



Canadian Intellectual Property Council
CIPC Le Conseil Canadien de la Protection Intellectuelle

September 29, 2017

Department of Innovation, Science and Economic Development
Department of Canadian Heritage
Copyright Board of Canada
cbconsultations@canada.ca

RE: Consultation on Reform of the Copyright Board of Canada:

CIPC

The Canadian Intellectual Property Council (CIPC) is a Canadian business coalition within the Canadian Chamber of Commerce (CCC), whose aim it is to provide a central voice to press for stronger and more sensible IP protection both in Canada and worldwide. The CIPC's primary objective is to ensure that the Canadian government provides the necessary legislative framework and sufficient resources to better protect IP rights.

The CIPC's Advocacy Efforts on Copyright Board Reform

The CCC, as part of its advocacy efforts, adopts policy resolutions that are approved every year at the CCC AGM. Policy resolutions typically take on issues with a national scope, and are open to submission from member chambers of commerce, boards of trade, and the CCC's policy committees. Each resolution has an effective advocacy lifespan of three (3) years.

In 2013, as part of its industry-related advocacy, the CCC adopted a policy resolution entitled, "Streamlining the rules of practice, decision-making process and governance model of the Copyright Board of Canada." In 2016, in an effort to continue its support for reforms to the Board, the CCC adopted a [new three-year policy resolution](#) entitled, "Refining and Remaking the Copyright Board of Canada" (the "2016 Board Resolution"). The two resolutions had similar goals: to advocate on behalf of Canadian businesses for a consistent, timely and predictable Board, one that supports and encourages new and existing businesses operating in Canada's cultural industries.

The Consultation on Options for Reform to the Copyright Board

As the organization whose voice represents a diverse coalition of Canadian businesses, the CIPC is uniquely positioned to comment on the need for a modernized Copyright Board, particularly with respect to its impact on the Canadian business community. Many Canadian businesses are impacted by the tariffs set by the Board, including many of the CCC network of more than 200,000 business members, from its over 450 chambers across Canada.

The 2016 Board Resolution recognized that “businesses can’t suffer from a process that is unpredictable, unstable and slow.” This consultation on options for reform represents a timely and welcomed opportunity for the government, the Board and its stakeholders to work collaboratively to develop a tariff-setting regime that is fit for today’s modern digital economy.

With that goal in mind, the CCC set forth a number of recommendations in its 2016 Board Resolution, most of which continue to have application and merit in light of the current consultation. Despite the fact that first recommendation calls for a review of the Board as part of the upcoming five-year review of the *Copyright Act* (which is a point that has now been rendered moot by the launch of this consultation process), the recommendations are of general application, and attempt to make the case for a more streamlined, efficient, and transparent Board process. For instance, the CCC recommended that the federal government:

1. *Undertake a structural review of the Copyright Board as part of the upcoming five-year review of the Copyright Act (in 2017), examine the current Copyright Board model (in comparison to other similar tribunals in Canada and abroad) and, in particular, the role of the Board in the context of the collective administration of copyright and how it should respond to (and keep pace with) the needs of the many industries that rely on its tariff-setting function.*
2. *Encourage the Board to consider and implement regulatory measures (including amendments to the Model Directive on Procedure) and other non-legislative tools that could streamline the tariff-setting process.*
3. *Promote efficiency by:*
 - a. *Ensuring that a full complement of qualified Board members is in place.*
 - b. *Ensuring that the Board member vacancies are filled in a timely fashion.*
 - c. *Promulgating procedures which encourage collective societies and users or their representatives to negotiate licenses.*
4. *Encourage the Board to minimize the delay between the filing of proposed tariffs and the certification of those tariffs, and in particular the delay between the filing of settlement tariffs and the certification of those tariffs, thereby minimizing the extent of retroactivity of the tariffs.*
5. *To promote transparency, encourage the Board to:*
 - a. *Encourage and foster means of enhancing stakeholder review of the Board’s procedures and practices and other Board related information, including the recommendations of any stakeholder review working groups and stakeholder surveys.*
 - b. *Ensure that rules governing dispute resolution processes and tribunal hearings, and, if those rules are departed from, the grounds for such departure, are fully disclosed.*
 - c. *Establish and publish a database of the Board’s rulings.*

- d. *Create a clear and easily-accessible list of guidelines and principles that are used to influence Board decisions, and build upon them regularly to take into account how businesses are operating in the fast-changing digital economy. For instance, the Board should consider adopting guidelines that require the Board to consider and adhere closely to negotiated market-based rates (using willing buyer-willing seller principle) when deciding tariff rates.*

Comments in Response to the Consultation's Options for Reform

Each of the recommendations listed above can be linked – either broadly or more specifically – to a number of the options for reform outlined in the government's Discussion Paper. For instance:

CCC Recommendation #1:

As part of its initiative to make the Board's tariff-setting process more efficient and productive, the government should, wherever possible, consider best-practices from comparable Canadian courts and tribunals, as well as similar copyright tariff tribunals in other countries. The government should focus on examples that have streamlined processes, that focus on the achievement of predictable, business-oriented results, and that have clear mandates/decision-making guidelines to help reduce or fast-track disputes between the parties.

