

Copyright Board
Canada



Commission du droit d'auteur
Canada

**Presentation delivered by
Mr. Claude Majeau
Vice-Chairman and Chief Executive Officer**

**Standing Senate Committee on
Banking, Trade and Commerce**

**Study, and Make Recommendations, on the
Operation and Practices of the
Copyright Board of Canada**

Ottawa, Ontario
November 3, 2016

Introductory Remarks

1. Mr. Chairman, Senators, I would like to thank you for giving me this opportunity to appear before you. I am accompanied by Mr. Gilles McDougall, who is the Secretary General of the Board. The Chairman of the Board, the Honourable Justice Robert Blair, unfortunately cannot be with us today because he is presiding this week over cases before the Ontario Court of Appeal.
2. I am happy to engage in this discussion on the operation and practices of the Board. The Board is an integral part of a larger scheme set out in the *Act*. This scheme supports collective administration of copyright and sets out some regulatory oversight, which was delegated to the Board.
3. Since the Copyright Board was established in 1989 as a successor to the Copyright Appeal Board, its mandate and workload have grown significantly with major revisions to the *Act* in 1997 and 2012.
4. Decisions of the Federal Court of Appeal and of the Supreme Court of Canada continuously add to the legal, economic and procedural issues the Board must address and take into consideration. Eight decisions of the Supreme Court, all but one resulting from parties' applications for judicial review of the Board's decisions, have substantial bearing on the Board's current and future activities. These decisions have also considerably complicated the Board's role in the tariff-setting process.
5. A 2015 study by Professor Jeremy de Beer shows that the Board certified 852 different tariff-units in respect of the 15-year study period between 1998 and 2013. The study further indicates that, on average, the Board is asked to certify more than 70 tariff-units per year.
6. The increasing volume and complexity of files which the Board is required to deal with cannot be ignored or underestimated. Professor de Beer made the following comments in this regard:

The Board's powers or procedures have been central to some of the most important copyright matters of the 21st century: music streaming, peer-to-peer file sharing, internet service provider liability, iPods or other device levies, the use of educational materials, and much more.

7. Underlying the creation of the Board was the recognized need for an organization mandated to assess opposing claims, to obtain reliable evidence, and to eventually strike an objective balance between the various competing interests at play in the setting of copyright royalties.
8. In striking this balance, the Board is under a legal obligation to act judicially – that is to act like a court of justice, in a rigorous, rational and unprejudiced manner. Acting judicially also implicitly entails the obligation to decide matters freely, without external

pressures, influence or solicitation, the only constraints stemming from the evidence adduced and the rule of law.

Background

Role of the Board

9. The Copyright Board of Canada is an independent, quasi-judicial tribunal created under the *Copyright Act* to establish the royalties to be paid for the use of works and other subject matters protected by copyright, when the administration of these rights is entrusted to a collective society.
10. Collective societies are entities that pool copyrights for efficient management purposes. In the 1980s there were approximately 5 collective societies while today there are more than 35. The direct value of royalties set by the Board's decisions is estimated to surpass \$400 million annually.
11. Because the Board acts as an economic regulator, it must issue decisions based on solid legal and economic principles, reflect a thorough understanding of constantly evolving business models and technologies such as streaming of music, and be fair and equitable to both copyright owners and users.
12. The Board has similarities to a trial division of a court for all matters it determines. In particular, it deals extensively with complex facts and evidence based on testimony and expert reports. The Board is also often the first to interpret new legislation or to apply legal principles established by the Supreme Court of Canada. The Board's reasons must be reliable, understandable and convincing, drawing heavily on the Board's resources and the skill and expertise of its Members and staff.

Challenges

13. In a 2016 study, Professor Daly wrote that "the delays before the Copyright Board may well be caused, at the very least in part, by a prevailing culture that tends to drag out decision-making processes, and that the Copyright Board should be given the tools to shift the prevailing culture". He added that "it may be that these delays are unavoidable in an increasingly complex copyright world, which features a Copyright Board with limited resources".
14. As a matter of fact, considering all comments, studies and submissions made by stakeholders so far, we see little consensus emerging as to what changes are required. Each stakeholder has different views, which makes solutions quite numerous and inconsistent. For instance, a suggestion was made that the Board could become something analogous to a business development office. It is difficult to understand what it means. In any event, it would be inappropriate to use any review of the Board's procedures to challenge the merits of the Board's decisions outside the proper recourses before the Courts.

Considerations

15. The Board cannot escape certain constraints set out by the legal framework within which it carries out its mandate.
16. First, the Board cannot avoid due process requirements, such as seeking all parties' submissions on specific issues that arise in the course of the proceedings. This procedural requirement can significantly slow down the process, yet it cannot be bypassed.
17. Second, despite the flexibility afforded to administrative law processes, the Board must account for the fact that the tariffs it certifies are of general application, contrary to court decisions which only bind the parties involved. The Board's decisions must be made in the public interest, which means that it has to account for interests beyond the parties.
18. Third, despite the Board being the master of its own procedure – as recognized by the Supreme Court of Canada – procedural rules may never alter or pre-empt statutory obligations. For example, even if the parties reach an agreement on a tariff, the Board must investigate to ensure that it is in the interest of parties who were not involved in the private negotiations.
19. This creates pressure on the Board's resources, pressure which is exponentially increased as new tariff proposals as well as technological, economic and legal complexity are added to the caseload. This increased workload has not corresponded in increased resources for the Board.
20. The Board is the first one to acknowledge that the current situation with respect to its processes needs to be improved. In this respect, the Board took some measures such as consolidating a number of processes into a single hearing. However, additional potential solutions need to be examined.
21. We believe the Board should be part of the five-year review of the *Act* to take place next year. Our contribution to this review would be structured around two themes:
 - First, there is a need to enhance the effective fulfillment of our mandate. In this respect, we will be working in close collaboration with officials of the Department of Innovation, Science and Economic Development.
 - Second, the inflow of cases needs to be addressed at the source, by analyzing the structures of the collective-administration regimes provided for in the *Act*. In particular, we will be looking at their functioning, the ways they can be streamlined in order to have fewer filings of proposed tariffs, or more consolidated filings, and the status of agreements filed with the Board.
22. As such, we will not limit our contribution to the sole questions of procedures. We will also be addressing some fundamental issues not necessarily addressed by others.

23. In this context, the Board can offer an unbiased perspective and propose solutions that could improve the statutory schemes. We believe we can build on our institutional expertise and understanding of the “ins” and “outs” of the cultural industries.
24. This concludes my presentation. I welcome any question you wish to ask.