations

Statutory damages provide a downside to non-compliance. Thus, any decision to stop complying is not likely to be considered lightly. This helps promote dialogue between the parties rather than immediate non-compliance, to avoid going to Court and potentially facing a royalty multiplier. Without statutory damages and its deterrent effects, those who seek to stop complying will do so without feeling the need to even attempt to settle the dispute since non-compliance carries little or no risk.

A pertinent example of this for Access Copyright relates to users in the post-secondary sector throughout Canada. Most post-secondary institutions outside Quebec are operating without a licence from Access Copyright and are relying instead on copying policies and practices that are substantially similar to those that were found by the Federal Court to lead to illegal behavior.⁸ Notwithstanding the Court’s unequivocal conclusions and the voiced interest of creators and publishers to resolve the conflict with these users amicably,⁹ no one from the post-secondary sector has yet to express an interest in resolving the conflict through negotiations. The fact that there are no downsides to maintaining their copying policies and practices other than eventually having to pay the tariff if pursued by the collective is likely playing a role in the protracted and costly conflict.

When parties are not communicating with one another or attempting to resolve their issues, it is more likely that the dispute will eventually end up in the Courts. More cases before the Courts results in the utilization of judicial resources, expending tax payers and the parties’ monies on litigation that may have been resolved at the onset of the dispute had the parties started communicating and attempting to resolve the issue.

Settled disputes are typically less costly than litigated disputes and result in parties being more satisfied with the outcome and form the basis of more positive future relation as opposed to litigation.

⁷ Thomas Axworthy, “Justice delayed is justice denied” the Star.com, Opinion April 17, 2007.

⁸ *York*, supra note 6.

⁹ Public statements made by Access Copyright indicating that it is open to resolving the situation in an amicable fashion. <http://www.accesscopyright.ca/media/announcements/statement-on-york-university's-decision-to-appeal-federal-court-decision/>; <http://www.accesscopyright.ca/media/announcements/court-decision-a-big-win-for-creators-and-publishers/>

Public Policy Benefit #3: Allows Efficient Use of Court Resources

Statutory damages promote discussions and settlement negotiations between the parties, but if there cannot be a negotiated settlement, the matters that go to Court will do so after the parties have ascertained the risk associated with potentially having to pay statutory damages and after having attempted to resolve the dispute. In other words, the parties that end up before the Courts will not have done so lightly and are more likely to have a genuine dispute that requires the Court's intervention. This helps manage the Court's resources by weeding out more frivolous cases.

Furthermore, statutory damages provisions are more straightforward in their application than traditional remedies such as profits and damages. They typically set out a range of damages (eg. s. 38.1(1)(b) "...in a sum of not less than \$100 and not more than \$5,000 that the court considers just ...") or a multiplier (eg. 38.1(4) "... in a sum of not less than three and not more than ten times the amount of the applicable royalties, as the court considers just ..."). Thus, the evidentiary requirements to ascertain the remedies are much simpler and straightforward which allows the Courts to determine damages expeditiously and in a cost effective manner.

Furthermore, statutory damages provisions such as s.38.1(5) include factors¹⁰ that the Court needs to consider when exercising its discretion as to the amount of statutory damages to award. These clear and consistent factors ensure that the Court has the necessary discretion to consider the context and parties' behaviours in setting the multiplier and further helps streamline and expedite the Court's decision making process.

Recommendation

Access Copyright submits that the *Act* be amended to extend the statutory damages in s.38.1(4) (and its relevant factors set out in s.38.1(5)) to all collective societies. Harmonizing the statutory damages provisions by extending the remedy in s.38.1(4) of the *Act* to all other Collectives will extend the public policy benefits gained with the introduction of s.38.1(4). It will deter infringement, encourage settlement and increase judicial efficiency. Extending the remedy to all Collectives will also strengthen the Board's role as an economic tariff setting tribunal. This deterrent measure instils in users of copyright the efficiency of collective management of rights, the important role of the Board and the legitimacy of its certified tariffs and the purpose of the *Act* as a legal code for the preservation and advancement of creativity and respect for the legislative process.

¹⁰ Those factors include: (a) the good faith or bad faith of the defendant, (b) the conduct of the parties before and during the proceedings, (c) the need to deter other infringements of the copyright in question and (d) in the case of infringements for non-commercial purposes, the need for an award to be proportionate to the infringements, in consideration of the hardship the award may cause to the defendant, whether the infringement was for private purposes or not, and the impact of the infringements on the plaintiff.

Mandatory Nature of the Tariff

The legitimacy of the *Act*, the Board and the collective management regime is dependent on the legal certainty of the Board's decisions and tariffs.

There are, however, arguments being advanced regarding the mandatory nature of tariffs and whether users can "opt out" of a tariff set by the Board. Access Copyright submits that the *Act* be amended to reinforce the mandatory nature of the tariffs set by the Board.

Access Copyright has recently experienced the result of such an argument from a party that sought to limit its responsibility under the tariffs in respect to s. 70.12. Access Copyright was compelled to commence expensive legal proceedings to enforce an interim tariff of the Board. When such arguments are advanced, they are not only costly to the collective and the copyright users, but they also undermine the Board's authority and the strength and weight of its decisions and tariffs.

In the *Access Copyright v. York University* case, the Federal Court confirmed that contrary to the argument advanced by York, tariffs were mandatory and users could not "opt out" of the tariff. The Court held that the legislative history of s.68.2(1) confirmed the legislative intent to provide Collectives with effective enforcement mechanisms against users who were not subject to an agreement and who reproduce, without authority from owners and the Court confirmed the compulsory nature of a tariff.¹¹

In light of the continued behaviour by some users to ignore certified tariffs, the review is an opportunity to reinforce for greater certainty through legislative amendment to the *Act*, the Court's conclusions that tariffs are mandatory. This would ensure that the functions of the Board operate smoothly and with certainty for all stakeholders subject to the tariffs set by the Board. Clarity in the *Act* in respect to the tariffs set by the Board would avoid unnecessary and costly litigation and instill confidence in the Board's jurisdiction to carry out its mandate.

Conclusion

It is extremely important to note that ultimately, any changes to the Board's processes and procedures will only achieve the desired outcomes of improved efficiency and productivity so long as the Board has sufficient resources and staff to implement these changes and handle their current and future workload. The government should review the Board's funding to ensure that it has the financial resources to undertake the necessary changes. Failure to do so may seriously impede the effectiveness of improvements made to the system.

¹¹ *York*, supra note 6 at para. 204-212.