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CANADIAN COPYRIGHT COLLECTIVES AND THE COPYRIGHT BOARD: A SNAP SHOT IN 2008

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THIS PAPER'S PERSPECTIVE

Originally, it was contemplated that there would be two speakers dealing with this topic. This is because the topic tends to be seen through either one or the other of the collectives' or users' perspectives. This area has become rather like labour law, if not more so. This is unfortunate, but probably inevitable. In any event, I[1] am the only presenter today. So, I will try to be as objective and balanced as possible under the circumstances.

INTRODUCTION

Canada has a unique approach amongst developed countries to collectives and to the oversight of collectives by a specialized tribunal and, in turn, by the Courts. While Canada provides very strong copyright protection in the form of mostly exclusive rights, it recognizes that these rights can most effectively and efficiently be enforced by collectives in many cases. The overall result is that Canada has more collectives and a larger tribunal with more full time members and, effectively, more power to make law than any other country with which I am familiar.

There is much that is good about this system. However, there is also much that can and needs to be improved. I will take this opportunity to present a snap shot and overview of how it works, with a little perspective on how it evolved. I will also take the liberty of making some suggestions on how it could work better.

Although things seem sometimes seem to move and evolve very slowly at the Copyright Board, it has produced a large body of important decisions over the years affecting billions of dollars worth of tariffs. The Federal Court of Appeal ("FCA"), which usually moves much faster, has produced numerous judgments in turn about the work of the Board. And on a few important occasions over the years, matters involving collectives and the Copyright Board[2] have attracted the attention of the Supreme Court of Canada ("SCC"). A short paper and presentation cannot hope to capture the full detail of this very important area.

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[1] The author is Counsel at Macera & Jarzyna, LLP in Ottawa, Canada. The author, as counsel, has opposed various proposed tariffs at the Copyright Board and in the Courts. However, the views expressed are solely his own and not those of his firm or any of its clients. Portions of this article are taken from previous writings of the author, both published and from his blog, which is at www.excessopyright.blogspot.com

[2] And its predecessor, the Copyright Appeal Board.

WHAT IS A COPYRIGHT COLLECTIVE?

Copyright collectives - or collective management organisations ("CMOs") as they are sometimes called - are pervasive and powerful throughout the world today. The sheer magnitude of money involved is staggering - and therefore important to policymakers, lobbyists and litigators. For example, ASCAP reported revenues of $785.5 million for 2006 and BMI reports revenues of almost $850 million for 2007. These are the two largest musical performing rights collectives in the United States. GEMA, the mega music collective in Germany, reported revenues of more than €874.4 million (about US$1.286 billion) for 2006. SACEM, the enormous French music collective, reports revenues of about €757.4 (about US$1.114 billion for 2006). These are four of the largest collectives in the world.

Turning to Canada, SOCAN's revenues, which are in excess of $200 million a year, are well over the normal benchmark of 10% of the comparable American figures (i.e., ASCAP + BMI) that one would expect to see. Likewise, Access Copyright has collected far more proportionally than its counterpart in the USA, the Copyright Clearance Center. The Neighbouring Rights Collective of Canada ("NRCC"), of course, has no counterpart in the USA because the USA does not have neighbouring rights.

In Canada, which is number 8 on the G-8 list in terms of GDP, and has a large deficit in copyright royalties, collectives have revenues approaching CAD $500 million a year. It is possible that per capita payments to collectives in Canada are overall among the highest in the world, and this is something that merits much closer study. This is not necessarily good news for Canadian creators, because most of this money leaves Canada and goes to the USA or Europe. Moreover, the Canadian creators who benefit from these high tariffs are the ones who are already very successful. That is the nature of the copyright system, which rewards success and not artistic merit or need. Sometimes the concepts coincide – but, often they do not.

While performing rights societies representing composers and authors are the oldest of the collectives, they are no longer alone in generating large amounts of money. Neighbouring rights collectives are catching up quickly in Canada. Private copying levies in Europe generate enormous sums, though the results are not very transparent. A 2003 BSA study predicted that private copying levies in France, Germany, Italy, the Netherlands and Spain would be €1.5 billion by 2006, almost $2.25 billion. In Canada, private copying levies have generated well over $200 million to date.[3]

New areas of collective management may be on the horizon. For example, there have long been efforts underway in Canada to collectively monetise the use of publicly available material on the

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[3] http://cpcc.ca/english/finHighlights.htm

internet,[4] ultimately through the controversial mechanism of extended collective licensing.[5] A very recent example of a suggested new area collective activity is the controversial proposal by the Songwriters' Association of Canada to impose a "licence fee of $5.00 per internet subscription per month."[6] This proposed "tax", as it is not surprisingly being called, would supposedly generate between $500 and $900 million a year.

Collectives have many forms and foundations. These range from those that provide blanket licences under a compulsory licence regime for a particular right for virtually all of the world's repertoire to collectives that function more like agencies and administer rights for a limited membership. One prominent collective in Canada, namely Access Copyright, has functioned in certain respects more like an insurance or indemnity company than a entity holding copyright rights by way of license or assignment. It has built a successful business model on indemnifying paying users for the infringement of copyright in countless works to which it has no chain of title.[7]

The ***Copyright Act*** (hereinafter "CA") defines a collective society as follows:

> *"collective society" means a society, association or corporation that carries on the business of collective administration of copyright or of the remuneration right conferred by section 19 or 81 for the benefit of those who, by assignment, grant of licence, appointment of it as their agent or otherwise, authorize it to act on their behalf in relation to that collective administration, and*
>
> > *(a) operates a licensing scheme, applicable in relation to a repertoire of works, performer's performances, sound recordings or communication signals of more than one author, performer, sound recording maker or broadcaster, pursuant to which the society, association or corporation sets out classes of uses that it agrees*

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4 ***Internet Educational Copyright Exemption Debate in Canada*** May 31, 2006, http://excesscopyright.blogspot.com/2006/05/internet-educational-copyright.html See also the "Bulte Report" from May, 2004. http://cmte.parl.gc.ca/Content/HOC/committee/373/heri/reports/rp1350628/herirp01/herirp01-e.pdf

5 This is mechanism mainly used in the Nordic countries. This entails a legislated regime in which a collective is entitled to collect for all the repertoire in respect of certain rights, notwithstanding that the collective may not have a chain of title to anything close to all such repertoire.

