

Copyright Board
Canada



Commission du droit d'auteur
Canada

Remarks prepared by
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Chairman of the Copyright Board of Canada

OBA Entertainment, Media & Communications Law, and
Information Technology & Intellectual Property Law Program:

*The Copyright Board of Canada: Recent Developments
and Practical Advice for Practice Before the Board*

Ottawa, Ontario
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On May 1, 2018, the Ontario Bar Association offered an educational program to its members on the subject of “The Copyright Board of Canada: Recent Developments and Practical Advice for Practice Before the Board”. Four general topics were discussed:

1. The role of the Board and its evolving nature in light of recent jurisprudence, legislative changes and developments in technology;
2. How Board proceedings differ from court proceedings, and what this means for counsel practicing before the Board;
3. Top strategies for excelling before the Board; and
4. What can we expect from the current consultations on Copyright Board reform?

The Chairman of the Board participated in the panel discussion with Ms. Sarah Kilpatrick (moderator) and Messrs. Gerald (Jay) Kerr-Wilson and Matthew Estabrooks. Although the format did not contemplate formal presentations by the panelist, the Chairman prepared the following in preparation for his participation.

By the Honourable Robert A. Blair

Let me begin by thanking the organizers of this program for inviting me to participate. I look forward to the discussion.

I. Role of the Board and its evolving nature in light of recent jurisprudence, legislative changes and developments in technology

The Copyright Board’s mandate is relatively simple to state: its job is to set royalties and tariffs for the use of copyright-protected works when the administration of those works has been entrusted to a collective society.

But there are many a thicket of legal and economic issues, resource demands and problems of practical application, underlying that simple statement. Because – while its stated mandate has remained relatively stable – the Board’s role and the factors bearing on how it performs that role have evolved, and in recent years have evolved quite rapidly.

Case law in relation to users’ rights, the impact of the 2012 amendments to the *Copyright Act* (the “*Act*”) (particularly the new exceptions), the breakneck speed of advances in technology and changes in how copyright-protected works are accessed through the Internet and the media – these have all affected not only the communications/copyright industry, but also the Board’s workload, the ways in which it has to address that workload, and the legal and economic issues with which it must cope.

Let me approach it this way, just to provide a theme:

In *ESA v. SOCAN*, one of the famous pentology of cases in 2012, Justices Abella and Moldaver, for the majority, characterized the internet as “simply a technological taxi”.¹ However, Justice

¹ *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34 at para 5, [2012] 2 S.C.R. 231. [ESA]

Rothstein's riposte in dissent aptly observed that while "the Internet may well be described as a technological taxi, [...] taxis need not give free rides".²

The debate about who gets a free ride, or at least the Uber rate, as opposed to regular taxi fare, has been going on ever since. The Board is caught in the middle. It's lots of fun. But it has its challenges!

ESA established that music downloads do not attract a tariff for communication to the public. They are simply the equivalent of a durable copy of the work in a store – a reproduction – delivered by the Internet taxi.

But wait! *Rogers v. SOCAN*³ (released at the same time as *ESA*) tells us that streaming a production via the Internet taxi (presumably, regardless of how many "reproductions" of music the stream may contain), does constitute a communication to the public by telecommunication, and is therefore copyright protected.

So, too, it appears, do:

- Simulcasting over the Internet;
- On-demand music services (Spotify, Google Play, Pandora, etc.);
- Webcasting in general – but does it matter whether it is non-interactive, semi-interactive or fully interactive?

While the size of the fare may vary, we seem to know that the Internet taxi is not giving a free ride in those circumstances.

Well, wait again! Do we? Maybe not.

What if the activity, communication or reproduction, falls within one of the provisions flowing from the 2012 amendments to the *Act*? For example,

- Fair dealing in the educational setting (the litigious battleground *du jour*) – electronic copying; web-based contents of electronic course packs, for example.
- The making available of works and musical sound recordings to the public by telecommunication for on-demand music services. The Board has said the right is engaged in those circumstances and therefore you have to pay, but the value of the right is still very much up in the air.
- Or, of course, there could be an exemption that comes into play:

- Cloud storage/hosting;

² *Ibid* at para 50.

³ *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283.

- Caching;
- Back-up copies;
- Ephemeral reproductions for broadcasters;
- Reproduction as part of a technological process; and
- Non-commercial user-generated content.

All of these considerations, at some point or another, raise the “whether” question: i.e., whether the use of the right in question legally attracts copyright protection and therefore whatever value attaches to the use of that right. And we haven’t even arrived yet at the complex economic issues bearing on the “if so, how-do-you-value the right?” question.

Well, if you are not all out of breath by this point, I am.

But why do I dwell on this? There are number of reasons:

1. It shows how interesting, wide-ranging and challenging the matters the Board must deal with, are. And, how interesting, wide-ranging and challenging the matters you as counsel must deal with. This is a very stimulating and exciting time to be involved in this area.
2. More importantly, it provides, I hope, some insight into the growing complexity of the Board’s role, the demands on its resources, and the time it takes to deal with matters in the system. These forces and factors are all relatively new to the copyright landscape, and they have to work their way through the system. For example:
 - a) The Board often finds itself as a decider of first instance on many of the fresh legal issues arising out of the environment I have just outlined. We are an economic regulatory body. But first we have to know the answer to the legal “whether” question before we can go on to complete that responsibility in any given case; and
 - b) What I have just described also helps explain the interactions between the Board and the parties, before and after the hearings, so the Board can be comfortable it has the information and data necessary to make the call on those increasingly complex legal and economic issues, and the time that must be devoted to that process.

