

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

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The Business of Copyright

This is the third in what has become an annual pilgrimage to the program offered by Ruth Corbin and as usual I am delighted to be here. The first time, I spoke about the first ten years since the 1997 copyright reform. Last year, I described the unlocatable copyright owner regime. When I was considering what to talk about this time, one of my associates suggested that I avail myself of that time-honored method used by academics, given that there are no returnees, and simply repeat myself. As tempting as that is, I will not, except in one or two occasions where I think it is necessary to underline what I said before in the hope that we can change a system that badly needs help. Before starting let me however tell you a story which I think underlines a communication or the lack of communication.

Let me tell you what we're all about and what we do at the Board. We are first and foremost an administrative tribunal created by statute, the *Copyright Act*, with powers granted under that *Act*. We are an economic regulator that establishes either mandatorily, or at the request of the parties, the tariffs to be paid for the use of copyright works when they are administrated collectively. The Board did not always exist in its present form.

In the early 1930s, the Parker Commission recommended that a tribunal be established to review public performance tariffs before they took effect and on a continuous basis.¹ In response the Copyright Appeal Board was established in 1936 and certified its first tariff in 1937. The Board has issued one or more decisions dealing with copyright tariffs every year since.²

The Copyright Board as it exists today was created in 1989. The 1989 amendments effectively broadened the jurisdiction of the Board to encompass all areas of collective administration of copyright as well as the licensing of published works whose owners cannot be located. In 1993, the Board's area of competence was further expanded. The Board now is responsible for certifying tariffs for: the public performance or telecommunication of musical works and sound recordings; the retransmission of distant television and radio signals; the reproduction and public performance by

¹ Michel Héту, "The Copyright Board: Functions and Practice," presented December 4, 1991 at *Copyright: From Beginning to End* in Toronto, Ontario at p. 1 and Report of His Honour Justice Parker, A Commissioner appointed by the Inquiries Act and the Copyright Amendment Act of 1931, pursuant to the Order of Council No. 738, March 22, 1935, J.O. Patenaude, I.S.O., Ottawa.

² Mario Bouchard, "Americans and the Copyright Board of Canada: Why Bother?" (unpublished) at p. 1.

educational institutions, of radio or television news, news commentary and other programs; the private copying of published sound recordings of musical works; and, at the request of a collective society, the doing of virtually any other act protected under Canadian copyright law.

The Collectives under the mandatory regime are SOCAN, NRCC, CPCC, the Retransmission collectives and Educational Rights. The optional regime includes SODRAC, CMRRA and CBRA (the full name attached to all of those initials can be found on the Board's website).

The Board consists of not more than five members.³ The chairman must be a retired or sitting judge of a superior court.⁴ The Vice-Chairman is the CEO and his duties, as well as the duties of the Chairman, are specified in the *Act*.⁵ Like most statutory tribunals, the Board controls its own procedures.⁶ Administratively, we are a small agency – 13 employees in total – but we are responsible for well over \$300 million in royalties.

I note that Mr. Mikus spoke to you yesterday about the pressures on owners and users of copyright caused by technological advances. 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. For example, I noticed in the *Globe and Mail* of July 29 that Avril Lavigne has discovered new ways to maximize revenue from her music on Facebook.

The Board is currently dealing with requests for tariffs for the communication of musical works on the Internet other than by online music services, in what will be known as SOCAN Tariff 22.B – 22.G. It is my fervent hope that those tariffs will be released within a few weeks. I give no guarantees however. We have been struggling with these tariffs for some time.

³ Subsection 66(1).

⁴ Subsection 66(3).

⁵ Section 66.1.

⁶ The template for the directive on procedure is available at: <http://www.cb-cda.gc.ca/aboutus/directive-e.html>.