6 http://www.songwriters.ca/studio/proposal.php

7 H. Knopf, ***Copyright Collectivity in the Canadian Academic Community: an Alternative to the Status Quo?*** (Dec. 1999) 14 I.P.J. 109-139

> *to authorize under this Act, and the royalties and terms and conditions on which it agrees to authorize those classes of uses, or*
>
> *(b) carries on the business of collecting and distributing royalties or levies payable pursuant to this Act*[8]

In practical terms, a collective is an entity that licenses users to engage in certain activities that require permission under the CA. The users are generally commercial entities or institutions, such as cable companies, TV and radio stations, universities, colleges, schools, cinemas, retail stores, bars, concert halls, restaurants, dentists' offices, strip clubs and even funeral homes. A few years ago, the powerful American collective ASCAP attempted to impose licenses on Girl Guides, an effort that became a huge public relations disaster.[9]

The customers or ultimate users of these entities are usually unaware of the costs and how the money is paid. The collective eventually distributes the collected royalties to its members, after deducting its administration costs. These costs can exceed 20% of revenues. For example, Access Copyright has expenses of almost $8 million a year for collecting about $34 million a year, approximately 23%. The Copyright Board has expressed little if any interest in enquiring into the internal operations of collectives, although it arguably has the jurisdiction and the responsibility to do so.

The rates, terms and conditions of the pursuant to which collectives can operate are subject to oversight by the Copyright Board. All of the activity of SOCAN, and collective activity in several other areas **must** be approved by the Copyright Board. Other areas of collective activity may come before the Board if the parties cannot agree. More details are provided below.

Canada has more copyright collectives than any other major developed country. It is said that Brazil may actually have even more. However, Canada has approximately three dozen active collectives, many of which have received substantial direct or indirect government subsidies.

SOME OF THE CANADIAN COLLECTIVES

The following are some of the better known collectives and the collectives that most practitioners are most likely to have occasion to deal with.

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8 ***Copyright Act***, R.S.C. 1985, Chapter C-42 as amended, (hereinafter "***Copyright Act***") s. 2.

9 Gerry McCusker, ***Talespin: Public Relations Disasters-Inside Stories & Lessons Learnt***, Kogan Press, 2005, p. 261

The Music Collectives:

- The largest and oldest collective is SOCAN[10] - which traces its roots in Canada back to 1925 and collects over $200 million annually.
- NRCC ("Neighbouring Rights Coalition of Canada")[11] is a collective of other collectives and collects revenues for certain activity involving sound recordings, and performers' performances. The rights involved are known as "neighbouring rights", because they historically were not recognized as being part of the mainstream of "authors' rights" or "droit d'auteur". NRCC activities mirror those of SOCAN to some extent and are currently valued by the Copyright Board at approximately 43% of SOCAN's comparable tariffs. The difference arises largely because sound recordings are not entitled to full "national treatment" under Canada's legislation, a point which will be further dealt with below. The NRCC is not very transparent in its operations, and does not publish its annual reports.
- Canadian Private Copying Collective ("CPCC")[12], which is also a collective of collectives that collects approximately $40 million a year from levies on blank audio recording media - almost all of which currently derives from sales of blank CDs. CPCC has been very active in litigation against alleged levy evaders, with a number of reported decisions in the Federal Court and the Federal Court of Appeal in recent years. It has collected over $200 million to date.
- CMRRA ("Canadian Musical Reproduction Rights Agency")[13] is a collective of music publishers. It grants licences on an agency basis for "cover versions" of musical compositions and other common activities. It is also a member of CPCC. Its revenues have been reported as exceeding $50 million annually. Its French Canadian counterpart is SODRAC. CMRRA and SODRAC have joined forces to form CMRRA-SODRAC Inc. ("CSI") to pursue tariffs from radio stations for the ephemeral reproductions made to facilitate broadcasting activities.

Note that the combined revenues of the main music collectives were conservatively estimated at $290 million in 2004, which excluded significant income from private copying and ephemeral rights.[14] This figure is likely much higher today, especially given significant increases in tariffs

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10 www.socan.ca

11 www.nrdv.ca/

12 www.cpcc.ca

13 www.cmrra.ca

14 ***A Statistical Profile of the Canadian Music Publishing Industry A Report Prepared for the Canadian Music Publishers Association and the Professional Music Publishers Association*** by Paul Audley & Associates Ltd. and Circum

applicable to commercial radio stations and new sources of tariff revenue, such as ringtones.

***Reprography*:**

Revenues for reprographic rights generating income of over $34 million have been reported by Access Copyright[15] for 2006 along with almost $12 million by Copibec,[16] the French Canadian counterpart to Access Copyright. Most of these revenues comes from governments and educational institutions under Government auspices.

Other Collectives

There are many other collectives, though they are generally less visible than those mentioned above. Examples include collectives for the licensing of motion pictures for classroom use[17] and a number of collectives involved in the very lucrative retransmission tariff. The first major decision of the new Copyright Board was delivered in 1990 when it awarded a tariff worth approximately $53 million annually in respect of the newly enacted retransmission right that resulted from the Free Trade Agreement with the U.S.A. [18] That was 15 years ago. Current figures for retransmission royalties are estimated by one of the main retransmission collectives as being about $75 million per annum.[19]

A relatively complete list of collectives can be found at the Copyright Board's website,[20] with more detail regarding names of personnel and some aspects of the interrelationships of these collectives in a recent report by Craig Parks commissioned by Canadian Heritage.[21]

Network Inc. December 13, 2005.

15 www.accesscopyright.ca

16 www.copibec.qc.ca

17 http://www.criterionpic.com/

18 ***Re Royalties for Retransmission Rights of Distant Radio and Television Signals*** [Indexed as: Royalties for Retransmission Rights of Distant Radio and Television Signals (Re)] 32 C.P.R. (3d) 97 Varied 34 C.P.R. (3d) 383 Copyright Board Medhurst J., Hétu, Q.C., Latraverse and Alexander, Members. October 2, 1990.

19 http://www.crc-scrc.ca/english/downloads/CRC_Biennial_Eng.pdf

20 http://cb-cda.gc.ca/

21 ***A Report on Copyright Collectives Operating in Canada,*** October 2006. Department of Canadian Heritage. http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/copyright_collectives/copyr

THE BENEFITS OF COLLECTIVES

The presence of collectives both solves and creates many problems.

On the positive side, these are some of the benefits from collectives:

1. Collectives can enable a "one stop shop" for users who wish access to a large and even universal repertoire for a particular usage, such as the right to perform in public, at a reasonable cost without the need for any immediate transactional costs for negotiation of a license.

2. Collectives can enable and empower actual creators who would otherwise have no other practical means to enforce their rights provided by copyright law. Even the most successful composer cannot enforce his or her rights against countless radio stations, restaurants and other establishments throughout Canada, much less around the world.

3. Copyright has been described as a "business of pennies."[22] The individual transactions licensed by collective may be very small and consist of pennies or fractions thereof. However, they add up to billions of dollars of important compensation for creators. Without collectives, there would be a "market failure" in many instances in terms of the ability to enforce creators' rights.

4. Collectives can lobby for stronger rights for creators. Creators on their own lack the resources and often the sophistication to seek the legislation they need to protect their interests.

5. Collectives can link with counterparts in other countries to ensure that creators in Canada are efficiently compensated for use of the work in other countries throughout the world in accordance with copyright laws in other countries.

