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Comments of Universities Canada

***Re: A Consultation on Options for Reform
to the Copyright Board of Canada (August 9,
2017)***

September 28, 2019



INTRODUCTION

Universities Canada, formerly the Association of Universities and Colleges of Canada, is the voice of Canadian universities, at home and abroad. Created in 1965 through special act of Parliament, Universities Canada advances the mission of our 96 member institutions to transform lives, strengthen communities and find solutions to the most pressing challenges facing our world.

Since its creation, Universities Canada and the post-secondary educational institutions that comprise our membership have been engaged on issues concerning copyright law as both creators and users of copyrighted content. Universities Canada welcomes the opportunity to participate in the Government of Canada's (the "Government") consultation process for reform to the Copyright Board of Canada (the "Board").

While the Government's current consultation does not directly address funding for the Board, the issue of the resources that are available to the Board is a fundamental one. In all likelihood, the implementation of several of the options proposed in this consultation will require the allocation of additional resources (including funding) in order for the Board to effectively implement the changes and manage its proceedings post-reform.

Universities Canada's comments on the specific options listed in the discussion paper, *A Consultation on Options for Reform to the Copyright Board of Canada* (the "Discussion Paper") published on August 9, 2017, are set out below.

OPTION 1: Explicitly require or authorize the Board to advance proceedings expeditiously.

The Board already has the necessary powers and authority to manage its proceedings expeditiously. Notwithstanding this, the Board's decision-making processes take too long, with one of the biggest issues being the time from the oral hearing until a final decision is rendered. Adding a legislative or regulatory provision explicitly requiring the Board to advance proceedings expeditiously on its own would not necessarily improve the timeliness of the Board's decision-making process. Further, on its own, it could prejudice parties before the Board if the time periods in proceedings are unnecessarily compressed to compensate for other delays in the decision-making process.

OPTION 2: Create new deadlines or shorten existing deadlines in respect of Board proceedings.

There is little doubt that the Board's decision-making processes take too long, as noted above in the comments regarding Option 1. This is an issue that was identified as a chief concern during the Government's previous consultations and research regarding the Board. The lengthy amount of time it often takes for the Board to render its final decisions creates uncertainty for all parties involved as well as other consequences, including higher costs associated with participation in Board proceedings and the potential for large retroactive payments for users of copyrighted content that choose to operate under Board-approved tariffs and licenses.

The creation of new deadlines or shortening of existing deadlines could be helpful in speeding up the decision-making process, so long as the Board is adequately resourced to meet those deadlines and the impact of any shortened time periods is not solely on the parties before the Board. Of course, if the Government were to implement the suggestion that the Board must render decisions within a fixed timeframe following a certain pre-established procedural step (e.g., after the conclusion of hearings), it would almost certainly shorten the length of time to decision. However, simply compressing the timeframes for Board decision-making on its own is not a solution, as any such changes would need to be combined with providing the Board with the necessary resources to appropriately manage its proceedings and meet any new and shortened deadlines.

“Soft” deadlines can be effective. If timeframes or deadlines are set out in legislative or regulatory provisions they should be benchmarks rather than “hard” deadlines and the Board should have the power to vary such timeframes or deadlines to account for special circumstances. If “hard” deadlines are ultimately going to be set as a result of this consultation process, then careful consideration should be given to what consequences (if any) would result from the Board’s failure to meet a particular deadline.

Universities Canada supports measures that would encourage the Board’s accountability towards advancing proceedings expeditiously and to any timeframes or deadlines set out in legislative or regulatory provisions (should they be implemented). An appropriate measure in this regard could be the suggested requirement for the Board to track and make public the length of time it takes to render its final decisions following the close of oral hearings. Consideration could be also given to the selection of other milestones in the Board’s decision-making process that could be tracked and reported in order to provide meaningful metrics on which to assess the Board’s timeliness. The implementation of explicit reporting requirements could also yield “a culture of greater efficiency at the Board”, which is a desirable effect mentioned in the Discussion Paper under Option 1.

OPTION 3: Implement case management of Board proceedings.

Under current practice, the Board will generally supervise the progression of proceedings in the pre-hearing stage on an *ad hoc* basis, but not as a matter of course. In the context of any given proceeding, the Board might issue orders and directions addressing many of the issues listed in the Discussion Paper at the request of one or more of the parties involved.

The implementation of case management has the potential to cause Board proceedings to be run more efficiently and to assist in the fair, expeditious and least expensive disposition of proceedings. The assignment of a case manager to each proceeding would also provide the parties with opportunities to obtain guidance from the Board earlier and more directly.

The role and responsibilities of a case manager may be better suited to the holder of a newly created position, rather than tasking such responsibilities on Members of the Board. The case manager should be given the necessary authority to decide the procedural and substantive issues that might come before them and the position(s) should be staffed by individuals with the appropriate skills and experience.

