



**A Consultation on Options for Reform to the Copyright Board of Canada
Submission by the Association of Canadian Publishers
September 2017**

Introduction

The Association of Canadian Publishers (ACP) represents 115 English-language book publishers from all ten provinces and Nunavut. Our members are independent businesses, owned and operated by Canadians. Along with our francophone counterparts, we publish 80% of the new books written by Canadian authors each year, contribute to local economies, and are an integral part of Canada's cultural industries. Our members publish in print, digital, and audio formats, and sell into a variety of markets, including K-12 and post-secondary education.

ACP is a member of Access Copyright, the Canadian Copyright Licensing Agency. Access Copyright counts independent Canadian publishers among its affiliates, and licenses the copying of their work to educational and other institutions. Though independent publishers do not have a direct relationship with the Copyright Board of Canada, through our affiliation with Access Copyright the operations of and decisions made by the Board have a direct impact on our businesses. The Board continues to play an important role in balancing the needs of content creators and producers with those of consumers, and we appreciate the opportunity to provide input as options for the Board's reform are considered.

ACP endorses the recommendations put forward by Access Copyright to the consultation, and offers the following context based on the experience of Canadian independent publishers.

Independent publishers and the Copyright Board

Copyright is the foundation on which the creative economy is built, and is an essential policy tool that protects the intellectual property rights of publishers and creators, while allowing Canadians ready access to the content they rely on for work, entertainment, and education. Independent publishers invest financial and human resources into the publication of new books each year. Some are purpose-built educational texts for Canadian curricula across the country, while others are trade, scholarly, children's, and literary works that are included on course reading lists or distributed for instructional use. In aggregate, hundreds of millions of pages are copied by Canadian K-12 and post-secondary institutions annually, providing educators and students with valuable resources that support curriculum delivery and propel academic achievement. These copies often serve as substitutes for finished books, which provide educators and students with the flexibility to select relevant materials to support



instruction and learning, but also impact publishers' ability to generate revenue through retail and wholesale channels.

Since the introduction of fair dealing for education to the *Copyright Act* in 2012, educational copying has gone largely uncompensated as both K-12 and post-secondary educational institutions have unilaterally adopted permissive copying guidelines. Royalty distributions to Access Copyright affiliates have declined by 80%—more than \$50 million in collective licensing royalties alone since 2013. In July 2017, the Federal Court of Canada found the education sector's copying guidelines to be unfair in both their terms and their application, and established that tariffs set by the Copyright Board are mandatory. This affirms the important role the Copyright Board plays in ensuring fair remuneration to Canadian rightsholders, and the need for effective mechanisms for enforcement.

ACP's areas of concern with the current operations of the Copyright Board fall under two areas:

1. Timelines & Process

For various reasons, the Copyright Board's tariff approval process has become very slow, with decisions made several years after the period to which they relate. The uncertainty surrounding this process makes it difficult for independent publishers to predict when, how much, or even if they will be paid for the institutional copying of their work. This degree of uncertainty around tariff timelines and rates acts as a barrier to innovation and competitiveness in the Canadian marketplace. Delays make it challenging for publishers to plan investment in new publishing projects, anticipate human resource needs, and respond to the emergence of the new technologies that are critical to success in today's publishing market. The lengthy and unpredictable process inevitably leads to delays in paying royalties on educational copying to Canadian authors, negatively impacting their economic well-being.

ACP supports Access Copyright's recommendation that the Copyright Board's process be refined through the introduction of new tariff hearing procedures. These procedures should establish clear rules for various steps in the tariff process, and include new proactive case management rules.

2. Enforcement

The ability to enforce the Board's decisions also challenges independent publishers' ability to collect revenue owed to them in the form of tariffs established by the Board. This results from inconsistency in the remedies offered to collective societies by the *Copyright Act* itself. Because it does not fall under the same regime that applies to SOCAN/Re:Sound, Access Copyright does not have the same ability to enforce the tariffs established by the Board. Though this is a function of the *Copyright Act* and not the



Board itself, because the *Act* empowers the Board, this issue is worth exploring here in anticipation of the upcoming parliamentary review of the *Copyright Act*.

In the absence of meaningful remedies, users have few incentives to pay tariffs awarded to Access Copyright. Despite clear direction from the courts that tariffs are mandatory, schools at both the K-12 and post-secondary levels have asserted their ability to “opt-out” from tariffs set by the Board. The inability for Access Copyright to collect tariffs that are certified by the Board in turn limits the revenue returned to rightsholders. As it stands, the legal remedies available to Access Copyright are costly, and divert revenues that could be distributed to rightsholders to legal and administrative expenses. Harmonizing the remedies for collective societies under the *Act* would level the playing field among Canada’s creative industries, and allow more revenue to flow to publishers and other rightsholders, enabling them to reinvest in their businesses.

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