

Copyright Board
Canada



Commission du droit d'auteur
Canada

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

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**Overview of the Organizations under
Innovation, Science and Economic Development Canada**

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Mr. Chairman, Members of Parliament,

I would like to thank you for giving me this opportunity to make an introductory presentation by taking a brief look at the history, purpose, nature and challenges of the Copyright Board of Canada.

Let me first start by introducing the people seated next to me: Mr. Justice Robert A. Blair, Chairman of the Board. Justice Blair is a sitting judge at the Court of Appeal of Ontario. Also sitting next to me is Mr. Gilles McDougall who is the Secretary General of the Board.

Context

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. The Board also issues licences for the use of works when a copyright owner cannot be located. Its workload is increasingly heavy and very complex.

The Board is sometimes referred to as a “polycentric” administrative tribunal, meaning that its mandate and responsibilities involve more than simply resolving a dispute between the individual parties before it; it involves public policy considerations and the weighing of a large number of conflicting and overlapping factors that affect the industry and the public interest as a whole. This has implications for our processes and procedures, and the resources needed to fulfil our mandate, which I will discuss later.

The *Act* establishes the Board, which consists of no more than five Members. At the present time, there are three Members: the part-time Chairman, the full-time Vice-Chairman and CEO, and a part-time Member, all appointed by the Governor in Council.

The Board’s Chairman directs the work of the Board and apportions its work among Members. The Vice-Chairman is the Deputy Head of the Board. As such, he has leadership on the work of the Board, as well as supervision and direction over Board staff.

In addition to its Members, the Board has 16 employees, consisting of administrative and support staff, as well as lawyers and economists. The operating budget of the Board is set at \$3.5 million per year.

The direct value of royalties set by the Board’s decisions is estimated to surpass \$400 million annually. As such, the Board’s decisions have a contributory impact on a number of industries, on individuals and on the Canadian economy as a whole.

The legislative framework of the Board has changed exponentially 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 who 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.

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.

Ongoing amendments to the *Act* as well as decisions of the Federal Court of Appeal and of the Supreme Court of Canada continuously add to the legal and policy issues the Board must address and take into consideration. Eight decisions of the Supreme Court (two in 2004, five in 2012 and one in 2015), all but one triggered by Board decisions, have significant bearing on the Board's mandated activities now and for the future.

Challenges, Issues and Initiatives

The Board acts as an economic regulator. The Board must ensure to render fair, equitable and timely decisions that require dealing with increasingly complex economic and legal issues. Its decisions must be based on solid legal and economic principles, reflect a solid understanding of constantly evolving business models and technologies, and be fair and equitable to both copyright owners and users.

The Board has similarities to a trial division of a court for all matters it determines. As such it is often the first to interpret new legislation or to apply legal principles established by the Supreme Court of Canada. Because of the polycentric nature of the Board's decisions, administrative law principles dictate that the Federal Court of Appeal, on judicial review, affords the highest level of deference to the Board's analysis of the evidence and findings of fact. As a result, this analysis and these findings must be reliable, understandable and convincing – drawing heavily on the Board's resources and the skill and expertise of its members and staff.

On average, the Board issues about 9 decisions every year, which encompasses over 70 tariff-units, including a significant proportion that have been the subject of public hearings. In spite of this, the Board currently faces a huge backlog of uncontested or agreed-upon tariffs to be certified. The increasing volume and complexity of files which the Board is required to deal with are all too often ignored and underestimated. Professor Jeremy de Beer, from the University of Ottawa, 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, iPod or other device levies, the use of educational materials, and much more.

Criticism

Over time, the Board has been subjected to criticism, most particularly in respect of the time it takes to render decisions, as well as the cost and burden of participating in its public hearings and the Board's processes overall efficiency.

In light of this, 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 some aspects of the Board's procedures. Public consultations were also held regarding these recommendations. It is noteworthy that among the members of the Working Committee, as well as between the comments received in public consultations, there was no consensus on the solutions to bring about.

The Board has yet to issue a decision on these recommendations, deciding instead to hold it so that the Board can benefit from parallel initiatives taken by the two Departments responsible for the copyright legislation.

These initiatives by the two Departments flow from one of the recommendations of the House Standing Committee on Canadian Heritage in its report entitled the *Review of the Canadian Music Industry* which read:

“The Committee recommends that the Government of Canada 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* so that any changes could be considered by the Copyright Board of Canada as soon as possible.”

It is noteworthy that in the course of this committee's work, most witnesses acknowledged the crucial role the Copyright Board plays while also stressing the insufficiency of its financial resources. This was also echoed by the Complementary Report of the Honourable Stéphane Dion, on behalf of the Liberal Party of Canada, in which he recommended that

[...] the Government of Canada undertake as soon as possible a consultation with the Copyright Board in order to analyse the delays in rendering decisions, notably in the digital context, and to establish, with the Commission, a level of funding that is adequate for the timely delivery of its mandate.

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.

For your information, some of these issues will probably be addressed as part of the 5-year, mandatory review of the *Act* that will be done by a Parliamentary Committee in 2017.

I thank you all for having given us with the opportunity to provide you with the Board's "State of the Union."

We will be pleased to answer any questions the committee members might have.