

Copyright Board
Canada



Commission du droit d'auteur
Canada

CANADA

**Speech delivered by
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The Copyright Board of Canada: Which Way Ahead?

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Introduction

Let me begin by acknowledging the invitation that I received from Professor Gendreau to participate in this conference regarding the Copyright Board. I am delighted to see a number of people here who either appeared before me as counsel or as expert witnesses during my tenure as Chairman of the Copyright Board.

Let me state at the outset that the thoughts expressed in my presentation are mine and don't necessarily represent the views of the Copyright Board.

What is the theme of this conference? The theme is to examine the structure, decision-making process, and future of the Copyright Board of Canada, and propose and consider recommendations for its reform on the basis that the Board is broken and needs to be fixed.

Who decided that a reform is needed? Who are these parties and where did the impetus come from? What was found to be broken and in need of a reform?

I think it is important to make a diagnosis before talking about remedies. What is the actual problem, if any? If there is one, at what stage in the process is it?

Criticism

Complaints about the Board's processes were voiced as far back as 2005 when the Board certified a tariff in Commercial Radio in which the royalty rate payable to SOCAN was increased from 3.2% to 4.2% of advertising revenues, a 31% increase, and Re:Sound's rate was increased from 1.44% to 2.1%, an increase of 46%. The screams from the Canadian Association of Broadcasters could be heard in Regina. The association issued a press release, stating that: "Because this panel of the Copyright Board acted in such an undisciplined manner, there is now a clear and immediate need for the Government of Canada to rein in this renegade to ensure it complies with its legislated mandate."

The broadcasters went even further by trying to convince the then Minister of Industry to adopt regulations giving directions to the Board and to establish criteria for setting copyright tariffs. The Government, in my opinion wisely, resisted the plea of the broadcasters.

At that time, collective societies were outraged that CAB would approach the Minister and thought that it was totally unacceptable, especially given the Copyright Board is an independent tribunal. It is rather ironic that some of the same collectives who criticized CAB's actions might be tempted to adopt similar approaches, but this time, they hope, to their own advantage.

More recently, these issues have publicly resurfaced. For instance, in an article written by Professor Michael Geist in the May 17, 2013 edition of the Toronto Star entitled: "It's time to admit the Copyright Board is broken", Geist wrote that: "The Copyright Board has seemingly shifted from neutral arbiter to self-appointed copyright collective guardian with little regard for Parliament and the Supreme Court of Canada."

This general theme of the necessity of reforming the Board has been later taken up in a number of other public fora such as blogs, press releases and trade periodicals. Many of these comments

have come from stakeholders who are not satisfied with recent Board decisions: the Re:Sound Tariff 8 decision dealing with Internet music streaming services, and two other decisions dealing with Access Copyright Tariffs for the reproduction of literary works in Governments and in elementary and secondary schools.

As you can see, certain complaints appear to be driven not by principle but rather by that old adage of whose ox is being gored. To this end, they attempt to “orient” and influence the decisions of the Board. As an example, Music Canada (formerly CRIA), in response to the Board’s decision in Re:Sound Tariff 8, launched a full-court public relations exercise. Not only did it attack the Board’s credibility in this media campaign but it also sought the aid of the general public to write to their MPs to generally support policies that, it alleged, would protect Canadian culture.

In fact Music Canada went so far as to initiate a letter-writing campaign directed at the new Chairman of the Copyright Board arguing that the decision in Re:Sound Tariff 8 was wrong and imploring him to consider how the “Copyright Board can facilitate the prosperity of Canadian cultural businesses rather than impede it.”

Let me say that I found it completely unacceptable and totally inappropriate for such an association to lobby the Chairman of the Board, an independent quasi-judicial tribunal—and I am certainly not alone in this view. It showed a lack of respect for the institution. The proper forum for dealing with a decision that Music Canada’s clients don’t like is to take it to judicial review. I can go on at great length on the lobbying efforts of Music Canada but I think you get the picture. The real reason for the outrage is not so much its concern for the purity of the process or consistency in decision-making but rather the fact that Music Canada doesn’t like the tariff. It’s a question of whose ox is being gored.

This brings me to Access Copyright, another organisation that is unhappy about some of the recent decisions of the Board as mentioned previously. This led Access Copyright to state in its latest annual report that: “In the Provincial – Territorial tariff decision and recent K-12 decision, the Copyright Board’s troubling opaque assessments led to outcomes that are simultaneously unfair for rights holders and impractical for users,” although I don’t think Access Copyright speaks for users. The annual report went on to say that these decisions highlight the systemic dysfunction in the Canadian copyright landscape and highlight the need for legislative reform. Once again what matters here is whose ox is being gored. This time it is the ox of Access.