Case management has been very successfully implemented in the Federal Court in furtherance of the objectives of Rule 3 of the *Federal Courts Rules*: “to secure the just, most expeditious and least expensive determination of every proceeding on its merits”. It has become a useful tool for parties before the Federal Court, particularly in complex intellectual property matters such as those that are often before the Board. The Government could look to the Federal Court and other existing case management systems to consider how case management could be implemented effectively for Board proceedings.

OPTION 4: Empower the Board to award costs between parties.

Universities Canada does not support the implementation of cost awards in Board proceedings. While Canadian universities are both creators and users of copyrighted content, the participation of Universities Canada and/or its member institutions in Board proceedings would be to provide the Board with a users’ perspective and as objectors to tariff proposals. The possibility of adverse cost awards would only increase the burden or potential burden on parties before the Board and creates a significant disincentive to participation by individual users of copyrighted content, users’ associations and other stakeholders in Board proceedings.

OPTION 5: Require parties to provide more information at the commencement of tariff proceedings.

This option proposes to implement requirements for collective societies and objectors to include additional explanations in their initial filings with the Board. The provision of additional information in the nature of what is listed in the Discussion Paper could help to narrow the focus of proceedings before the Board. If such requirements were to be implemented, the parties should be allowed to amend their filings with leave of the Board if relevant information or material changes come to light during the course of the proceedings.

However, adding requirements and steps to all proceedings would also have the negative consequence of slowing down the Board’s procedures at an early stage, since there would be additional documents and submissions to be considered by the Board and the parties involved. To minimize the number of added requirements and steps to Board proceedings, some consideration could be given to combining the requirements suggested under this option with the requirement that the parties file statement(s) of issues as suggested under Option 10(a).

OPTION 6: Permit all collective societies to enter into licensing agreements of overriding effect with users independently of the Board.

This option raises broader and significant public policy issues relating to the collective administration of copyright, which should be outside the scope of this particular consultation on possible reforms to the Board.

In any case, it is questionable whether or not the implementation of this option would achieve the intended benefit of reducing the number of matters coming before the Board annually. For example, The Canadian Copyright Licensing Agency (“Access Copyright”) is a collective society under section 70.1 of the *Copyright Act* (“Act”) and is permitted to enter into licensing

agreements of overriding effect with users independently of the Board.¹ However, Access Copyright has opted to pursue both options under section 70.12 of the Act and has several proposed tariffs currently before the Board.

As noted in the Discussion Paper, “it is likely that collective societies would continue to seek Board-certified tariffs because of the difficulty of concluding and enforcing private agreements with many different prospective users”. Accordingly, even if this option were to be implemented, it would be unlikely to reduce the number of matters coming before the Board.

OPTION 7: Change the time requirements for the filing of proposed tariffs.

The suggestion to stipulate a longer minimum effective period for proposed tariffs has the potential to reduce the number of matters coming before the Board annually and also to improve the efficiency of the Board’s decision-making processes. Several collective societies already tend to file proposed tariffs that cover more than one calendar year. However, it is noted that other collective societies appear to have a practice of filing proposed tariffs for the minimum effective period of one year, which are often later consolidated by the Board into a single proceeding or hearing.

Implementing this option would eliminate the inefficiencies that would be inherently associated with the Board’s consideration of proposed tariffs covering the minimum effective period of one year. Further, it would minimize the need for the Board to consider and decide on the consolidation of multiple short tariff periods.

OPTION 8: Require proposed tariffs to be filed longer in advance of their effective dates.

As noted in the Discussion Paper, collective societies are to file their proposed tariffs by March 31 of the year prior to the expiry of a previous tariff sought to be renewed or the proposed effective date where no previous tariff exists. Recent experience with Board timeframes will typically see the proposed tariffs being published in the *Canada Gazette* no earlier than late-April and sometimes as late as early-July of the same year. Prospective users then have sixty (60) days to file written objections and the Board can take several months to inform the parties of the objection(s) filed. In every case, the better part of the calendar year will have passed without any steps taken towards the substantive consideration of the proposed tariff. The Board’s procedures during this early stage of the proceedings should be reviewed as well, since the current timeframes are another contributing factor to why the Board’s decision-making processes take too long.

Requiring that proposed tariffs be filed further in advance of their effective dates could improve Board timeframes for certification of simple tariff renewals, where the collective society proposes little to no changes from the previous tariff and the proposed renewal tariffs are uncontested by prospective users. However, for opposed tariffs, a short period of time (such as the two additional months mentioned in the Discussion Paper) is highly unlikely to have much impact, if any.

¹ *Copyright Act*, RSC, 1982, c C-42, ss 70.12 and 70.191.

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.

The Act currently permits for the use of the copyrighted content at issue and the collection of royalties pending the approval of proposed tariffs in all cases where a previous tariff has been certified by the Board.² This should not apply to cases where there has never been a consideration by the Board and a determination of the fair and reasonable royalties (and related terms and conditions) for the targeted uses or activities (*i.e.*, proposed inaugural tariffs where no previous tariff exists) and Universities Canada strongly opposes any such change.