This last observation brings me to a final comment on the evolving role of the Board, which we will talk about more, shortly, when we discuss the differences between court proceedings and board proceedings. For now, I simply highlight that the Board has a broad mandate with a public interest component. It is concerned with more than simply resolving a dispute between the parties before it. Tariffs have general application and affect others too, unlike court decisions that only bind the parties. The Board’s objective is to set tariffs that are fair and equitable to all – creators, users, and the public in general.⁴

I sometimes refer to this as the “polycentric” nature of the Board’s mandate. It creates some differences in approach from a traditional court setting, and has implications for the Board’s processes and procedures, and the resources needed to play its role and fulfill its mandate.

⁴ See *SOCAN v. Canadian Association of Internet Providers* 2002 FCA 166, at para 75; *Neighbouring Rights Collective of Canada v. SOCAN* 2003 FCA 302 at paras 43–44.

II. How Board proceedings differ from court proceedings, and what this means for counsel practicing before the Board

The Board works within the same general adversarial/advocacy model as courts do – examination and cross-examination of witnesses; filing of exhibits; experts and experts’ reports; written and oral submissions. But because the Board is an administrative tribunal, the processes are considerably less formal, at times, than they are in court. And because of the Board’s broad public-interest mandate, outlined above, there are other significant contrasts as well.

Let me highlight three areas, in particular, to illustrate what I mean: the rules of evidence; the use of the Board’s own judgment and expertise; and the Board’s power to complement a partially defective record. The latter two are somewhat related, and I underscore at this point the importance of the Board ensuring the preservation of procedural fairness in each of these areas of difference.

The Rules of Evidence

First, as is the case with most administrative tribunals, the Board is not obliged to comply with the normal rules of evidence, particularly the hearsay rules of evidence. So, your task as counsel is a little more relaxed in that regard.⁵

There may be occasional objections, but these are usually worked out without having to fall back on a strict application of Wigmore or Sopinka and Lederman on Evidence.

An anecdote from the first Copyright Board hearing in which I was involved drove this difference home to me. An expert witness was being cross-examined. He was asked about the source of a certain piece of factual information in his report. As the explanation evolved, it became clear that the evidence stated in the report was not only hearsay, it was hearsay, based upon hearsay, based upon hearsay, which in turn was based upon a not entirely scientific source itself. In a room filled with very able counsel, there was not a single objection! And probably with good reasons: the factual statement wasn’t really contentious. However, the manner of leading the evidence was somewhat more elastic than that to which I had become accustomed in my role as a member of the judiciary over many years – particularly, when two of the hearsay sources turned out to be Twitter and Facebook!

The Use of the Board’s Own Judgment and Expertise / The Board’s Power to Complement a Partially Defective Record

Two other characteristics of the Board’s role result in differences between how a court approaches its tasks and how the Board does: (i) the Board’s entitlement to rely upon its own judgment and expertise in addition to evidence before it, filed by the parties; and (ii) consistent with that, its power to complement a partially defective record through its own research. Subject, of course, to the Board ensuring at all times that procedural fairness is respected.

⁵ See e.g. *Canadian Recording Industry Association v. Society of Composers, Authors and Music Publishers of Canada*, 2010 FCA 322.

The first of these characteristics was recently confirmed by the Supreme Court of Canada in *Canadian Broadcasting Corp. SODRAC 2003 Inc.*,⁶ the second by the Federal Court of Appeal in, for example, *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*.⁷

There are a number of reasons for these features of the Board's work, but amongst them are:

1. The very technical and specialized nature of the Board's deliberations and the complexity of its files;
2. The need arising out of that for a certain informed judgment when the Board exercises its broad discretion to assign monetary values to uses of copyright-protected works whose value is not easily quantified; and, finally
3. What I have referred to as the "polycentric" nature of the Board's mandate and responsibilities.

By "polycentric", as I have noted above, I refer to the Board's broad public interest responsibilities in setting tariffs of general application that reach beyond the parties appearing before and apply to all potential users of that tariff. The Board's role involves policy considerations and the weighing of many conflicting and overlapping factors that affect the particular industry, its players, and the public interest as a whole. Its purpose in each case is to render the most effective decision it can by establishing a workable and useful tariff. In this respect, the Board needs the parties, as much as the parties need the Board.

Hence, the interactions between the Board and the parties – before and after, and sometimes during, the hearing – where the Board seeks additional information, or clarification, or the parties' responses to information or data Board staff has uncovered on its own inquiries outside of the formal record put forward by the involved Collectives and Users. Indeed, the Federal Court of Appeal has acknowledged the Board's role in going back to the parties and seeking further evidence.⁸

This can appear to go on interminably, and we can debate the extent to which this occurs and how far it should go. I am aware that this has been the subject of considerable commentary during the recent consultation process. But it is a frequently necessary feature of the rate-setting process that flows from the Board's broadly based public interest mandate.