Interestingly enough the one who took Access Copyright to task is Michael Geist. In his blog of May 26, 2015, wherein he opines that “the solution to its problems does not lie in further litigation nor in making claims based on what it would like the law to be. Rather, it comes from rapidly changing its business model to reflect what Parliament, the Supreme Court, and now the Copyright Board have ruled with respect to fair dealing.”

I am under no illusion, and I will return to this later, there is a concern, a valid concern about how long it takes the Board to render decisions. When one alleges however that it is the responsibility entirely of the Board for there to be a 3- or 4-year period from the time there is a proposal for a tariff and a decision is misleading. As Professor de Beer has pointed out, it frequently takes more than 3 years from a tariff proposal until the time the matter is ready for a hearing by the Board. The parties themselves, from both sides, bear a responsibility to bring the

matters before the Board in a timely fashion.

It would also have to be determined what the “normal” amount of time would be for perfecting a file, having regard to all the particular characteristics of the Board’s various responsibilities, with tariff certification being just one among many others. It would be appropriate to gauge the scale of the task in light of the resources available. On average, the Board certifies over 70 tariff units annually. This volume alone could justify a marked increase in current resources.

Before I get into a description of the various initiatives that have been put in place to address the issues as they relate to the Board’s processes and operations, I would like to stress the importance of establishing a distinction between two different sets of regulation-making powers provided for in the *Act*. Section 66.91 deals with regulations that the Governor in Council may make, to issue policy directions to the Board and establish general criteria to be applied by the Board or to which the Board must have regard. The Board has nothing to do with this power which falls entirely under the initiative of Government, if it sees fit. This power does not target or address any of the issues that are related to the operations of the Board and the efficiency of its processes.

It is rather pursuant to section 66.6(1) that the Board may, with the approval of the Governor in Council, make regulations governing its own practices and procedures. This is a fundamental point. When it comes to its procedures, it is up to the Board and no one else to determine whether such regulations should be adopted, and for what purpose.

Initiatives

There are currently many people, far too many in my opinion, involved or having a say on how to make the Board more efficient. There are also too many conflicting initiatives currently underway, or recently undertaken. I will address some of them in turn.

First, the Board has put in place a Working Committee to look into the operations, procedures and processes of the Board so as to make them more efficient and more productive. In its first report, the Committee was able to produce a number of recommendations in respect of two aspects of the Board’s procedures, namely the identification and disclosure of issues to be addressed during a tariff proceeding, and the interrogatory process. Public consultations were also held regarding these recommendations. It is noteworthy that among the members of the Working Committee, and the comments received in public consultations, not only was there no consensus, but there were also many contradictions on the solutions to bring about. This was the result of the very nature of the composition of the members of the working committee comprised of eight counsel representing the interests of both rights holders and users. The Board has yet to respond to these recommendations, deciding instead to hold off so that it might benefit from parallel initiatives taken by the two Departments responsible for the copyright legislation.

Second, the House of Commons Standing Committee on Canadian Heritage decided to undertake a review of the Canadian music industry which according to it, has been profoundly affected by the digital revolution. Its report was tabled in June 2014. The first recommendation of the Committee dealt with the Copyright Board, asking the Government of Canada to examine the time that it takes for decisions to be rendered by the Copyright Board of Canada ahead of the upcoming review of the *Copyright Act* in 2017 so that any changes could be considered by the Copyright Board of Canada as soon as possible.

Third, in June 2015, the then Minister of Industry, the Honourable James Moore, wrote to the new Chairman of the Board, Justice Robert A. Blair, to invite the Board to consider, within its existing resources, measures that could help further streamline its processes, as well as reduce the time it takes to issue decisions.

Fourth, two studies were commissioned by the Departments of Canadian Heritage and Innovation, Science and Economic Development. We have the study of Professor de Beer and the study of Professor Daly.

The empirical study conducted by Professor de Beer is useful in the sense that it sets out timelines from the initial proposal for a tariff to the final rendering of a decision. It is useful by reason that it clearly indicates that the majority of time taken up from proposal to decision-making rests with those people proposing and objecting to a tariff.

The report of Professor Daly deals elegantly with matters of administrative law in responding to the request from the Departments as to how the Board “can improve its tariff setting process to bring it in line with best practices in administrative decision-making.” He worked on the assumption that no additional funding would be made available to the Board. He states that the goal of his report is to provide the Copyright Board with additional tools that it can use to improve the efficiency of its decision-making process. He goes on to note that tariff-setting delays might be due in part at least to the attitudes and expectations of those participating in the process. He makes 5 recommendations.

The report’s proposed solutions for better managing our process are definitely interesting, but in certain cases they risk working against the objectives for streamlining procedure. The additional procedural steps suggested also raise resource issues. Moreover, we must emphasize that the Board’s procedure is, in fact and practice, already governed and structured through a variety of tools, notices and ad hoc orders. It is tailored to the main procedural steps established by the *Copyright Act*.