6. Collectives can fairly and efficiently distribute the large sums of money they collect, sometimes from thousands or more licensees, to their members, which may also number in the thousands or more. This is clearly a complex task. A well run collective can keep its administrative costs under 20%, with the balance flowing to its creator and corporate members.

THE DETRIMENTS OF COLLECTIVES

On the negative side, some of the criticisms that are often heard are these:

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[22] http://www.socan.ca/jsp/en/word_music/Summer06_Publish.jsp

1. Tariffs are often seen by users as very high and excessive. Collectives are often not a one stop shop. Copyright Board hearings are very expensive for objectors. In Canada, the proliferation of collectives and of rights provided for in the *Copyright Act*, and the Copyright Board's approach to oversight of collectives have led to the need in many cases for multiple payments to multiple collectives for basically the same act or transaction, not to mention multiple expensive hearings covering the same activity from the users's standpoint. Examples include the downloading of "authorized" music from an online music provider or the broadcasting of music over the radio. Moreover, with the exceptions of SOCAN and NRCC, no collective in Canada has a truly "universal repertoire"[23] and some collectives have very little actual repertoire in fact compared to the actual existing repertoire, thus detracting even further from the "one stop shop" promise. As noted, one major collective arguably functions more as an insurance or indemnity company than as a traditional collective.

2. Collectives are an exception from the basic antitrust and competition law abhorrence of price fixing and conspiracies. In fact, that is precisely the business that collectives are engaged in. Oversight by the Copyright Board does not necessarily address concerns about competition law, since the Copyright Board has no expertise in competition law and has no mandate to take it into account. While the Commissioner of Competition is empowered and arguably expected to become involved in certain Copyright Board matters,[24] neither she nor any of her predecessors have ever done so.

3. The business of pennies is now collectively worth almost half a billion dollars a year in Canada and is a very significant cost in many instances to businesses and individuals. However, it is not very beneficial to most actual creators.[25] It is by definition not effective at helping "starving artists", since the collective system with its "follow the dollar" logic largely rewards already commercially successful creators. In fact, the system has a great

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[23] Through some complex reasoning in the 1999 hearing, the Board found that NRCC was found to have about 95% of the eligible repertoire for sound recordings and effectively was entitled to collect for the performers' share of this repertoire. See http://cb-cda.gc.ca/decisions/m13081999-b.pdf pp. 10-19.

[24] See sections 70.5 and 70.6 of the ***Copyright Act.***

[25] Collectives exploit the notion that the average income of conventional writers, song writers, performers, actors and various other artists is only a few hundred or a few thousand dollars a year. This is because almost anyone can call themselves an artist and actually earn a small amount of income. However, amending the legislation or raising tariffs so as to double their income from $1,000 to $2,000 a year will not solve their problems. It will, however, make an enormous difference to the Britney Spears' and J. K. Rowlings' of this world, and the large companies to whom they are tied.

deal of trouble tracking the usage of relatively unknown and commercially unsuccessful creators and copyright owners. Collectives generally avoid subsidies from more successful creators to less successful creators. Direct subsidies form institutions such as the Canada Council are arguably a far more effective incentive for emerging or non-commercial creators. Collectives, however, provide an excuse to Government or wealthy patrons to avoid providing such subsidies. Moreover, Canadian collectives have avoided the European model of a "cultural fund," which sets aside up to 25% of revenues for worthy projects and the care of needy young and old artists who may need some benevolence. Notably, such funds are outside of the "national treatment" requirements and result in keeping more money in the country where it is paid.[26]

4. The lobbying power of collectives has arguably become excessive and even threatens the public interest in some respects. Understandably, some collectives directly or indirectly are active lobbyists. The "public choice" doctrine[27] has been the subject of work by several Nobel Prize winners. The doctrine shows that a single purpose entity with even modest funding can achieve enormous public policy and financial victories against a much larger adversary with many diverse priorities and even when the policy appears to fly in the face of the overall desires of the general public and the public interest. These issues are now being pursued in an interesting and potentially very important way by the renowned scholar and, for a brief time, possible congressman, Professor Lawrence Lessig.[28]

5. The international networks of collectives that should ensure that Canadians get paid for use of their work abroad do not work as well or as transparently as they should. The system works reasonably well in the case of CISAC, the International Confederation of Societies of Authors and Composers, which has existed since 1926 in the performing rights field.[29] There is also a mechanism for doing so in respect of reprographic rights.[30]

6. Some collectives are notoriously slow and inefficient in distribution of the revenues. In some cases, the collectives have an inadequate scientific basis for their distributions and resort to unreliable proxies or models to allocate revenues to members, or simply make arbitrary "repertoire fund" payments in order to disburse revenues that cannot be

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[26] The SOCAN Foundation is a small exception. However, even it does not compare in scope or nature to European practices.

[27] http://en.wikipedia.org/wiki/Public_choice_theory

[28] www.lessig08.org

[29] www.cisac.org

[30] http://www.ifrro.org

accurately allocated. A one year old but only recently released independent study[31] by Martin L. Friedland, C.C., Q.C., former Dean of Law of the University of Toronto Law School confirms the lack of transparency and method in distribution of Access Copyright's considerable revenues, now in excess of $30 million a year. Given that this study is very critical of Access Copyright and could reasonably have been expected to turn out this way, Access Copyright does deserve credit for commissioning it and, eventually, making it available online.

OVERALL ASSESSMENT OF COLLECTIVES IN CANADA

There is no doubt that copyright collectives can serve a useful purpose for all concerned and are even necessary in one form or another in many cases. It has taken a long time for collectives to earn the public trust and government approval.

This hard earned equilibrium is occasionally threatened by such tactics as attempting to force licenses on Girl Guides in the USA. The recent effort by Canadian songwriters to impose a $5 monthly "tax", as it is being called, on internet subscribers[32] is already extremely controversial.[33] This would apply to each internet subscriber in Canada for the downloading and sharing of music, regardless of whether the subscriber or anyone in the subscriber's household has ever done so or would ever even want to do so and in spite of evidence that such behaviour, even when it occurs, may actually benefit the music industry.[34]

Historically, the Canadian government was very wary and even averse to collective activity in the field of copyright. This is reflected in several historical reports, ranging from the Parker Commission of 1935 to the Ilsley Report of 1957 and the Economic Council Report of 1971. Until the 1980's, successive governments were unable to see any benefit from collectives other than in the performing rights field. The predecessors to SOCAN were allowed to exist as a limited exception in the performing rights field. No other collectives were granted any exception from the then existing conspiracy provisions of the *Competition Act*, until the doors were opened

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31 Martin L. Friedland, C.C., Q.C., ***Report to Access Copyright on Distribution of Royalties,*** February 15, 2007. (The "Friedland Report").