In carrying out its functions, the Board regularly addresses administrative law issues and interprets not only its own statute but certain aspects of the regimes it administers.⁷ Initially, the Board's position was that it could not deal with any issue of law; however, in 1993, the Federal Court of Appeal decided that the Board could deal with issues of law as a necessary incident to the exercise of its core function.⁸

The situation has now evolved to the point where on certain issues of law, the Federal Court grants the Board the highest level of deference.⁹ That level of deference, which existed prior to *CAB v. SOCAN*¹⁰ in which the Federal Court set aside and remitted a tariff to the Board because in the exercise of its mandate the Board did not adequately explain how it arrived at the tariff, is now in doubt. Real questions exist about the extent of reasons to be provided by the Board to avoid judicial review.

The Board oversees dealings between collective societies and users of copyright. In fixing the tariffs the Board is mindful of the comments of the Supreme Court of Canada in *CCH Canadian Ltd. v. Law Society of Upper Canada*¹¹ and *Théberge v. Galerie d'art du Petit Champlain inc.*,¹² that the stated purpose of copyright law is to balance the public interest in promoting the encouragement and dissemination of works of arts and intellect and obtaining a just reward for the creator. In fact, the Board's approach is somewhat unique in comparison to like organizations in other territories whose overwhelming focus is on preventing collective societies from abusing their monopolistic powers against users. In *Canadian Association of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada*,¹³ the Federal Court of Appeal found that

it is no more the Board mandate to protect consumers to the detriment of copyright owners than it is to protect monopolies to the detriment of consumers.

⁷ For a thorough description of the powers of the Board and how it interfaces with collective societies, see M. Bouchard, "Collective Management in Commonwealth Jurisdictions: Comparing Canada with Australia," in D. Gervais (ed.), *Collective Management of Copyright and Related Rights* (Kluwer, 2006) and D. Gervais, "Essai sur le fractionnement du droit d'auteur", (2003) 15 *Cahiers de propriété intellectuelle* 501.

⁸ *Canadian Cable Television Assoc. v. Canada (Copyright Board)*, [1993] 2 F.C. 138 (C.A.) at paras. 12-16 [hereafter CCTA]. See also *FWS Joint Sports Claimants v. Canada (Copyright Board)* [1992] 1 F.C. 487 (C.A.).

⁹ *Neighbouring Rights Collective of Canada v. Society of Composers, Authors and Music Publishers of Canada* 2003 FCA 302 [hereafter *NRCC v. SOCAN*].

¹⁰ 2006 FCA 337.

¹¹ 2004 SCC 13 [hereafter *CCH*].

¹² 2002 SCC 34.

¹³ (1994) 58 C.P.R. (3d) 190 (F.C.A.) at 196 [hereafter *CAB v. SOCAN*].

[...] the Board properly understood its function when it stated that it had to regulate the balance of market power between copyright owners and users.

Again, in *NCRR v. SOCAN*, the Federal Court of Appeal acknowledged that the Board must balance the competing interests of copyright holders, service providers and the public.

The Board typically performs its functions on a case-by-case basis. In doing so, it has developed a high level of expertise and specialized technical knowledge in the areas of collective administration and administrative, contract and copyright law.¹⁴ It is useful to note that the Board generally does not set policy. It sets rates. It deals with issues on a case-by-case basis from the bottom up rather than from the top down.

The Board, in the furtherance of its mandate, has embarked on analyses to determine and resolve many of the legal issues which have come before it. In so doing, it continuously strives to balance the interests of the parties and to provide workable solutions.

Let me say a word about the value of rights. The tariffs are created by reason of a statutory regime that otherwise provides exclusive economic rights to copyright owners and requires users to seek a licence. Some users, the broadcasters, for example, just to identify one group, contend that the Board does not take into account that they pay multiple tariffs for multiple rights (communication and reproduction, etc.) and as a result pay disproportionately higher fees than other users. We partially agree with their complaints but there are reasons. First, section 90 of the *Act* provides that the creation of neighbouring rights could not, of itself, be used to justify lower rates for the 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 be otherwise a fair and equitable tariff.

SOCAN Tariff 22.A

Given that we are dealing with the year in review, it seems fitting to look at the Board's SOCAN Tariff 22.A decision.¹⁵ The tariff targets the communication to the public by

¹⁴ *NRCC v. SOCAN* at para. 42.