With respect to recommendation 1 of the report, the awarding of costs in a regulatory proceeding as distinct from a trial or other adversarial process is not only impossible but not helpful. To take an obvious example, should Access Copyright be punished in costs in both Government and K-12 because it did not achieve the amount of the tariff that it requested or should it receive costs on a lesser scale because it achieves only a minimal amount of what it requested. The Board’s role is to set a tariff that is fair and equitable both for the right holders and the users. There are no winners and no losers. In my tenure at the Board, I can hardly think of a situation that would have warranted awarding costs. The legal community that practices before the Board acts in good faith, representing their clients’ interests vigorously. There may be at times examples of “remedial overreach” or expressions of “litigation culture” but this does not warrant costs.

With respect to recommendation 2, as to formalising procedural rules, only 2 of the 15 stakeholders recommended it during the 2015 public consultation on the Report of the Working Committee on Two Procedural Issues. In addition, recommendations 2 and 3 (retain the Model Directive) in my opinion appear to be somewhat contradictory.

Recommendation 4, calling for cultural changes, is probably best answered by looking at what happened when the Board requested parties who regularly appear before it to come together to

make the suggested changes to improve the efficiency of the Board, in the form of a Working Committee. Without being too critical, each side chose to advance suggestions which would advance the interests of their clients as opposed to looking at the process as a whole.

With respect to recommendation 5, when doing a comparative analysis, it is crucial to go beyond the simple administrative steps involved in each process and try to assess the burden associated with the quantity and complexity of the issues a tribunal has to deal with.

I would be the first to acknowledge that there are perhaps ways to streamline the process but most of the suggestions that I have seen so far are either impractical or not possible given the current structure of the Board. Take case management and/or pre-hearing conferences for example. It would seem to me that all this would do is to increase the complexity and expense of the process without achieving any predictable shortening of the timelines that it takes to render decisions.

As for the Model Directive on Procedure, it is designed to facilitate the hearing of all matters on a case-by-case basis in order to deal with complexities as they arise. What is required is the cooperation of those parties who regularly appear before the Board requesting a tariff or objecting to the tariff to realistically assess their positions and seek out the relevant and necessary information to enable the process to proceed expeditiously. This is a significant aspect of the practice before the Board. Each case is governed by a tailored schedule agreed upon by the parties.

Board's Challenges

Before addressing the Board's challenges, it is important to make a brief summary of legislative changes that were made over the years to the *Copyright Act* because they are not generally understood.

The legislative framework of the Board has changed dramatically over the years. The Board was created in 1989 by the Phase I of the modifications to the *Copyright Act* as the successor of the Copyright Appeal Board that had been in existence since 1936.

A second major phase of amendments to the *Copyright Act* was adopted in 1997, as Bill C-32. These amendments significantly expanded the Board's mandate and responsibilities, which gave the collective societies the option of negotiating a license agreement with users or to file a tariff. Since this new provision was in place, the Board has dealt with the: Reproduction of Musical Works; Reproduction of Literary Works; Reproduction of Sound recordings and Performer's Performances; and Media Monitoring. As part of this second phase, the Board also dealt with the new neighbouring rights, the private copying regime, and the educational rights.

A third major phase of amendments, the *Copyright Modernization Act* (Bill C-11), came into force in November 2012. By adding new rights and exceptions, this third phase of amendments further expanded the Board's mandate and workload. Among the new rights and exceptions introduced are: the new distribution and making available rights; the addition of education, parody and satire as allowable fair-dealing purposes; and the exceptions dealing with non-commercial user-generated content, reproduction for private purposes, copying for the purpose of time-shifting, backup copies, ephemeral copies made by broadcasting undertakings and certain

activities of educational institutions.

As you can see, ongoing amendments to the *Act* continuously add to the legal and policy issues the Board must address and take into consideration. In addition, decisions of the Federal Court of Appeal and the Supreme Court of Canada have significant bearing on the Board's mandated activities now and for the future. For instance, there have recently been eight copyright decisions of the Supreme Court (two in 2004, five in 2012, and one in 2015), all but one triggered by Board decisions.

In addition, the Board must face the following key challenges:

Balancing multiple interests: The Board's role includes maintaining a balance in light of the interaction of a plurality of interests emerging from the community of rights holders and the various categories of users and consumers of protected content, while taking also into account the public interest. These are known as polycentric interests.

Volume and complexity of files: The volume and complexity of files which the Board is required to deal with are all too often ignored and underestimated.

Technological, economic and commercial changes: The increased role of the Board can also be explained by the advances in information technology, which have led the economic sectors of intellectual creation to make copyrights an important driver of growth and a primary focus of investment for intellectual property.

New business models: Information technology facilitates the launching of new business models and new ways of consuming cultural products, which further increases the complexity of the files before the Board.

