Speech given by
the Honourable Justice William J. Vancise
Chairman of the
Copyright Board of Canada

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I am happy to be here at your summit to discuss some of the issues that have been identified in the program and to hopefully clear up some misconceptions about the Board and its role in setting rates for the use of copyright. Some of you will remember that I spoke to the annual convention of the Canadian Association of Broadcasters in Vancouver in November 2006 and tried to do a number of things: first to dispel a number of myths – the greatest among them being that the collectives received favored treatment; and, second, suggested how you as broadcasters could maximize your effectiveness before the Board. If you are interested, you can find that speech on the Board's web site.

Generally speaking, the adoption and use of new media are rapidly increasing as is the use of copyright protected content. This rapid technological advancement has enabled copyright owners to seek new ways to maximize the monetization of their interests in this material in the new media such as the use of content on the Internet. We are currently dealing with requests for tariffs for the use of protected content on the Internet. The Board has already rendered decisions with regard to online music services. Its decision pertaining to streaming, podcasting, etc. is under advisement.

Well, what are we? The Board is an economic regulator that establishes, either mandatorily or on the request of the parties, tariffs to be paid for the use of copyright works when they are administered collectively. The collectives under the mandatory regime are: SOCAN, NRCC, CPCC, Retransmission and Educational rights. The optional regime includes SODRAC, CMRRA and CBRA.

The Board does not set policy. It sets rates. The CRTC, on the other hand, sets broadcast policy and the decisions it makes conform to that policy. It is a top down policy decision- making exercise. As the Chairman stated recently, the policy is set and there is a certain degree of predictability to the decisions the CRTC renders as a result of the policy. The Board, on the other hand, has a responsibility to establish rates in response to requests by the collectives and does so based on the economic evidence that is provided at the hearing. The result is that a policy emerges as the decisions setting the rates are made. In other words, the Board makes policy on a bottom up rather than a top down basis.

It also sets the terms and conditions of a licence when the collective society and a user cannot agree under the terms of the arbitration regime provided for in the *Copyright Act*. To date there has only been one arbitration (MusiquePlus v. SODRAC).

The Board also issues licences pursuant to the provisions of the *Act* for the use of copyright material when the owner cannot be found.

It is estimated that the tariffs set by the Board are worth over $300 million annually.

A comparison between the CRTC and the Board as well as the departments of Industry Canada and Canadian Heritage is interesting. The Board does not have a policy mandate unlike the other three. The Board and the CRTC are very different in a number of ways. The CRTC deals only with broadcasters and telecoms. The Board, on the other hand, sets tariffs that affect thousands of copyright users, cable operators, direct-to-home satellite, pay audio services, satellite radio operators, ringtone suppliers, iTunes, restaurants, bars, sports teams and the list goes on.

We are small – 13 employees. The CRTC is big. The chair of the CRTC, Konrad Von Finkenstein, is quoted as saying that he has an army behind him. I have a squad.

The CRTC has the power of life and death over the broadcast industry. It giveth and it can taketh away!

The Board regulates the price and sets the tariff for a few creative inputs like music. In passing I note that inasmuch as some broadcasters complain about the amount of the tariff for the use of music, the Board did not set the price CTV paid for the copyright of the theme to Hockey Night in Canada!

The jurisdiction of the CRTC is wider than the Board's and its intervention and orders can have an enormous impact on copyright holders and users, for example in relation to Canadian content requirements, Canadian programming expenditures, the admissibility of foreign signals for distribution in Canada, etc.

The Board operates under the *Copyright Act* which reflects international agreements based on the notion of national treatment. The *Act*'s underlying perspective is pluralistic and universal which is why it is so difficult to update.

The *Broadcasting Act*, on the other hand, reflects a nationalistic perspective. Its objective is to promote national cultural policy goals. It has an industry regulatory role.

The Board does not regulate the industry. It functions as an administrative tribunal and sets rates based on the economic evidence which the parties present.

It is worth noting that in the new media context, the term broadcasting in the *Broadcasting Act* and communication by telecommunication in the *Copyright Act* does not mean the same thing. Thus, there may be some regulatory overlap between the Board's and the CRTC's jurisdictions. Whatever the CRTC does in the new media environment legally cannot be, and from a policy point of view cannot be seen as legitimizing matters that are governed by copyright law. CRTC fees are not based on or calculated as a result of copyright. Copyright permission must be obtained in advance of use.

Permit me to say a word or two about the cooperation between the CRTC and the Board. When the CRTC decided to change the way in which it licensed small systems, it consulted the Board to make sure the intended changes would not have unintended consequences on the retransmission regime.

The Board and the CRTC have had discussions regarding the conduct of hearings including how to deal with confidential documents. The Vice-Chairman has recently served on the CRTC's Advisory Committee on New Media. There was consultation between the CRTC and the Board with respect to new media in relation to the Library and Archives Digital Information policy. Thus, even though we have different mandates, there is cooperation on matters of mutual interest.

In so far as cooperation with the departments of Industry Canada and Canadian Heritage are concerned, I can tell you that we were not consulted with respect to Bill C-61 and we were not asked whether the new rights created would have a financial impact on the Board. There has been no consultation.

Let me say a word about the value of rights. The tariffs are created by reason of a statutory regime that provides exclusive economic rights to copyright owners and requires users to seek a licence. The broadcasters contend that the Board does not take into account that they have to pay for multiple rights and as a result pay disproportionally higher fees. We partially agree, but there are reasons.

First, section 90 of the *Copyright Act* provides that the creation of neighbouring rights could not be used to justify lower rates for incumbent rights holders.

Second, the Board considers that when Parliament creates a right it must be worth something.

Third, the Board does however consider the ability to pay which can be used to reduce the amount that would otherwise be a fair and equitable tariff.

The broadcasters have in the past requested that in calculating the tariff the Board takes into account their contributions to the music industry. The Board did not and does not agree because this would be to take into account public policy in our tariff decisions. The tariffs are set because the *Act* creates rights. It is the CRTC that decides whether or not to impose contributions to Canadian culture and music as a condition of licence. One wonders whether the CRTC could choose to take into account the royalties paid by broadcasters when setting the conditions of licence.

The CAB and the broadcasters contend that they are burdened with excessive multiple tariffs. That may be so and the Board can use other means to alleviate this burden. For example, the CAB recently applied for an order consolidating the proceedings in the commercial radio tariffs. The Board granted the order consolidating the request for tariffs filed by a number of collectives (SOCAN, NRCC, etc.) over the strenuous objections of the collectives. This is the first time with regard to Commercial Radio that the communication and reproduction rights will be heard at the same time and where all the collective rights will be considered. The result is that the tariffs of six collectives[1] will be considered at one hearing:

- All issues will be considered at one hearing;
- The CAB will be able to argue that music is a single input;
- The Board will be able to consider the overall impact of all the tariffs on the broadcasters;
- The Board has the option to select, if appropriate, a single rate base tariff.

Consolidation will permit a reduction in cost. For example, the Board ordered that the collectives agree on one set of interrogatories to be sent to the CAB rather than 6.

The Board also consolidated the hearing of the SOCAN, NRCC and CSI in Satellite Radio.

Thank you.

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[1] SOCAN, NRCC, CSI, AVLA, SOPROQ and ARTISTI (two umbrella organizations: CSI representing two collectives – CMRRA and SODRAC – and NRCC which represents five collectives)