32 http://www.songwriters.ca/studio/proposal.php

33 See masthead editorial ***Debunking the Tax***, National Post, February 25, 2008. http://www.nationalpost.com/opinion/story.html?id=332290

34 Birgitte Andersen* and Marion Frenz***, The Impact of Music Downloads and P2P File-Sharing on the Purchase of Music: A Study for Industry Canada. 2007.*** See: http://excesscopyright.blogspot.com/2007/11/industry-canada-p2p-study-shows.html

in the historic amendments of Bill C-60, which came into force on June 8, 1988.

Indeed, in one historic battle, a Canadian collective was formed to attempt to enforce then existing performing rights in sound recordings, notwithstanding that the rights had lain dormant for decades and were probably an inadvertent legislative accident. More than three decades ago, the attempt by Sound Recording Licences (SRL) Ltd. was derailed by the government of the day in the midst of protracted proceedings before the Copyright Appeal Board (predecessor of today's Copyright Board) and some serious litigation.[35] In many ways, the repercussions from the "SRL affair" are still reverberating in Ottawa. Needless to say, the recording industry has recovered from what was viewed at the time as a crushing setback.

For critics of the collective movement in Canada, the overall problem is that collectives have achieved a degree of power, wealth and influence that has enabled them to arguably create certain market distortions that not only do not benefit Canada or Canadians but put Canadian business and consumers at a competitive disadvantage in comparison to their American counterparts. For example, Canadians pay significant levies on blank media such as CDs that are often used entirely for purposes other than music, whereas Americans pay no such levies. Canadian radio broadcasters arguably pay far more comparably than their American counterparts, and pay for neighbouring rights which do not exist in the USA. Canadian educators at all levels pay tens of millions a year for reprographic and other rights that are simply not required under American law. Moreover, there is considerably less access to copyrighted works for educational purposes in Canada than in the USA as a result of the legislation itself, the empowerment of the responsible collectives by federal and provincial governments and the weak opposition of the Canadian educational establishment, which is funded and controlled by government.

Canada's policy is to a certain degree driven by our treaty obligations. One of the main aspects of these obligations is that most rights (with the important exception of certain rights in respect of sound recordings and performers' performances, otherwise known as "neighbouring rights") must be granted on a "national treatment" basis. That means that we must treat foreign rights holders at least as well as we treat Canadians, which is a sort of "golden rule" of international copyright law. The problem, however, is that Canada is by far a net importer of copyright rights. Accordingly, a very large amount of royalty revenues leave this country.

According to Statistics Canada, Canada imported $3.9 billion worth of culture goods from the world, a 3.2% decline from 2005. At the same time, exports fell 12.7% to $2.1 billion, the third consecutive decline.[36] According to Canadian Heritage, Canada exported $5.1 billion in Copyright Industry products and services in 2004 while importing $8.3 billion. This is an

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[35] See: ***Re Canadian Association of Broadcasters*** (1971) 2 C.P.R. (2d) 16; 4 C.P.R. (2d) 201; Jacques R. Alleyn, Q.C, ***The Phonographic Industry Deprived of its Performing Right in Canada*** (1972) 6 C.P.R. (2d) 258

[36] http://www.statcan.ca/Daily/English/070625/d070625a.htm

increase from 2003 when exports totalled $4.6 billion while imports remained relatively steady.[37]

For example, Canada accounted for only 2.1% of world music publishing royalties in 2001, according to the powerful National Music Publishers' Association, ranking slightly higher than Switzerland but lower than The Netherlands.[38] Despite this, Canada provides certain rights to music publishers that the USA does not provide, such as a right to remuneration for private copying. This right alone is worth tens of millions a year, most of which leaves Canada.

Despite Canada's net importer status, Canada has commendably taken the high road and honoured the national treatment doctrine and its existing treaty requirements, far more so than certain other countries. Ironically, the most flagrant adjudicated violator of international copyright treaty law is the USA, which has exempted countless small establishments, such as restaurants and retail stores under a certain square footage formula, from the need to pay royalties for the performance of music in their premises. This is known as the "Section 110" dispute, and the USA shows no sign of complying with the WTO Ruling.[39]

Despite the importance of the collective movement in Canada and the enormous amount of money at stake, there is surprisingly little analytical analysis of collective activity in Canada. A recent study commissioned by Canadian Heritage[40] is frankly disappointing. The Canadian study is largely an unreasoned and undocumented defence of the multiplicity of collectives currently operating in Canada.

A useful comparative reference book on collectives has recently been edited by Prof. Daniel Gervais.[41] It includes a good chapter comparing Canada and Australia, although a more detailed

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[37] The Economic Impact of Canadian Copyright Industries – Sectoral Analysis March 31, 2006, Commissioned by the Department of Canadian Heritage. http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/copyright/07_e.cfm

[38] http://www.nmpa.org/pressroom/surveys/twelvth/NMPA_International_Survey_12th_Edition.pdf

[39] http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm

[40] ***A Report on Copyright Collectives Operating in Canada,*** October 2006. Department of Canadian Heritage.
http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/copyright_collectives/copyright_collec_e.pdf
My detailed critique of the his study as an opportunity missed can be found here:
http://excesscopyright.blogspot.com/2007/10/craig-parks-on-canadas-copious.html

[41] Professor Daniel Gervais (ed.)***, Collective Management of Copyright and Related Rights***, Kluwer, 2006.

chapter on Canada alone might have been preferable. I have reviewed[42] this book quite positively and can recommend it strongly to anyone working in this area in Government or private practice.

Technology and Future Trends in Collectives

Technology could, in principle, drastically change the role of collectives. At the extreme, it could make collectives unnecessary and obsolete. More realistically, it would make them much smaller and more efficient. This would entail the massive use of DRM (digital rights management) technology by copyright owners and users to track uses of copyright material and remit payment, or enable access only to users who have paid appropriate licensing fees.

While this sounds attractive to all concerned, and has been the subject of discussion for three decades, there has been very little tangible progress in this direction. Naturally, large collectives employing hundreds of people are institutionally reluctant to make themselves redundant, or at least much smaller. Users may also have good reason to be wary of DRM solutions, especially since this technology continues to be increasingly mired in controversy for numerous reasons ranging from privacy concerns to the technological crippling of utility.

Unfortunately, many collectives have also shown little interest or commitment to the softer technological solution of RMI (rights management information), which does not necessarily "manage" transactions, but merely enables easier tracking of them by including digital ownership information in the content itself. Older collectives, such as performing rights collectives, spend enormous resources on tracking and sampling actual uses. They are also the ones pushing the envelope on the promising RMI technology, through CISAC. New collectives seem more and more to resort to estimates[43] or dubious but convenient proxies such as the use of radio play and CD sales data to allocate private copying tariff revenues.

A very interesting and rather pessimistic paper on the future of collectives and the possible role of DRM in restoring competitive efficiency has recently been published by Prof. Ariel Katz of the University of Toronto. He concludes that the use of technology could replace the natural monopoly model of collectives but will not happen spontaneously, especially in Canada due to Canada's lack of competition between collectives and other structural impediments.[44] Although this paper is only two or three years old, Prof. Katz might well be even more pessimistic now due to all of the recent controversy concerning DRMs and the trend of the big four record companies

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[42] 2007 E.I.P.R. 160.