In addition, the Board is faced with Regulatory challenges. This situation is clearly illustrated in Professor Paul Daly's comments on the Supreme Court's most recent decision concerning copyrights, in *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*:

The Copyright Board, then, is not simply an adjudicative body setting objective rates based on submissions from interested parties but has to play a proactive policy-development role in analyzing the effects of new technology on the creative process.

He also said that "*Rothstein J.'s analysis turns the Copyright Board into something of a technological traffic cop.*"

In reality, the Board has in fact become a tribunal of first instance for copyright-related matters. All the major principles of copyright law articulated by the Supreme Court and several of the new provisions resulting from the reform of the *Act* in 2012 are addressed by the Board. As previous Board General Counsel Bouchard noted one day, the organization that does more copyright law in the country is the Copyright Board.

Procedural challenges: Finally, let me say a word about the uncertainty in the area of judicial review. I have written at length on this subject for over 20 years. Never has the judicial landscape been so uncertain by reason of the recent decisions of the SCC and the FCA.

Normally, the Board is entitled, as an expert tribunal, to deference in relation to findings of fact and the reasonableness of its decisions. In addition, it enjoys discretion over the power to establish its own procedure. The recent *Alberta* decision of the SCC put the former in question and the decision of the FCA in *Netflix v. SOCAN* brings the Board's discretion on procedural matters in doubt.

Professor Daly remarked on this in his blog, opining that as a result of the recent *Netflix v. SOCAN* FCA decision, "the Board should usually be very accommodating to new parties, for fear of being second-guessed by the courts. This can only lengthen the Board's tariff-setting process and provide incentives for parties to wait on the sidelines, lie in the weeds, before joining in at the most opportune moment for them."

Some of those who make a lot of noise about how long it takes for a decision to be rendered might not have the full knowledge of what goes into the decision-making process.

The extra volume and complexity of files was addressed during the review of the Canadian music industry by the Standing Committee on Canadian Heritage in 2014. For instance, in his complementary report to the June 2014 report of the committee entitled *Review of the Canadian Music Industry*, the Honourable Stéphane Dion, on behalf of the Liberal party of Canada, noted that:

The Copyright Board of Canada seems overwhelmed by the number and complexity of the cases it must address. The Board must face a huge workload and constantly analyze complex and massive expert reports dealing with legal, economic and technical issues. Although this is not only a resource issue and the Board's modus operandi must also be scrutinized, it is clear that a serious study of the means presently available to the Board must also be included in the Standing Committee's recommendation.

As indicated by Mr. Claude Majeau, Vice-Chairman and CEO of the Board, in his presentation of May 5, 2016, before the Standing Committee on Industry, Science and Technology:

"The Board is in full agreement with this recommendation. The problem with the time it takes for the Board to render its decisions could be fixed relatively easily by providing the Board with the necessary resources to adequately deliver its mandate. That being said, the complexity and importance of the issues imply however that no matter how many staff we have, the Board will always have to take the time required to fully assimilate and analyze the complex evidence, and to write a decision accordingly. But providing the adequate resources for the Board would contribute to reduce the decision-time dramatically."

If you ask me "what would the Board do with the additional money and resources?" – It would hire more lawyers and more economists to be able to assign one lawyer and one economist to each file to see it through to completion. Given the volume of the work that exists now that is not possible. I for one have experienced difficulty and frustration in attempting to advance files of which I was seized because the economists and lawyers assigned to my file were frequently co-opted to deal with more urgent matters – such urgent matters as respond as dealing with 400 interrogatories filed by one party or another which had been objected to by the other side. As just one example there are many others.

In my final message as Chairman of the Board in the 2013-14 Annual Report to Parliament, I stated quote “During my tenure the workload of the Board has increased substantially, as evidenced by the value of all tariffs certified by the Board which is now well over \$400 million with no commensurate increase in funding. The processes leading to decisions have become more complex to manage as Board staff has been called upon to deal with an increasing number of requests to settle disputes over evidentiary matters”. I then continued, “We as a Board strived to render decisions in a timely manner in a context of an ever-increasing number and complexities both economic and legal of the issues that come before it. This has become a challenge given the board’s lack of resources, recognized by many stakeholders, that have prevented us from hiring additional personnel to deal with the issues.”

Let me conclude by stating that it would be in the best interest of all if all the parties involved could arrive at a consensus prior to the five-year Parliamentary review of the *Copyright Act* that will take place next year. I appeal to the cooperation of all. But I also wish to stress the importance that the Board be kept at the very center of these discussions, by letting it play the leadership role it should have when “reimagining the way ahead” for the Board. In examining all of the issues potentially relevant to all parties, the parties also need to remain conscious that the issue of the financial and resource requirements of the Copyright Board, an institution that is extremely important in this digital age, is as central as critically important.