Canadian Federation of Library Associations (CFLA-FCAB)

Comments pertaining to Consultation on Options for Reform of the Copyright Board of Canada (September 2017)

The CFLA makes the following recommendations:

The CFLA supports reforms to the legislative foundation in the *Copyright Act* for the Copyright Board of Canada.

1. The CFLA supports the creation of an explicit statutory mandate for the Copyright Board – one that focuses the Board on the public interest and the maintenance of fairness amongst the multiplicity of interests inherent in the copyright environment.

2. The CFLA believes that the public interest will be better served through the inclusion of a statutory process for intervenors before the Copyright Board and establishment of a system for making funds available to ensure a broad range of interventions.

3. The CFLA supports the enactment of a list of decision-making factors the Board must consider in its decision-making – but recommends it appear in the *Copyright Act* itself.

The CFLA is in favour of making certain substantive and procedural changes to the tariff process before the Copyright Board while retaining other important elements of the current statutory regime.

4. The CFLA supports amending the *Copyright Act* such that while a new tariff is pending before the Board, the previously ordered tariff will continue to apply to affected institutions and the new tariff, when ordered, shall only apply prospectively.

5. The CFLA believes that libraries and their institutions should be able to choose whether to initiate a relationship with a collective through contract, whether or not that collective has proposed a tariff (which will require amendment to current s 70.12), or to participate in a tariff process initiated by a collective.

6. The CFLA endorses the current regime both in respect of maintaining the distinction between the processes of the Board governing collectives under s 67 and those under s 70.1 and in so far as the *Act* supports the fact that literary collectives are not the exclusive representatives of the rights holders they represent.

7. Where a library or its institution is not using works or other subject matter in ways that lie within the ambit of the rights represented by a collective that has proposed a tariff, the CFLA recommends that the legislation governing the Copyright Board make it clear that such libraries are not required to provide evidence about their operations to any proceeding before the Board.

BACKGROUND:

I. The CFLA supports reforms to the legislative foundation in the *Copyright Act* for the Copyright Board of Canada.

1. The CFLA supports the creation of an explicit statutory mandate for the Copyright Board – one that focuses the Board on the public interest and the maintenance of fairness amongst the multiplicity of interests inherent in the copyright environment.

The CFLA believes inclusion of a statutory mandate for the Copyright Board, one that ensures its role in safeguarding the public interest, is a key necessary reform.[1] A survey of the Copyright Board's Annual Reports from 2009 to 2015 indicates that the Copyright Board does not currently consider itself an arbiter of the public interest[2]– and the CFLA believes that this needs to change.
Indeed, while the CFLA commends the insight in the *Consultation* itself that safeguarding the "public interest" is a function of the Copyright Board,[3] it agrees with the *Consultation* only if the "public interest" is construed more broadly than appears to be the case in the *Consultation* document. In the *Consultation* document the "public interest" appears to apply only to consideration by the Board of "written comments from anyone, including members of the public"[4] and to encompass only increasing "the availability of copyrighted content to the public."[5]

The CFLA recommends that the following statutory language be considered when modeling a statutory mandate for the Copyright Board:

- "safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada" [*Broadcasting Act*, s 3(1)(d)(i)[6]]
- "safeguard, enrich and strengthen the social and economic fabric of Canada and its regions" [*Telecommunications Act*, s 7(a)[7]]

The CFLA recommends, in this connection, that the following more purposeful type of language be included in legislating a mandate for the Copyright Board:

- "The [Copyright Board of Canada should perform its functions] in a flexible manner that … does not inhibit the development of information technologies and their application or the delivery of resultant services [and information] to Canadians" [adapted from the *Broadcasting Act*, s 5 (2)(f)].[8]

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[1] Government of Canada. *A Consultation on Options for Reform of the Copyright Board of Canada* (August 9, 2017); see http://www.ic.gc.ca/eic/site/693.nsf/eng/00158.html[*Consultation*], at p 17, Recommendation 11.
[2] See Copyright Board Annual Reports, accessed September 12, 2017; each Report mentions the "public interest" only twice – once as an historical note and a second time in relation to the responsibility of the Commissioner of Competition in respect of the Copyright Board under the *Copyright Act*.
[3] *Consultation*, see part 1.1(c) at p 5
[4] Ibid.
[5] Ibid.
[6] *Broadcasting Act*, SC 1991, c 11.
[7] *Telecommunications Act,* SC 1993, c 38.
[8] Supra, note 6.