[43] See the Friedland Report, passim.

[44] Ariel Katz, ***The Potential Demise of Another Natural Monopoly: New Technologies and the Future of Collective Administration of Copyright***, Law and Economics Research Paper No. 04-02, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=547802

to abandon the technology.

THE COPYRIGHT BOARD OF CANADA

Introduction

Canada's Copyright Board and its predecessor until 1989, the Copyright Appeal Board, have long served as an important example of a specialized copyright tribunal. Its function is to serve as a specialized administrative tribunal to oversee the collective administration of copyright in Canada.

Although every administrative tribunal has its own culture and traditions, the Copyright Board is subject to the same general principles of administrative law as other administrative tribunals generally in Canada, and in particular those that are subject to the regime set out in s. 28 of the *Federal Courts Act.* There is no appeal as of right from any decision of the Copyright Board. There is also no privative clause. Accordingly, the only remedy available to a dissatisfied party is recourse by way of judicial review to the FCA. That said, a large proportion of the substantive decisions of the Copyright Board – and even some procedural ones – have found their way to the FCA in recent years. The Federal Court (formerly the Federal Court Trial Division) has no further role to play in matters relating to the Copyright Board.[45]

Comparison to Certain Other Tribunals

The American counterpart institution to the Copyright Board is the Copyright Royalty Board, which has only three full time Copyright Royalty Judges (CRJs).[46]

The UK Copyright Tribunal is a part time responsibility for most or all concerned, including its one support staff person.[47] Its current Chairman is Michael Fysh, QC, Senior Circuit Judge having responsibility for the Patents County Court in England and Wales. The UK Intellectual Property Office has recently published an exhaustive report[48] recommending reforms to the Copyright Tribunal. However, it would appear that even this reformed tribunal would still be smaller in scope than Canada's.

The Australian Copyright Tribunal is likewise a part time occupation for those involved, and it

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[45] ***Evangelical Fellowship of Canada et al. v. Canadian Musical Reproduction Rights Agency et al.*** (1999) 1 C.P.R. (4th) 497

[46] http://www.copyright.gov/crj/

[47] http://www.ipo.gov.uk/ctribunal.htm

[48] http://www.ipo.gov.uk/ctribunalreview.pdf

has no full time staff. The President must be a judge of the Federal Court.[49]

The Mandate of the Copyright Board

The mandate of the Copyright Board (which prior to 1988 was called the Copyright Appeal Board) has long been held to entail the balancing of the rights of creators with the need to guard against "oppression and extortion" of consumers. As stated by Justice Létorneau[50]

> *In addition, it is no more the Board's mandate to protect consumers to the detriment of copyright owners than it is to protect monopolies to the detriment of consumers. In this context, the observation of Lord Justice Lindley in Hanfstaengl v. Empire Palace; Hanfstaengl v. Newnes, [1894] 3 Ch. 109 (C.A.), at p. 128 is still appropriate:*
>
> > *Copyright, like patent right, is a monopoly restraining the public from doing that which, apart from the monopoly, it would be perfectly lawful for them to do. The monopoly is itself right and just, and is granted for the purpose of preventing persons from unfairly availing themselves of the work of others, whether that work be scientific, literary, or artistic.* ***The protection of authors, whether of inventions, works of art, or of literary compositions, is the object to be attained by all patent and copyright laws. The Acts are to be construed with reference to this purpose. On the other hand, care must always be taken not to allow them to be made instruments of oppression and extortion.***
> >
> > (Emphasis added)

This principle was reiterated by the FCA in the controversial SOCAN Tariff 2A matter, wherein the Board developed a "modified blanket license " (otherwise known as a source license) against the strong wishes of SOCAN and completely outside of the framework of the tariff sought.

> *[3] With respect to the Board's alleged mandate to protect copyright users from owners, Justice Létourneau cited the Hanfstaengl case2 and noted that "the Board properly understood its function when it stated that it had to regulate the balance of*

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[49] http://www.ag.gov.au/www/agd/agd.nsf/Page/CopyrightCopyright_Tribunal
See also M. Bouchard, ***Collective Management in Commonwealth Jurisdictions: Comparing Canada with Australia,*** Chapter IX in D. Gervais, ***Collective Management of Copyright and Related Rights***, The Netherlands, Kluwer, 2006, p. 305.

[50] ***Canadian Assn. of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada,*** (1994) 58 C.P.R. (3d) 190 affirming 52 C.P.R. (3d) 23 (FCA). See also ***Vigneux et Al. v. Canadian Performing Right Society Ltd.*** (1943) 2 C.P.R. 251 (SCC) at Sec. II, p. 258 Affirming 2 C.P.R. 59

market power between copyright owners and users", stating:

> *[o]nce again, the Board is in a better position than this court to strike a proper balance between the interests of copyright owners and users and this court will not interfere unless the result reached is patently unreasonable. In this case, the applicant has failed to establish that the Board acted unreasonably or exceeded its jurisdiction in doing so. [emphasis added]*[51] (emphasis is by the Court)

Justice Robertson's comment about general deference on the question of the balancing of interests may not be so broadly applicable, or even necessarily good law any longer in view of several subsequent decisions, some of which are mentioned below.

The Copyright Board does have broad powers to deal with terms and conditions that are related to a tariff in question, and is not simply restricted to raising or lowering the amounts in issue. Unlike the much disliked (by SOCAN) modified blanket license referred to above and imposed by the Board, this can also work in favour of a proponent, as was determined in 1954 by the Supreme Court of Canada in a deliberately designed test case. In this case, the Supreme Court of Canada held that the Board could approve a tariff based upon a percentage of the gross earnings of a broadcaster and could authorize an audit procedure. This principle has been fundamental ever since.[52]

History of the Copyright Board Canada

The Copyright Board is the successor to the Copyright Appeal Board, which in turn traces back to the Parker Commission of 1935 and amendments to the ***Copyright Act*** made in 1938. The Report of the Parker Commission of 1935[53] put Canada forward as a world leader in collective administration of copyright. The regime that was established as a result lasted intact for 60 years until 1980, when new Copyright Board regime was established. Its influence still remains in significant measure.

The Parker Commission was the first major example of several "learned" commissions and reports that have influenced the development of Canadian copyright policy until the mid 1980's

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51 ***Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Broadcasters et al.*** (1999) 1 C.P.R. (4th) 80;

52 ***Maple Leaf Broadcasting Co. Ltd. v. Composers, Authors & Publishers Association of Canada Ltd.*** (1954) 21 C.P.R. 45 Varying 18 C.P.R. 1 (SCC)

53 ***Report of His Honour Judge Parker, A Commissioner appointed by the Inquiries Act and the Copyright Amendment Act of 1931, pursuant to the Order in Council No. 738,*** dated March 22nd, 1935, Ottawa, J.O. Patenaude, I.S.O., Printer to the King's Most Excellent Majesty, 1935

and 1990's, when the advice of professional civil servants and learned commissions was largely replaced by the influence of lobbyists.