OPTION 10: Codify and clarify specific Board procedures through regulation.

All parties who appear before the Board are likely to welcome clarification on specific Board procedures common to most proceedings. However, the codification of specific Board procedures through regulation may be unwise and lead to future inefficiencies and problems given the lengthy time period required to amend regulations, as such procedures are bound to evolve and change over time. One only needs to look to the courts to see that it can take years to amend a court's governing rules and regulations to implement desirable procedural changes. Rather, additional clarification on specific Board procedures should come in the form of amendments to the Board's *Model Directive on Procedure*³ or the issuance of practice notices to the parties and the profession.

Universities Canada's comments on the specific measures listed in the Discussion Paper under this option are set out as follows:

(a) Statement of issues:

Universities Canada agrees that implementing a requirement for parties to file joint or separate statement(s) of issue at an early stage would be beneficial in streamlining Board proceedings and provide some focus for subsequent steps (particularly, the interrogatory process).

Even if the parties are unable to come to an agreement on a single joint statement of issues, the parties' respective statements would give the Board an overview of the issues that are of import to each party in a given proceeding.

(b) Interrogatory process:

Universities Canada supports the suggested changes listed in the Discussion Paper to create a more efficient interrogatory process and minimize the need to involve the Board at this stage. In particular, Universities Canada strongly supports the adherence by the Board and by all parties appearing before it to the principle of proportionality (as adopted by the Federal Courts) in the interrogatory process and in relation to Board proceeding generally.

² *Copyright Act*, RSC, 1982, c C-42, ss 68.2(3) and 70.18.

³ <http://www.cb-cda.gc.ca/about-apos/directive-e.html>.

In keeping with the principle of proportionality, Universities Canada strongly supports any changes that will establish or clarify that responses to interrogatories need only come from a representative sample of an association's members, rather than from all members.

(c) Simplified procedure:

Universities Canada agrees that the creation and use of a simplified procedure could create welcome efficiencies in the Board's decision-making processes in the circumstances noted in the Discussion Paper.

(d) Evidence:

In practice, many of the suggested measures in the Discussion Paper regarding evidence are already in use by parties and their experts appearing before the Board. For example, collectives and objectors have in the past arranged for joint surveys to be conducted, expert reports filed with the Board will already typically subscribe to the suggested content requirements listed in the Discussion Paper, and parties generally ensure that their experts are available to provide their testimony at the oral hearings. As a result, any codification or clarification of the suggested measures regarding evidence is unlikely to generate efficiencies that are not already being realized.

Regardless, the suggestion that the Board be permitted to appoint independent experts and any consideration of implementing this option must include at a minimum, an assessment of: (i) the potential adverse impact that it could have on timeframe of the Board's decision-making processes; (ii) how independent experts could be used in a way that ensures transparency and procedural fairness; and (iii) the potential overlap in so far as economic issues are concerned, between the Board's staff economists and independent economic experts retained by the Board.

(e) Confidentiality:

Universities Canada is of the view that the Board's current procedures with respect to confidentiality are functioning well and that no changes are needed in this respect.

OPTION 11: Stipulate a mandate for the Board in the *Act*.

Universities Canada does not oppose the stipulation of a mandate for the Board. If an explicit mandate for the Board is to be added to the *Act*, then the mandate should be expressed simply. It would be sufficient to stipulate that the Board must ensure that royalty rates and their related terms and conditions are fair and equitable for both copyright owners and users of copyrighted content. This would reflect the current widely accepted mandate for the Board, which has been recognized also by the courts.

Further, and as noted above, Universities Canada supports the adherence by the Board and by all parties appearing before it to the principle of proportionality as adopted by the Federal Courts. The codification of the application of this principle in relation to Board proceedings generally would be a welcome change and an exception to Universities Canada's general comment above that the codification of specific Board procedures through regulation may be unwise.

OPTION 12: Specify decision-making criteria that the Board is to consider.

Universities Canada does not support the stipulation of specific decision-making criteria that the Board would be required to consider.

The Board is a specialized economic regulatory body that will consider evidence and arguments that can vary significantly from one proceeding to the next. In its decision-making processes, the Board is assisted by staff economists and legal counsel, the parties' expert witnesses, legal counsel and representative, and any other evidence that is made of record and relevant to the proceeding at hand. Imposing a pre-determined set of criteria for the Board to consider could unduly constrain the Board's decision-making processes and result in inefficiencies if the Board is required to consider certain factors that may be potentially irrelevant in the circumstances.

OPTION 13: Harmonize the tariff-setting regimes of the *Act*.

Similarly with Option 6 discussed above, this option raises broader and significant public policy issues relating to the collective administration of copyright, which should be outside the scope of this particular consultation on possible reforms to the Board.

The harmonization of the tariff-setting regimes of the *Act* and a consideration of the positive and negative consequences of any such changes would be more appropriately raised in the context of the upcoming five-year Parliamentary review of the *Act*.