



CANADIAN PUBLISHERS' COUNCIL

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Canadian Publisher's Council Submission on

Copyright Board of Canada Reform

September 29, 2017



The Canadian Publishers' Council (CPC) welcomes the opportunity to share its views on what measures the Ministries of Innovation, Science and Economic Development Canada, and Canadian Heritage (the "Ministries") may pursue to improve the performance and functioning of the Copyright Board of Canada (the "Board").

CPC was founded in 1910. It represents the interests of over 20 publishing companies that publish books and other media for elementary and secondary schools, colleges and universities, professional and reference markets, and the retail and library sectors. Collectively, CPC's member companies have close to 20,000 Canadian titles in print. Moreover, they employ more than 3,000 Canadians and together account for nearly three-quarters of all domestic sales of English-language books.

CPC's members are publisher-affiliates of Access Copyright. The 'reproduction of literary works' tariffs that Access Copyright prosecutes at the Board on behalf of its affiliated authors and publishers, and the efficiency with which the Board can set those tariffs, are of great importance to CPC's membership for two main reasons. First, fairly-valued tariffs are an important source of royalty compensation for authors and publishers alike. Timely receipt of such income, received in exchange for the use of their copyright-protected works, is a critical component to help ensure that resources can be reinvested in Canadian publishing endeavours and that, in turn, high-quality, Canadian-authored works can be created and published for the public benefit.

Second, the Board's ability to streamline and certify tariffs in a straightforward manner plays a critical role in normalizing relations in the publishing marketplace. The customers to whom CPC publishers sell their printed and digital works in the 'K-12' and post-secondary education sectors also exercise rights under certified tariffs. Accordingly, both publisher and customer have a joint interest in confidently knowing, without undue delay, the scope of those rights under the tariffs that the Board establishes. Routinized fair and efficient setting of such scope promotes good relationships between publishers and customers and facilitates their focus on what new literary, educational and professional works need to



be created, published and sold and purchased for the greatest public benefit. Conversely, the market for these works is compromised by the negative distraction of drawn-out, expensive and acrimonious tariff hearings, or the judicial review of Board tariff decisions.

Streamlining the Tariff-setting Process

CPC encourages the Ministries to take legislative and regulatory steps to permit the Board to set tariffs more quickly and with a simplified, mandatory procedure. CPC, like many other rightsholders and end-users, are concerned with the all-too-often very long and expensive tariff hearing process which commonly results in retroactive tariffs. To speed up the process and to cut down on delays and legal expense, the CPC supports a number of the options identified in the Ministries' discussion paper, *A Consultation on Options for Reform to the Copyright Board of Canada*, dated August 9, 2017 ("Consultation Paper"). For example, CPC is in favour of the following:

1. The implementation of formal rules for the completion of procedural steps in tariff proceedings, which rules could expand on the Board's current Model Directive on Procedure.
2. As part of the creation of such formal rules, the introduction of mandatory case management. Case management, at a minimum, could involve pre-hearing conferences aimed at identifying, clarifying and simplifying disputed issues between parties as well as scheduling deadlines within which they must all complete procedural steps.

Harmonizing Tariff Regimes

In addition to the foregoing, and with reference to the thirteenth option for reform discussed in the Consultation Paper, the CPC also supports changes to harmonize the tariff setting regimes prescribed by the Act. Specifically, the CPC would like to see copyright collectives operating under the 'general' tariff



regime, like Access Copyright, have the same ability to seek the same statutory damages that those collectives administering performing rights and communication rights in musical works can under the 'mandatory' regime.

Currently, under the general regime, the members Access Copyright represents may only seek to recover statutory damages equal to the amount of royalties that would have been payable to Access Copyright pursuant to license agreement or certified tariff. By contrast, mandatory regime collectives have a statutory right to seek, on behalf of their members, statutory damages in a sum of not less than three and not more than ten times the amount of the applicable royalties. Where the statutory damages available in the mandatory regime are appropriate and support the Board's tariff setting process, and more generally the balanced copyright policy goals of fair compensation for rightsholders and broad access to works for the Canadian public, statutory damages available under the general regime do not. Indeed, weak statutory damages available under the general regime, coupled with the high cost to rights-holders of pursuing legal action against those end-users who unjustifiably choose not to pay a certified tariff, undercut the efforts of the Board. This is unfair to rights-holders as well as end-users who engage in the tariff-setting process and who properly pay certified tariffs.

Mandatory Nature of Tariffs and Board Mandate

Related to the issue of insufficient statutory damages under the general regime is the ostensible argument surrounding the issue of whether tariffs are mandatory or voluntary. Institutional users of copyright protected works who treat tariffs as voluntary, and consequently refuse to provide information on their copying practices of such works as part of tariff certification proceedings, undermine the work of the Board. The lack of information and participation from such end users who believe they can simply "opt-out" of tariffs, makes it more difficult for the Board to achieve its goal of setting appropriate tariffs that are fair to both rightsholders and users.



The Federal Court of Canada's recent 2017 decision in *Canadian Copyright Licensing Agency v. York University* ("FCC Decision") addressed the nature of tariffs. The FCC Decision contains clear reasons for why interim and certified tariffs are indeed mandatory vis-à-vis users who reproduce works covered by such tariffs without permission from rightsholders or under a fair dealing exception. These reasons include the absence of any 'opt-out' language in the tariff setting provisions of the *Act*. Moreover, in addressing its intended compulsory effect, the Federal Court stated in the FCC Decision that "the use of the term 'tariff' is consistent with the provisions of the *Act* directed at ensuring that copyright owners are paid for the reproduction of their works and is also consistent with the role of collectives, such as Access [Copyright], in collecting the amounts which are due or become due." However, given that the FCC decision is currently under appeal, and that many educational institutions and provincial ministries of education continue to opt out of tariffs, there is reason to clarify legislative intent in the *Act*. To that end, the inclusion of a mandate for the Board in the *Act* which stipulates its ability to set mandatory tariffs could remove any uncertainty concerning the nature of tariffs and, in turn, bolster the Board's ability to achieve copyright policy goals in the public interest.

Thank you for your consideration of our views. We would be pleased to discuss any of the foregoing.

Yours truly,

A handwritten signature in blue ink, appearing to read "David Swail".

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cc. James Reeve, President
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