The Copyright Appeal Board - from its inception in 1938 until it was restructured in 1989 - dealt with essentially one issue, namely the "performing right" in musical compositions. Until the late 1940's this was administered by one organization, namely the Canadian Performing Right Society, which became the Composers, Authors and Publishers Association of Canada, Ltd. (CAPAC) in 1946.[54] A competing organization, namely BMI Canada was formed in 1941. In 1978, BMI became known as PRO Canada. The two organizations merged on March 16, 1990 and are now known as SOCAN. [55]

The old Copyright Appeal Board survived essentially unchanged from 1938 until 1989. Throughout this period, it was a part time responsibility normally undertake by one Judge of the Exchequer or Federal Court, as it was later known and two civil servants, all of whom undertook their roles on a part-times basis in conjunction with their other duties. Even the administrative duties were the part time responsibility of one public servant. The constitutionality of the old Copyright Appeal Board and the scheme that established it was tested and considered in 1955.[56]

Bill C-60 came into force on June 8, 1988 and broadened the possibility of collective activity beyond the limited field of musical performing rights. The Copyright Board, as it was now called, was established in 1989. It is now comprised of four full time members plus a Chairman. The position of Chairman must be filled by a judge, who may be a retired judge. However, there is no mandatary requirement that a Chairman actually be appointed. For several years, the Copyright Board was without a Chairman. There is a staff consisting of several full time professional (including economic and legal) and administrative persons. There is no requirement that the members be appointed full-time. They could be appointed on a part-time basis.[57]

As noted above in another context, the first major decision of the new Copyright Board was delivered in 1990 when it awarded a tariff worth approximately $53 million annually in respect

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54 ***Final Report to the Minister of Consumer and Corporate Affairs for 1987*** 15 C.P.R. (3d) 129 Copyright Appeal Board. July 8, 1987 p. 134.

55 ***Statement of Royalties to Be Collected for the Performance in Canada of Dramatico-musical or Musical Works for the Calendar Year 1991 for Which SOCAN Holds the Performing Rights*** [Indexed as: SOCAN (Re)] 37 C.P.R. (3d) 385 Copyright Board Medhurst J., Chairman, Hétu, Q.C., Alexander and Latraverse, Members July 31, 1991.

56 ***Composers, Authors and Publishers Association of Canada, Ltd. v. Sandholm Holdings Ltd., Sandler and Holmes*** (1955) 24 C.P.R. 58.

57 ***Copyright Act***, s. 66(2).

of the newly enacted retransmission right that resulted from the Free Trade Agreement with the U.S.A.[58]

The Inherent Powers of the Copyright Board

Unlike the Competition Tribunal which has ample explicit powers as a "court of record"[59], the Copyright Board has much more limited defined powers as a "court of record". However, it does have powers comparable to a court of record in relation to determining its own proceedings. The ***Copyright Act*** provides that:

> *General powers, etc.*
>
> *66.7 (1) The Board has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its decisions and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.*

The issue is important in relation to the limits of power that the Copyright Board can exercise directly, especially when a panel is not actually being presided over by a Judge of a Superior Court, as was the case from 1994 to 1999.

For example, it is questionable whether the Copyright Board would have the same powers to cite for contempt as does the Competition Tribunal.[60] This is important because the Board has occasionally issued implicit threats to invoke what it perceives as its power to cite for contempt, for example when a party chooses to withdraw from a proceeding rather than answer interrogatories as ordered by the Board or respond to a subpoena that the Board might issue following such a withdrawal. For better or worse, this has not yet been put to an actual test. The ***Copyright Act*** certainly does not provide any explicit reference to a power to cite for contempt, such as is found in s. 8(3) of the ***Competition Tribunal Act***:

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[58] ***Re Royalties for Retransmission Rights of Distant Radio and Television Signals*** [Indexed as: Royalties for Retransmission Rights of Distant Radio and Television Signals (Re)] 32 C.P.R. (3d) 97 Varied 34 C.P.R. (3d) 383 Copyright Board Medhurst J., Hétu, Q.C., Latraverse and Alexander, Members. October 2, 1990.

[59] ***Competition Tribunal Act,*** Chapter C-36.4 (R.S., 1985, c. 19 (2nd Supp.)) s. 9 (1).

[60] ***Chrysler Canada Ltd. v. Canada (Competition Tribunal)***, (1992) 42 C.P.R. (3d) 353 (SCC).

> *Power to penalize*
> *(3) No person shall be punished for contempt of the Tribunal unless a judicial member is of the opinion that the finding of contempt and the punishment are appropriate in the circumstances.*
>
> *R.S., 1985, c. 19 (2nd Supp.), s. 8; 1999, c. 2, s. 41; 2002, c. 16, s. 16.1.*

Likewise, the Board's power to issue a subpoena under hostile circumstances is uncertain and has never been directly tested, though the sabre has been rattled on occasion.

Generally, the Board is the master of its own procedure. MacKay J. clarified in an important procedural decision in 1993 that:

> *In my view, the authority to grant intervener status, and the authority to determine procedural rights of individual interveners is within the implicit authority of the Board as a necessary incident in the discharge of its role in the public interest. It is implicit within the terms of s. 66.7(1), as a power in relation to "matters necessary or proper for the due exercise of its jurisdiction", a power akin to that "vested in a superior court of record".*[61]

The Copyright Board as an Administrative Tribunal

The Copyright Board is an administrative tribunal whose members are appointed by the Governor in Council for not more than two terms not exceeding five years each.[62] Not all appointments have been renewed and not all renewals have been promptly and smoothly effected. It has become the practice for vacancies to be posted in the Canada Gazette and the Prime Minister's Office has become closely involved in the appointment process.

The Copyright Board is a quasi-judicial tribunal whose members must follow basic rules of natural justice. For example, they must not consider or look for evidence in a proceeding outside the course of the hearing process.[63]

Although the Copyright Board has complained about a lack of sufficient resources to carry on it

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[61] ***Society of Composers, Authors and Music Publishers of Canada v. Canada (Copyright Board)***, (1993) 47 C.P.R. (3d) 297.

[62] ***Copyright Act***, s. 66 (2).