The CFLA does not believe that sources such as the [EU] Collective Rights Management Directive are appropriate sources from which to draw when establishing a mandate for the Canadian Copyright Board. It indicates that its focus is "to help create innovative and dynamic licensing structures that encourage the development of legitimate online music services" [9] and lacks a public interest focus. Instead, because the Commissioner of Competition currently has an oversight role to play in the governance of the Copyright Board under the *Copyright Act*, Part VII,[10] the CFLA believes that a mandate for the Copyright Board should be consistent with the purposes of the *Competition Act*: the mandate of Canada's *Competition Act* includes not just economic and market goals but also a public interest focus "to provide consumers with competitive prices and product choices."[11]

2. **The CFLA believes that the public interest will be better served through the inclusion of a statutory process for intervenors before the Copyright Board and establishment of a system for making funds available to ensure a broad range of interventions.**

The CFLA believes it is important that the processes for intervention before the Copyright Board be legislated: the current information "guidelines" of the Board[12] are not well promulgated and are not adequate to the important role that intervenors should play before the Copyright Board. The Competition Tribunal, closely related to the Copyright Board through the relationship between the *Competition Act and Copyright Act*, noted above, has formally regulated detailed provisions for intervenors.[13] The Canadian Radio-Television and Telecommunications Commission and National Energy Board also have formal regulations in this regard,[14] both more detailed that the current informal procedures laid out by the Copyright Board.

The CFLA notes that the *Consultation* has adopted the non-statutory nomenclature of "creators."[15] The CFLA is concerned that this non-statutory language may blur the identities of various constituencies involved with copyright. The true "creators" under the *Copyright Act* are surely those who hold the moral rights[16] – and these individuals are not necessarily members of collective societies. While there are members of Canada's collectives who do hold the moral rights in works or performances, there are many more institutional members of Canada's collectives who do not. While the institutional members of Canada's collective societies may represent certain interests of creators, Canada's libraries have always uniformly and historically supported the creativity of all moral rights holders, of all authors, illustrators, musical composers, and performers.

It is the CFLA's position that the *Copyright Act* should recognize the multiplicity of interests involved with copyright. The CFLA urges the government to ensure that a formal, statutory mechanism exists through which libraries and their institutions, as well as all other information users, moral rights holders, and members of the public can have an opportunity to gain standing before the Copyright Board.

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[9] GOV UK, "Licensing bodies and collective management organizations," (11 April 2016), online: https://www.gov.uk/guidance/licensing-bodies-and-collective-management-organisations/. See The Collective Management of Copyright (EU Directive) Regulations 2016, 2016 No 221.

[10] *Copyright Act*, RSC 1985, c C-42, s 70.5.

[11] *Competition Act*, RSC 1985, c C-34, s 1.1.

[12] Copyright Board of Canada, "Model Directive on Procedure" (25 June 2010), online: http://www.cb.cda.gc.ca/about-apropos/directive-e.html.

[13] See *Competition Tribunal Rules*, SOR/2008-141, ss 42-55.

[14] *Canadian Radio-television and Communications Rules of Practice and Procedure*, SOR/2010-277, s 26 and *National Energy Board Rules of Practice and Procedure*, SOR/95-208,ss 28-31.

[15] See, for instance, the second sentence in the *Consultation* (supra, note 1), in the Overview, at p 3.

[16] Pursuant to the *Copyright Act*, supra, note 10, ss 14.1, 14.2, 17.1, 17.2, 28.1, and 28.2.

The CFLA urges the government to legislatively establish a funding mechanism as part of the regulation of intervenors before the Copyright Board, along the lines of the funding mechanisms already in place for intervenors before other Canadian statutory boards and tribunals.[17] It is only through such funding mechanisms that the Copyright Board of Canada will truly receive representative information to inform its decisions in the public interest.[18]

3. **The CFLA supports the enactment of a list of decision-making factors the Board must consider in its decision-making – but recommends it appear in the *Copyright Act* itself.**

Harmonization such as Recommendation 12[19] that expedites Board processes, yet retains fair and equitable royalty rates and properly addresses the public interest, is welcomed by CFLA. It would not only bring clarity to the Board's decision-making but would also assist all parties, including intervenors and objectors, to bring relevant evidence and submissions before the Board. It is important, however, that this list become part of the *Copyright Act* itself, rather than being left to regulation: the decision to provide for regulations in the *Copyright Act* has, in the past, often led to inaction. For instance, we still await regulations under s 41.21pertaining to Technological Protection Measures.

The CFLA is in favour of making certain substantive and procedural changes to the tariff process before the Copyright Board while retaining other important elements of the current statutory regime.

4. **The CFLA supports amending the *Copyright Act* such that while a new tariff is pending before the Board, the previously ordered tariff will continue to apply to affected institutions and the new tariff, when ordered, shall only apply prospectively.**

Adoption of Recommendation 9,[20] to allow for the use of the copyrighted content at issue and the collection of royalties pending the approval of tariffs in all Board proceedings, will lead to cost certainty for libraries and their institutions. This cost certainty would, in turn, do away with the necessity and uncertainty of the current library practice of projecting costs based on a possible tariff rate and setting aside funds based upon these projections without any certainty that the projected sums will be sufficient. Adopting Recommendation 9 would eliminate the financial challenges of a retroactive payment once a tariff is certified: for example, in 2009 school boards did not know how, or if, provincial education ministries would fund their retroactive payments to Access Copyright.[21] The certainty introduced by adoption of Recommendation 9 will streamline budgeting for users and their institutions, save on budget administration, and allow users and their institutions greater economic security when using repertoire materials while awaiting tariff certification.

