



Colleges and Institutes Canada
Collèges et instituts Canada

**Submission to the Department of Innovation, Science and Economic
Development, the Department of Canadian Heritage, and the Copyright Board
of Canada**

A Consultation on Options for Reform to the Copyright Board of Canada

September 29, 2017



Colleges and Institutes Canada
Collèges et instituts Canada

Colleges and Institutes Canada (CICan) is the voice of Canada’s publicly-supported colleges, institutes, cégeps and polytechnics, and an international leader in education for employment with ongoing programs in over 25 countries. Colleges and institutes add over \$190B to Canada’s economy each year and contribute to inclusive economic growth by working with industry and community partners to offer more than 10,000 programs at campuses serving urban, rural, remote, and northern communities.

Introduction

Colleges and Institutes Canada (CICan) is the national association representing the interests of publicly-supported colleges, institutes, cégeps and polytechnics in all provinces and territories, which serve more than 1.5 million students in over 3,000 urban, rural, remote and northern communities. CICan's membership constitutes the sector of Canada's post-secondary system that is mandated to provide employment-focused post-secondary programs and training.

Copyright legislation and related regimes and adjudication procedures are highly relevant for post-secondary institutions, and any changes to the Copyright Board's decision-making processes can have important implications for CICan member institutions. CICan therefore welcomes this opportunity to make a submission to the consultation on options for reform to the Copyright Board of Canada and considers the consultation an important opportunity to identify potential changes that promise to render the Board's proceedings more efficient and expeditious.

Importance of copyright to colleges and institutes

Colleges and institutes offer a vast array of post-secondary programs designed to help graduates launch careers and mature workers reskill in response to a changing labour market, as well as to equip the workforce more generally for a global economy and for changes brought about by technological change and disruption. These programs rely on the availability and accessibility of a wide range of educational materials and learning resources used by instructors and students.

Copyright Board procedures and the tariffs set by the Board, court rulings on copyright issues, and any legislative or regulatory changes that impact them have the potential to either constrain or widen the availability and accessibility of copyrighted material. They can therefore have important implications for the ability of colleges and institutes to fulfill their mandate and to offer the post-secondary educational opportunities that Canadians need.

One important way in which the legal and regulatory system for copyright protection affects CICan's member institutions and their students is through its impact on the cost of using copyrighted material. Tariff changes, the scope of fair dealing rights, and changes to the structures and processes through which copyright matters are adjudicated can directly and indirectly increase or decrease how much institutions must spend to provide their students with access to educational material and ensure compliance with copyright legislation. This in turn has a direct impact on the cost of post-secondary education to students and on the quality of the training that students receive.

Challenges posed by current Copyright Board processes and options to address them

The length of time it currently takes the Copyright Board to approve tariffs is a key concern for CICan members due to the uncertainty it creates regarding the cost of copyrighted material. A case in point in recent years has been the procedural delays relating to Access Copyright's post-secondary tariffs, which were filed years ago but in respect of which the Board has not yet ruled. Due to the possibility that the

Board will decide that a new tariff should apply retroactively once it is established, these delays mean that post-secondary institutions could owe significant back payments if the newly set tariff is higher than the tariffs previously in place. CICA therefore supports reforms that would increase the efficiency of the Board's procedures and decision-making and lead to more timely Board rulings.

Some of the options proposed in the discussion paper for this consultation could potentially save the Board time and improve efficiency. They include, among others, Option 5(a) (Require collective societies to include additional explanations with proposed tariffs) and Option 5(b) (Require objectors to include additional explanations with statements of objection). These options, if implemented jointly, could help narrow the scope and the focus of interrogatories and thereby streamline Board proceedings. Another example is Option 3 (Implement case management of Board proceedings), which could help reduce the workload involved in the different procedural steps of a typical Board proceeding, although an analysis of existing case management systems would have to precede such implementation so as to better determine how case management could be effectively used in the specific context of Copyright Board proceedings.

While some of the proposed options could lead to more timely decision-making on the Board's part, others could potentially increase the Board's workload and exacerbate delays, or limit the Board's discretion and therefore its effectiveness. For example, specifying decision-making criteria that the Board must consider in reaching its various tariff decisions could force the Board to consider such factors even in circumstances in which they would have little relevance. This would not result in greater efficiency of the Board's operations but could, instead, lead to increased litigation among the opposing parties in the context of judicial review proceedings before the Federal Court of Appeal. Stipulating a mandate for the Board in the *Copyright Act* could limit the Board's independence unless the mandate is expressed simply. Finally, allowing all collective societies to enter into license agreements of overriding effect with users independently of the Board could lead to an increase in the number of Board arbitrations while simultaneously limiting Board oversight. Careful analysis of all the proposed options and their likely impact on the Board's hearing processes is therefore required before the government implements any changes that could have major policy implications or unintended consequences.

Conclusion

In principle, CICA supports reforms aimed at enabling the Copyright Board to reach its decisions faster and more efficiently. The length of time it takes the Board to set tariffs creates an uncertainty for post-secondary institutions regarding future financial liabilities and makes it difficult for them to plan and manage related budgets, which has repercussions for CICA members and their students.

Despite the need for reform, it is important that the government carefully weigh potential improvements against possible unintended consequences when considering the proposed options, especially those that would change legislative provisions governing the Copyright Board. Such changes could have important policy implications, as they could limit the Board's independence, the exercise of its expertise, and its ability to protect users from any abuses of collectives' monopolies. In implementing reforms aimed at faster proceedings and decisions, care should be taken to ensure that the rights of both right-holders and users are protected and that the Board can continue to effectively fulfil its statutory mandate to establish fair and equitable tariffs.