



29 September 2017

Copyright Board of Canada
Suite 800 - 56 Sparks Street
Ottawa, Ontario K1A 0C9

RE: Consultations on the Options for Reform to the Copyright Board of Canada

The Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC) is a legal clinic based at the Centre for Law, Technology & Society at the University of Ottawa's Faculty of Law in Canada. Founded in 2003, CIPPIC's mission is to contribute to public policy debates on technology law issues, ensure balance in policy and law-making processes, and provide legal assistance to under-represented organizations and individuals on matters involving the intersection of law and technology.

CIPPIC welcomes the opportunity to provide comments on the consultations regarding options for reform to the Copyright Board of Canada. Our primary purpose in responding is to promote reforms that would create a more expeditious, cheaper, and more efficient Copyright Board, one that operates with improved clarity, greater public participation, and a more proactive Board membership. These changes would foster innovation in the marketplace to the benefit of authors and users in Canada.

CIPPIC urges the Copyright Board of Canada to consider five reforms:

- (i) adopt shorter timeframes;
- (ii) implement case management;
- (iii) implement a streamlined evidentiary process;
- (iv) extend tariff length to 5 years and eliminating tariff retroactivity; and
- (v) allow for interveners in tariff proceedings.

We note that these suggestions in no way constitute a comprehensive recommendation for Copyright Board reform. In our view, there are many forms a revamped Board could take. There are many administrative decision-making bodies, both within and without Canada, from which the Board could model reforms. However, in our view, and based on our past experience with and observation of the Board's operations, these five considerations would improve the Board's ability to fulfil its mandate.

We observe that the copyright industry is a regulated industry that enjoys significant state intervention in the market to its benefit. Copyright is a Parliamentary grant. Both the collective structure and the tariff system are again state regulatory mechanisms that operate to the benefit of the copyright industry. As a regulated industry, copyright interests may operate under conditions in which the state may justifiably impose reforms to the Board's processes that benefit Canadians as a whole.

(i) *Enabling the Board to Deal with Matters More Expeditiously*

The procedures by which the Board deals with matters before it should expedite their resolution. Currently, matters take far too long to come to a resolution.

- Consider adopting shortened timeframes. Other regulated industries, such as telecommunications, operate under far stricter timelines set by their regulators.
- A procedurally streamlined evidentiary process would result in a much shorter timeframes by removing time-consuming and unnecessary activities. We particularly advocate a greatly truncated interrogatory system. We suggest that the Board is best placed to identify the kinds of evidence it requires to settle matters before it. A more proactive Board with a mandate to compel relevant evidence, and dispense with irrelevant and wasteful interrogatory proceedings, would prove a more effective and speedier decision-maker.

(ii) *Implement Case Management of Board Proceedings*

Case management is a tool by which the Board could accelerate its process, cut down on unnecessary costs and fulfil its mandate in a more efficient manner. Case management is now a common process in Canadian courts and tribunals.

- In a managed system, proceedings are supervised by a case manager which would allow for the expeditions prosecution of proceedings before the Board while being attentive to the needs of the Board and the parties.
- Managed proceedings would also allow for improved dispute resolution opportunities. Some matters could be resolved before having to be heard by the Board. The case manager has authority to select the best course of action in each case. Mandatory mediation is an option here that could sharpen the issues before the parties at an early date.
- The Board should be proactive by choosing the extent and reach of evidence exchanged so that it be proportionate and designed for a speedy resolution.

(iii) *Preventing Tariff Retroactivity or Limiting Its Impact by Other Means*

CIPPIC would like to highlight the importance of certainty in the Canadian marketplace. Canadians have long complained of the slowness of new and innovative content services coming to market. Tariff retroactivity creates uncertainty since it imposes indeterminate liability for new service providers and innovators in the marketplace. This uncertainly hurts all Canadians – innovators and service providers, who cannot come to market under such conditions; authors and copyright owners, who cannot get paid for foregone use of content; and users, who are deprived of innovative services enjoyed by citizens of foreign countries operating under different conditions.

There are several mechanisms available for approaching the problem. Liability under a tariff could begin once a tariff is certified to promote certainty so that service may know what their costs will be. Mediation or an expedited proceeding could be used to set an interim tariff that is binding until the decision is reached. Whatever option is chosen should establish the Board as an actor that promotes innovation in content delivery in Canada.

(iv) Reducing the Number of Matters Coming Before the Board Annually

CIPPIC recommends extending the length of tariffs from 3 to 5 years. A prolonged tariff with the implementation of case management and a revised evidentiary process with streamlined procedures would reduce the number of cases annually and promote better certainty in the marketplace.

(v) Allowing Interveners in Matters Brought in Front of the Board

The Board's current practice is to permit only tariff applicants and objectors to participate in tariff proceedings. However, tariff proceedings are onerous. Many organizations and individuals with legitimate interests in copyright lack the resources to participate before the Board. Indeed, the view of many is that the interrogatory process is intended to weed out participants to streamline Board proceedings.

The Board's position on participation deprives it of the benefit of many worthwhile voices. Many organizations might offer the Board compelling legal arguments that would assist the Board in reaching decisions on important points of law, but have nothing to contribute on the evidentiary front or on the merits of the case before the Board. Courts have long admitted public interest interveners at all levels of the Courts. CIPPIC has made telling interventions in cases at first instance, on appeal and in the Supreme Court of Canada. However, it has never been able to offer its assistance to the Copyright Board.

In accordance with the Board's mandate to resolve disputes and protect public interest, allowing public interest interveners would enable the Board to better safeguard the public interest while also efficiently administering matters before it.

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We thank you for the opportunity to provide you with these comments. We hope you find them helpful.

Yours truly,

A handwritten signature in black ink that reads "David Fewer". The signature is written in a cursive, slightly slanted style.

David Fewer
Director, CIPPIC