¹⁵ Decision dated October 18, 2007 certifying SOCAN Tariff 22.A (Internet - Online Music Services) for the Years 1996 to 2006, 61 C.P.R. (4th) 2007 353 [hereafter "Tariff 22.A"].

telecommunication of musical works by means of Internet transmissions or similar transmission facilities. This decision was the first part (the second part will be released shortly) of the second phase of a process that began in 1996. Phase I of Tariff 22.A was released in October 1999 and dealt with various legal issues.¹⁶ That decision was reviewed by the Federal Court of Appeal¹⁷ and subsequently appealed to the Supreme Court of Canada.¹⁸

The Board's 2007 decision in Tariff 22.A squarely dealt with two issues: (1) whether the transmission of a download is a communication to the public by telecommunication within the meaning of paragraph 3(1)(f) of the *Act*; and (2) whether previews involve fair dealing for the purposes of research as defined in section 29 of the *Act* and as described by the Supreme Court of Canada in *CCH*. I will not spend a lot of time on this, for a number of reasons.

The first issue seems to have been resolved by the Federal Court of Appeal in its most recent decision involving SOCAN Tariff 24 (Ringtones).¹⁹ The second issue still is a live one. *CCH* stands for the proposition that fair dealing is a user right as opposed to an exception under the *Act* and must receive a liberal interpretation.

Fair dealing was an issue in SOCAN 22.A. The Board concluded that listening to previews so as to decide whether to purchase a download of a musical work over the Internet was fair dealing for the purposes of research. That ruling is the subject of an application for judicial review.

Fair dealing will be considered by the Board again in the context of reprographic reproduction of works protected by copyright in primary and high schools in the Access Copyright's tariff matter. It was heard by the Board in 2007 and is currently under deliberation. This is an issue which will have serious implications and not one of course which I am prepared to discuss at this time.

¹⁶ Decision dated October 27, 1999 certifying Tariff 22 (Transmission of musical works to subscribers by a telecommunication service not covered under Tariff 16 or 17) [Phase I – Legal Issues], 1 C.P.R. (4th) 427.

¹⁷ *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2002 FCA 166 [hereafter *SOCAN v. CAIP (FCA)*].

¹⁸ *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45 [hereafter *SOCAN v. CAIP (SCC)*].

¹⁹ *Canadian Wireless Telecommunication Association; Bell Mobility Inc. and Telus v. Society of Composers, Authors and Music Publishers of Canada*, 2008 FCA 6 [hereafter *CWTA v. SOCAN*].

The Board heard an application by SOCAN, NRCC and CSI for Satellite Radio. I had hoped that tariff would be ready by now but was a trifle optimistic. There are a number of serious and difficult legal issues that need to be resolved and we are actively working on those and will get the decision out as quickly as we can.

The Board currently has under advisement the application for a tariff by CPCC for blank CDs. A motion has recently been filed which resulted in the matter being reopened and that will delay the final determination of the tariff.

The last outstanding decision is the SOCAN Tariff 16 for Background Music use.

Finally, we have been asked many times about whether there is cooperation with the Departments of Industry and Canadian Heritage. I can tell you without hesitation that we were not consulted with respect to Bill C-61 and we were not asked whether the new rights that would be created by the proposed amendments would have a financial impact on the Board. There has been no consultation.

When we examined the proposed Bill C-61, we were struck by the fact that section 30.02 for example extends the existing reprographic licence to allow education institutions to scan and then communicate the digital reproduction of a work covered by the reprographic licence. Subsection 30.02(4)(b) and section 30.03 set out the role that the Board may play in setting the rate for digital reproduction and communication of the work. More work for the Copyright Board.

There are other provisions of the proposed Bill C-61 that will impact the work of the Board. For example, the revised subsection 67.1(4) provides that the new making available rights of performers and makers are subject to the SOCAN regime. If those rights are administered collectively, a tariff must be filed. This will have a direct impact on the work of the Board. The resources of the Board at the level of support staff, lawyers, economists, etc. are already stretched to the limit.