For example, apart from the broader legal questions about "whether" and "if so, to what extent", the tariffs themselves are intricate and complex. A single tariff, for example, may involve multiple uses and multiple users and collectives, and cover multiple years. The initial submissions and evidence filed – and even those once a hearing is completed – may not respond to a particular issue that may arise at the granular level; more inquiries may be needed. Or, the

⁶ *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615.

⁷ *Society of Composers, Authors and Music Publishers v. Bell Canada*, 2010 FCA 139.

⁸ *Canadian Association of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada*, 2006 FCA 337, at paras 17–19.

Board may raise matters that have not been addressed by the parties, and therefore call for more input.

Given its mandate, it is sometimes difficult for the Board to develop a workable tariff that is consistent with the public interest objectives it seeks to achieve, based on the expert testimony provided by the parties. I do not mean by this to be critical or dismissive of experts' testimony. Nor is it simply a matter of accepting or rejecting one side's expert and model over another; it is a matter of assessing that testimony and model in light of the Board's broader mandate.

Parties, by definition, are seeking to present a certain position. That perspective may naturally find a way into the assumptions made by their respective experts. The experts are not charged with taking the interests of others into account, and it is open for the Board to conclude that neither opinion nor model works from the perspective of the Board's broader purposes. As a result, the Board may find itself considering new or somewhat modified economic methodologies. This obviously requires it to go back to the parties, because if the Board contemplates taking a different route than that proposed in the evidence of one or the other of the parties' experts, fairness demands the parties have an opportunity to provide their further input.

I emphasize again that, though the Board is not bound by the strictness of court procedures, its processes must nonetheless be fair. Parties must be given the opportunity to provide input when something new arises. Indeed, as *Netflix* tells us, even late-arriving non-parties (or, more accurately in that case, re-arriving former parties) may be entitled to introduce new evidence and make new submissions, at least in cases where the subject matter of the tariff to be certified by the Board deals with matters that were not covered in the proposed tariff published in the *Canada Gazette*.⁹

So, in summary – when you are involved in a matter coming before the Board, you will have less cause for concern about having to comply with all the stickily rules of a normal court hearing; but you will have to learn to reckon with a process that may not let you confine the Board's decision-making exercise to the record the parties chose to put before it, at least without further prodding by the Board.

III. Top strategies for excelling before the Board: what tends to work?

There are many things that can be said on this subject. You will no doubt hear many good tips from the perspective of experienced advocates before the Board, from Mr. Kerr-Wilson and Mr. Estabrooks. Let me simply provide a few suggestions from the Board's perspective.

1. Remember that the issues are very complex, and often very technical. Keep the presentation as understandable and as structured as you can. Clarify, simplify and identify the issues you are addressing and that you say the Board needs to address. And make sure we understand what the purpose is of what you are doing at any particular time.

⁹ *Netflix, Inc. v. Society of Composers, Authors and Music Producers of Canada*, 2015 FAC 289, at para 51.

2. Successful counsel prepare summaries, power points to facilitate the presentation of their witness's testimony, and charts (which can sometimes be very effective, as long as they are not too simplistic).
3. Make sure that the Board members are where you want them to be in the mass of documentary materials that typify a hearing. Give them the time to get there. It is not helpful if you are three minutes into your line of questioning and we are still trying to find where you are in Exhibit Collectives-103, in Collectives binder 24, at Tab 34F, paragraph 16(b)(iii) [...] to be compared with Exhibit Objectors-33, in Objectors binder 11, Tab [...] You get the drift.

I think it is also important to keep in mind that, while the Board's staff, and at least the current Vice-Chair, are the repositories of a great deal of expertise in the rate-setting process, all members of the tribunal at the hearing may not have that same in-depth knowledge. The Chair must be a sitting or retired superior court judge (where very little intellectual property work, much less copyright work, is done), and to date has not come from the Federal Court system where they actually know something about those subjects! In addition, none of the present members is an economist. In this sense, the old adage that applies to every good counsel, in any setting, is relevant: know your adjudicator and your forum.

4. Finally, I have been impressed with counsel's ability to check the "gunslinger" mentality often seen in courts, for one that is as cooperative as the interests of their clients permit. Without in any way detracting from the advocate's duty to represent their clients vigorously and persuasively, I recommend this attitude as a top strategy before the Board.

IV. What can we expect from the current consultations on Copyright Board reform?

I think it would not be appropriate for the Chair of the Board to say much on this topic at the moment. There are ongoing consultations and discussions involving the relevant Departments, the Board, and stakeholders from all sides. Nothing is yet finalized.

I add only this. What the Board hopes will emerge at the end of the day is a balanced playing field that neither favours one group of stakeholders or another, and a process that will enable the Board to set royalties and tariffs that are fair and equitable to all creators and users, and in the public interest, and to do so in a fashion that is as effective and timely as possible.

Thank you again for asking me to participate on behalf of the Copyright Board in this valuable program.