[63] ***Canadian Cable Television Assn. - Association Canadienne De Television Par Cable v. American College Sports Collective of Canada, Inc. et. al.*** [indexed as: Canadian Cable Television Assn. v. American College Sports Collective of Canada, Inc.] 36 C.P.R. (3d) 455 Federal Court of Appeal Mahoney, MacGuigan and Linden JJ.A. June 3, 1991.

mandate, it has not been particularly receptive to alternative initiatives that would, for example, permit it to recover costs from key players in the proceedings that take place under its jurisdictions. An attempt to implement such a scheme was included in Bill C-93, a budget implementation bill that suffered an historical defeat in the Senate in 1993 for reasons not related to the circumstances concerning the Copyright Board. Bill C-93 would have created an Intellectual Property Tribunal that would have merged the Copyright Board with the Trade-marks Opposition board, as a first attempt to implement an Intellectual Property Tribunal as suggested in the Henderson Report of 1991.[64]

There are precedents for cost recovery mechanisms that can be found in the telecommunications regime at the CRTC and the National Transportation Agency. Essentially, the party seeking approval of a tariff would be required to pay for the costs of the process and even the costs of intervention or objectors in certain circumstances according to legislated principles.

The importance of the Copyright Board is reflected in part by virtue of it being one of the select list of 16 federal boards or tribunals from which recourse by way of judicial review lies directly and solely with the FCA by virtue of section 28 of the *Federal Courts Act*. Most of the tribunals on this list are high profile and important federal tribunals. There is no longer any need to distinguish between taking interlocutory matters to the Federal Court Trial Division and final matters to the FCA. All judicial review is now to the higher body as a result of amendments to the *Federal Court Act* dating from February 1, 1992.

The Copyright Board has some powers to enact regulations, subject to Governor in Council approval. For example, under s. 66.6(1) of the ***Copyright Act*** , the Board could set out regulation providing for practice and procedures, as well as the requirements for a quorum. However, it has never done so. This has occasionally led to some difficulties and uncertainties, and will likely lead to others. As time passes, it will likely become more difficult to devise regulations that are broadly acceptable, since various parties will have developed long standing views of how the Board should be run. On the other hand, there is a certain virtue in the Board's ability to deal with particular matters on a largely *ad hoc* basis, since each "inaugural" tariff tends to have a different ethos and degree of complexity of its own.

In its decision making capacity, the Copyright Board operates under a regime that the Board itself describes[65] as follows:

> *The Copyright Act (the "Act ") requires that the Board certify tariffs in the following fields: the public performance or communication of musical works and of sound*

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[64] G. F. Henderson, ***Intellectual Property: Litigation, Legislation and Education, Minister of Supply and Services***, 1991. Chapter VIII.

[65] Copyright Board Annual Report 2006-2007. Page 9. http://cb-cda.gc.ca/aboutus/annreps/20062007-e.pdf

recordings of musical works, the retransmission of distant television and radio signals, the reproduction of television and radio programs by educational institutions and private copying. In other fields where rights are administered collectively, the Board can be asked by a collective society to set a tariff; if not, the Board can act as an arbitrator if the collective society and a user cannot agree on the terms and conditions of a licence.

The Board's specific responsibilities under the Act are to:

- *certify tariffs for the public performance or the communication to the public by telecommunication of musical works and sound recordings [sections 67 to 69];*
- *certify tariffs, at the option of a collective society referred to in section 70.1, for the doing of any protected act mentioned in sections 3, 15, 18 and 21 of the Act [sections 70.1 to 70.191];*
- *set royalties payable by a user to a collective society, when there is disagreement on the royalties or on the related terms and conditions [sections 70.2 to 70.4];*
- *certify tariffs for the retransmission of distant television and radio signals or the reproduction and public performance by educational institutions, of radio or television news or news commentary programs and all other programs, for educational or training purposes [sections 71 to 76];*
- *set levies for the private copying of recorded musical works [sections 79 to 88];*
- *rule on applications for non-exclusive licences to use published works, fixed performances, published sound recordings and fixed communication signals, when the copyright owner cannot be located [section 77];*
- *examine, at the request of the Commissioner of Competition appointed under the Competition Act, agreements made between a collective society and a user which have been filed with the Board, where the Commissioner considers that the agreement is contrary to the public interest [sections 70.5 and 70.6];*
- *set compensation, under certain circumstances, for formerly unprotected acts in countries that later join the Berne Convention, the Universal Convention or the Agreement establishing the World Trade Organization [section 78].*

In addition, the Minister of Industry can direct the Board to conduct studies with respect to the exercise of its powers [section 66.8].

Finally, any party to a licence agreement with a collective society can file the agreement with the Board within 15 days of its conclusion, thereby avoiding certain provisions of the Competition Act [section 70.5].

The Board's Procedure

The Board has a Directive on Procedure that has changed very little over the years. It outlines the

normal steps and stages in a hearing. It can be found at the Board's very helpful website.[66]

The Board's staff are extremely courteous and helpful in explaining how things work and providing information about past and current proceedings. There is considerable and invaluable corporate memory amongst this small staff and they are generous in sharing their knowledge with those who need to know it.

Hearsay and Survey Evidence

The Board takes a very relaxed view on hearsay evidence. Sometimes, voluminous amounts of material are filed from the internet and other sources, sometimes even without presentation through witnesses. However, such material is often given little if any weight.

On the other extreme, collectives sometimes make extensive and expensive presentations of survey evidence, basically because they can afford to do so. However, objectors can rarely begin to match the spending of most collectives on survey evidence. The Supreme Court of Canada has recently voiced great scepticism about survey evidence in intellectual property matters, at least in the trade-marks context.[67]

Expert Witnesses

The Board places considerable reliance on opinion evidence presented by supposed experts, although it often does not formally "qualify" the experts as such. Some of the experts who appear before the Board do so quite regularly and have close economic ties if not outright dependency on the party calling them. While these persons may have considerable "expertise," they may have little or no independence with respect to the party paying for their services. Indeed, in some cases the witness may be effectively playing a management and/or advocacy role for the collective. The Board has shown great reluctance to permit any questions relating to the independence of the experts or going to the weight of their testimony.

In Canadian courts, the normal rule is that:

> *The expert witness should provide independent assistance to the court and should not assume the role of an advocate.*[68]

While the Copyright Board is not a "court," it is arguable that it should not completely discard

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66 http://cb-cda.gc.ca/aboutus/directive-e.html

67 ***Mattel, Inc. v. 3894207 Canada Inc.*** (2006) 49 C.P.R. (4th) 321

68 J. Sopinka et al, ***The Law of Evidence in Canada***, second edition, Toronto, 1999, §12.44

basic evidentiary principles that apply in the courts. This is an area in which serious and important challenges could arise in the future. Interestingly, the recent UK report about its Copyright Tribunal calls for use of expert witnesses only when "necessary" and the use of jointly retained expert witnesses, other than in exceptional circumstances. The UK Report recommends:

> *In our view, unless there are exceptional and compelling reasons, any expert evidence should be by a single, joint expert...*[69]

The Copyright Board may wish to revisit its policy of tolerance and, indeed, frequent reliance on expert opinion evidence from persons who are not sufficiently independent of the party for whom they are testifying and who may even function, in effect, as advocates.