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[17] See *The Environment Act*, SM 1987-88, c 26; *Natural Resources Conservation Board Act*, RSA 2000, c N-3; *Utilities Commission Act*, RSBC 1996, c 473.

[18] Uncertainty over the costs of litigation has been found in previous research to be a disincentive to potential intervenors; see The Public Law Project, "Third Party Interventions in Judicial Review: An Action Research Study" (May 2001), at pp 27-29, available at http://www.publiclawproject.org.uk/data/resources/35/ThirdPartyInt.pdf

[19] *Consultation*, at p 18.

[20] *Consultation*, at p 14.

[21] See *Canadian School Board Association Info Picks*, September 21, 2009.

5. **The CFLA believes that libraries and their institutions should be able to choose whether to initiate a relationship with a collective through contract, whether or not that collective has proposed a tariff (which will require amendment to current s 70.12), or to participate in a tariff process initiated by a collective.**

The CFLA see benefits through harmonization that would allow for *all* collective societies and their users to enter into agreements without Board involvement (Recommendation 6).[22] The process of negotiating these agreements presents the opportunity to foster mutual understanding and collaboration between users and collectives and to minimize the adversarial nature of relationships that is inevitably engendered by tariff proceedings.

6. **The CFLA endorses the current regime both in respect of maintaining the distinction between the processes of the Board governing collectives under s 67 and those under s 70.1 and in so far as the *Act* supports the fact that literary collectives are not the exclusive representatives of the rights holders they represent.**

The CFLA would like to see the distinction in processes between “s 67 collective societies”[23] and “s 70.1 collective societies”[24] maintained, as well as the characteristics of the collectives as either exclusive licensees for their rights holders or non-exclusive licensees for their rights holders. The current situation of non-exclusivity of rights holder representation that exists with Access Copyright and Copibec, Canada’s literary collectives, is of vital importance to libraries: libraries enter into numerous agreements directly with rights holders for access to the rights holders’ works. This is especially the situation with respect to digital works. Harmonizing all licences to be either exclusive or non-exclusive would be disruptive to current business practices across Canada[25] – and it would be unworkable for libraries and their partners, both preventing libraries from working with publishers to develop new digital products and creating barriers to digital licenses from intermediaries that offer aggregated content products to libraries and their patrons.

7. **Where a library or its institution is not using works or other subject matter in ways that lie within the ambit of the rights represented by a collective that has proposed a tariff, the CFLA recommends that the legislation governing the Copyright Board make it clear that such libraries are not required to provide evidence about their operations to any proceeding before the Board.**

Legislation governing the Copyright Board should make it clear that organizations, such as libraries, using works or other subject matter in a fashion not covered by a collective society’s tariff (or tariff application), should not be compelled to provide evidence before the Board, nor to respond to

[22] *Consultation*, at p 12.
[23] Sections 67-69 (*Copyright Act*, supra, note 10) cover collective societies for performance in public or communication to the public of musical works rights and communication rights.
[24] Section 70.1 (and following sections; see *Copyright Act*, supra, note 10) covers collective societies that operate licensing schemes in relation to a repertoire of: works of more than one author, performer’s performances of more than one performer, sound recordings of more than one maker, and communication signals of more than one broadcaster.
[25] Digital resources are licensed by libraries through contracts agreed to by library institutions and rights holders directly. Collective societies currently play no role in the licensing of digital resources by libraries. It is difficult to envision that rights holders would wish collective societies to have a role in their licensing of digital content with libraries.

interrogatories. Introducing legislative clarity on this point would clear up the ambiguity currently existing around the Board's ability to compel evidence from non-parties.[26]

About the Canadian Federation of Library Associations (CFLA-FCAB)

CFLA-FCAB is the national voice of Canada's library communities, representing provincial and territorial library associations across the country, as well as national and provincial sector-specific associations. We represent public, academic, and research libraries and the professionals who work in them. CFLA-FCAB exists to:

- advance library excellence in Canada;
- champion library values and the value of libraries; and
- influence national and international public policy impacting libraries and their communities.
- promote initiatives to advance reconciliation and understand Indigenous knowledge issues
- foster collaboration and alignment on copyright across library communities

[26] See Gilles M. Daigle and J. Aidan O'Neill, "The Evidentiary Procedures of the Copyright Board of Canada" in *The Copyright Board of Canada: Bridging Law and Economics for Twenty Years* (Cowansville QB: Editions Yvon Blais, 2011) at 49. See also *University of Toronto v Canadian Copyright Licensing Agency* (Access Copyright), 2014 ONSC 646 (Maranger, J.).