



**Submission by the
Canadian Association of Research Libraries (CARL)**

to

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

regarding

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

September 29, 2017

The Canadian Association of Research Libraries (CARL) represents 29 university library members and two federal government libraries. CARL provides leadership on behalf of Canada's research libraries and enhances capacity to advance research and higher education. It promotes effective and sustainable knowledge creation, dissemination, and preservation, and public policy that enable broad access to scholarly information.

As part of this submission, CARL would like to acknowledge and generally support the recommendations in the submission by the **Canadian Federation of Library Associations (CFLA-FCAB)**. The recommendations included in this document will affirm many of the points from their submission, adding additional points, reasoning and suggestions relevant to CARL member institutions.

Recommendations

- 1. The Board should encourage and support engagement by non-commercial and public interest stakeholders by offsetting expenses related to such interventions.**

The Board should provide opportunities for non-commercial and public interest stakeholders to intervene in Board proceedings. Interveners representing the public interest should be supported through a funding mechanism similar to that established by the Canadian Radio-Television and Telecommunications Commission.¹ This recommendation would facilitate engagement from individuals who are users of copyrighted works and are often subject to Copyright Board approved tariffs but do not have either a suitable method or the financial ability to provide information to the Board.

¹ See Telecommunications Act (S.C. 1993, c. 38) s. 56 and Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure (SOR/2010-277) ss. 60-70; Canadian Radio-television and Telecommunications Commission (CRTC) Government of Canada, "Guidance for Costs Award Applicants Regarding Representation of a Group or a Class of Subscribers," Information Bulletins, (May 17, 2016), <http://www.crtc.gc.ca/eng/archive/2016/2016-188.htm>.

2. Tariffs should only apply prospectively, or measures should be put in place to limit the length of time affected by retroactivity.

Section 1.2 of the *Consultation on Options for Reform of the Copyright Board of Canada* discussion paper states that the length of the decision-making processes at the Board was one of the major issues identified leading up to this review. These delays can have severe implications for user groups, as “they may create uncertainty in the marketplace by preventing users from knowing what uses will be covered by a given tariff or license set by the Board and at what cost.”²

CARL member institutions have been impacted by these slow decision-making processes. There are currently outstanding *tariff proposals* for provincial and territorial governments and for post-secondary educational institutions. The majority of these tariffs will apply retroactively when released. The outstanding tariffs for the post-secondary sector have been particularly problematic, as there are retroactive tariff proposals extending back to 2011.

To make the tariff process more tenable from both a cost and administrative perspective, CARL recommends that all tariffs apply prospectively when approved. At minimum, CARL supports the adoption of *Recommendation 8 and 9* from Section 2.3 the discussion paper. CARL further believes that regulations, or if necessary legislation, should require that no tariff can be retroactive for more than one year. This would be consistent with jurisprudence from the Supreme Court of Canada going back to 1954 and a recent comment from the Court indicating that retroactivity of Board tariffs could be in issue in future cases.³ These recommendations, designed to prevent or limit tariff retroactivity, would result in more stability for CARL member institutions.

3. All documents filed with the Board and matters relating to them should be made publicly available whenever possible.

As there is a presumption of openness in our judicial system, the Copyright Board should champion the “open by default” position and make all documents and related materials open to the public unless it can be clearly demonstrated that the “disclosure of a document would cause specific, direct harm to a person and whether that harm would outweigh the public interest in the document’s disclosure”.⁴ We therefore support the adoption of *Recommendation 10 e* from the discussion paper and would furthermore suggest that the Board be required to post all documents on its website in all of the matters before it, other

² Department of Innovation, Science and Economic Development, Department of Canadian Heritage, and Copyright Board of Canada, “A Consultation on Options for Reform to the Copyright Board of Canada” (Government of Canada, August 9, 2017), <http://www.ic.gc.ca/eic/site/693.nsf/eng/00158.html>.

³ *Maple Leaf Broadcasting v. Composers, Authors and Publishers Association of Canada Ltd.*, [1954] S.C.R. 624; *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615, fn. 2

⁴ Department of Innovation, Science and Economic Development, Department of Canadian Heritage, and Copyright Board of Canada, “A Consultation on Options for Reform to the Copyright Board of Canada.”

than documents or portions thereof ruled as confidential. In order to facilitate transparency and efficiency, all documents submitted to the Board should be in searchable electronic format.

4. Procedural improvements to the Board should be undertaken through regulation whenever possible.

Sub-section 66.6(1) and 66.91 of the Copyright Act would allow for the creation of a wide range of regulations that would improve procedures at the Board. CARL supports the use of regulation whenever possible. CARL therefore supports all *Recommendation 10* from the discussion paper, and would encourage using the regulation process to accomplish many of the other recommendations in the paper and additional improvements, including:

- A. The establishment of fixed deadlines as suggested in Recommendation 2. This should include deadlines for approval of any tariff, including deadlines for holding any hearing and for the rendering of any decision following a hearing.
- B. The implementation of case management and procedures for board proceedings, and particularly the imposition of a requirement that an applicant for a tariff be required to file “pleadings” at the outset. (*Recommendation 3*).
- C. The time requirements for the filing proposed tariffs (*Recommendation 7*).
- D. A requirement that all applicants for a proposed tariff be required to file adequate evidence of their membership and repertoire at an early stage of an application.
- E. There should be a presumption that interveners in Board hearings should not be required to undergo interrogatories.

The Board and members of CARL thank you for this opportunity to provide comments on behalf of Canada’s research library community.

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