In today's fast-paced digital economy, businesses (both rights holders and users) can't afford the costs that are attributed to a lengthy and unpredictable tariff-setting process. The government makes a number of recommendations that, if adopted, would help to address those concerns – such as:

- **Recommendations 1, 2 and 3:** each of these proposed reforms would greatly assist the Board in setting tariff rates more expeditiously, under clear time frames, and under specialized administrative guidance.
- **Recommendation 6:** this recommendation completely aligns with the desire in the business community to enter into market-based negotiations and obtain predictable, timely agreements that are not, when agreements can be reached, prone to regulatory delays.
- **Recommendations 10, 11 and 12:** these proposed reforms, if adopted, would add much-needed certainty to an otherwise ad hoc process. Regulations that clearly define the processes and timelines of the tariff-setting process would streamline proceedings; a clear mandate – one that reflects the need for the Board to set royalties that are properly reflective the true value of works – would assist the Board and its stakeholders in presenting the most useful and compelling evidence; and codified criteria (by way of regulation) would, as the Discussion Paper states, clarify the Board's decision-making process for all.

CCC Recommendation #2:

As the Discussion Paper alludes to, there is added incentive to enact reforms by way of regulation, rather than through legislation. Regulations can be implemented with greater ease and speed, and would reduce the risk of being derailed as part of a long, drawn-out legislative process. The need for reforms to the Board is well documented; the growing concern for many stakeholders is the urgency for reform.

One of the biggest complaints the CIPC hears about the Board's tariff-setting process is the issue of delay, and the resulting uncertainties that businesses face as a result. Regulatory action should be taken immediately to combat this delay, and ensure that the Board certifies tariffs in a more efficient and timely way. The Recommendations in the Discussion Paper that attempt to reduce the impact of procedural delays, as well as those that seek to limit the time it takes for the Board to certify a tariff, are welcomed by the CIPC. For instance:

- **Recommendations 1, 2 and 3:** as noted above, each of these proposed reforms would greatly assist the Board in setting tariff rates more expeditiously, under clear time frames, and under specialized administrative guidance.
- **Recommendations 5 to 8:** on their face, these options would assist in reducing the scope and number of issues that can lead to a more lengthy and complex process. As long as these options could be combined with other options designed to limit the potential for delays and uncertainties [i.e. the recommendations to implement deadlines (2), clear, predictable procedural steps (10), a mandate for the Board (11), and decision-making criteria for the Board to consider (12)], they could be effective solutions.

CCC Recommendation #3:

The CIPC is aware that the Discussion Paper specifically excluded issues of Board funding, so it will reserve its comments with respect to CCC Recommendations 3(a) and (b). However, with respect to CCC Recommendation 3(c), the CIPC greatly supports the adoption of a streamlined tariff-setting process whereby rights holders and users may negotiate tariff rates independently of the Board – pursuant to the concepts identified in **Recommendation 6** of the Discussion Paper. Rates that are negotiated directly between collective societies and users, independently of the Board's regulated tariff-setting process, have the potential to save the Board and its participants significant time and money, and generate licensing terms that are more economically favourable for all.

CCC Recommendation #4:

This recommendation similarly draws on the concepts identified in the previous sections, with the goal of making the tariff-setting process faster and more efficient. For instance: tariffs should be certified in a reasonable time; the procedures that govern the process should be regulated, clear and designed to limit the time it takes the Board to certify a tariff; and the parties should be guided by predictable decision-making criteria, which would reduce disputes, narrow the issues, and generally reduce the Board's decision-making time.

The tariff-setting process would be greatly improved by enabling the Board to make use of case management tools (**Recommendation 3**) to keep proceedings on track. In addition, the Board would be further enabled by a more specific mandate and clear decision-making criteria (**Recommendations 11 and 12**) that would ultimately lead to a more predictable and efficient process.

CCC Recommendation #5:

In the interests of promoting the predictability and transparency of the Board's tariff-setting process, participants need a modernized, accessible Board whose decisions reflect the true economic value of the copyrighted works at issue. Businesses need to be able to rely on the Board to render fair, economically sound tariff rates through a predictable and transparent process.

Accordingly, the CIPC would encourage the government to adopt clear decision-making criteria and a mandate, for the reasons outlined above. In addition, the Board should be enabled to solicit stakeholder feedback on an ongoing basis, with the goal of ensuring that the Board's policies and procedures are being adhered to, and that they are achieving their desired effects.

Conclusion

The CIPC, on behalf of the CCC and its member businesses, congratulates and applauds the government for its initiative to reform the Board's tariff-setting process. This is an historical problem that has long-challenged Canadian and foreign businesses looking to operate under Canada's copyright regulatory regime. This consultation is sure to result in changes to the Board's process that will better reflect Canada's strong economic position in the world, and that will benefit the many cultural industries who rely on the Board's important function.

The CIPC welcomes any questions or comments with respect to this submission, or its 2016 Board Resolution.

Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read 'S. Smith'.

Scott Smith

Director, Intellectual Property and Innovation Policy
Canadian Chamber of Commerce