IMPORTANT RECENT DECISION OF THE FEDERAL COURT OF APPEAL CONCERNING THE COPYRIGHT BOARD

Standard of Review

In the AVS decision from the FCA in 2000, the Court ruled that the question of whether blank CDs were "ordinarily used" by individual consumers to copy music must be reviewed on the basis of patent unreasonableness. Linden, J.A. writing for the Court held that

> *In our view, this issue is mainly a question of law, that is, the interpretation of legislation that the Board administers. Such a determination falls squarely within the jurisdiction of the Board. It is in its home territory..the proper standard of review on this issue, even though there is no privative clause, is patent unreasonableness, as considerable curial deference is due to this Board on this question.*[70]

However, the FCA effectively overruled itself on this point shortly thereafter in the ***Tariff 22*** matter in a careful judgment by Evans, J.A., the Court's doyen of administrative law and author of Canada's leading treatise on the subject.[71]

After the Tariff 22 matter went to the Supreme Court of Canada, the battles over what standard of review applies to the Copyright Board are now hopefully over. Most of the issues that are likely to give rise to judicial review applications will concern questions of law and jurisdiction, and the

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69 http://www.ipo.gov.uk/ctribunalreview.pdf §7.39

70 ***AVS Technologies Inc. et al. v. Canadian Mechanical Reproduction Rights Agency et al.*** (2000) 7 C.P.R. (4th) 68 para. 5

71 ***Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers et al.; Canadian Recording Industry Association et al., Interveners*** (2002) 19 C.P.R. (4th) 289 paras. 40-55.

Supreme Court of Canada has made it entirely clear that these will be dealt with on a basic "correctness" basis. In other words, the Board gets no deference from the reviewing Court where the law is concerned. If the Board is wrong, it is wrong. As Justice Binnie stated in the SOCAN decision from the Supreme Court of Canada:

> *49 There is neither a preclusive clause nor a statutory right of appeal from decisions of the Copyright Board. While the Chair of the Board must be a current or retired judge, the Board may hold a hearing without any legally trained member present. The Copyright Act is an act of general application which usually is dealt with before courts rather than tribunals. The questions at issue in this appeal are legal questions. For example, the Board's ruling that an infringement of copyright does not occur in Canada when the place of transmission from which the communication originates is outside Canada addresses a point of general legal significance far beyond the working out of the details of an appropriate royalty tariff, which lies within the core of the Board's mandate.*
>
> *50 None of the parties is challenging the Board's view of the facts themselves. It is the legal significance of the facts that is in issue. In my view, accordingly, the decision of the Board on the legal questions at issue in this appeal should be reviewed on a correctness standard.*[72]

The FCA is extremely reluctant to get involved in purely procedural and interlocutory matters arising from the Board.[73] These matters can be quite serious, particularly in respect of disputes over interrogatories. Nonetheless, the Board has essentially free reign in these respects. However, a new and important element has been added, which is that the Board must now provide adequate reasons, even where it is reviewable only on the basis of patent unreasonableness.

The Need to Provide Adequate Reasons

For many years, the Copyright Board regarded itself as essentially "bullet proof" with respect to matters relating to the actual calculation of rates and the rendering of interlocutory decisions, particularly on matters relating to interrogatories. That era has come to an end.

On October 14, 2005 the Copyright Board gave SOCAN and NRCC an increase in the tariff payable by commercial radio stations amounting to about 30% by the Board's own estimate. The hearing had taken place in May, 2004, about 18 months earlier. The Canadian Association of Broadcasters ("CAB") was very upset, calling the decision "aberrant and unreasonable" and

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[72] ***Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers,*** [2004] 2 S.C.R. 427 pars. 49-50.

[73] ***Groupe Archambault Inc. v. CMRRA/SODRAC Inc. et al.*** (2005) 53 C.P.R. (4th) 290.

referring, controversially, to the Board as "renegade".

After only one week of deliberation, the FCA on October 19, 2006 has granted, with costs, a judicial review application by the CAB on the basis of "the inadequacies of the Board's reasons respecting the quantification of the royalty increases attributable to both the historical undervaluation of music, and the greater efficiencies achieved by the industry through its use of music". The FCA declined to reverse the Board on its alleged failure to take into account the "cumulative royalty burden" resulting from the "proliferation in the number of rights holders to be compensated". This additional burden – of course – flows mainly from the decision of Parliament in 1997 to recognize neighbouring rights.

The decision[74] was written by Evans, J.A., who said:

> *[16] The Board is entitled to the greatest deference in the exercise of its discretion to set a rate and, accordingly, the discretionary decisions lying at the heart of its expertise are reviewable only for patent unreasonableness. However. it must explain the basis of its decisions in a manner that enables the Court on Judicial review to determine on the basis of the reasons, read in context, whether the decision was rationally supportable. When an administrative tribunal's decision is reviewable on a standard of reasonableness, its reasons are the central focus of a judicial review: Law Society at New Brunswick v. Ryan, [2003] 1 S.C.R. 247, 2003 see 20, at paras. 48-9, 54-55.*
>
> *[17] In my view it was not sufficient in the circumstances of this case for the Board to justify its quantification of the undervaluation by merely referring to the evidence taken as a whole. It is not enough to say in effect: "We are the experts. This is the figure: trust us." The Board's reasons on this issue served neither to facilitate a meaningful judicial review, nor to provide future guidance for regulatees.*

The Court went on to conclude that the Board had breached "its duty to provide adequate reasons for its decision."[75] This appeared to be a victory, at least for at least the time being, for the CAB.

However, the really interesting question is what effect this could have on the Board itself. The Board already takes considerable time, well over a year on some occasions, to render its reasons, which are invariably carefully written and which had hitherto been considered close to "bullet proof" in terms of appellate deference to rate calculation, review of the evidence and the other matters in which the Board is presumed to have expertise, i.e. "the working out of the details of

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[74] ***Canadian Association of Broadcasters v. SOCAN***, 2006 FCA 337

[75] 2006 FCA 337, para. 22.

an appropriate royalty tariff, which lies within the core of the Board's mandate."[76]

Now, however, it seems that Board must now explain in greater detail how it gets to its bottom line, even on these "core" matters. And in some respects, more detailed reasoning may open up even more possibilities for judicial review. Merely referring to the often voluminous evidence filed before it is not likely to be sufficient any longer.

The new regime set forth by Justice Evans may also lead to the need for the Board to evaluate more critically and analyse the quality of the evidence it relies upon, and why it is being relied upon. Evidence at the Board is often less than convincing. It is sometimes hearsay by any measure and is sometimes submitted by persons whose independence as experts is problematic, as noted above.

Below the tip of this iceberg on this issue is the fact that Parliament has chosen to largely delegate - some might say "abdicate" - a lot of power to the Board to not only determine terms, conditions and rates of tariffs, but to effectively make law from square one.[77] This is in stark contrast to many royalty mechanisms in the USA which are sometimes spelled out in extreme detail by Congress.

At the other end of the spectrum from broad law making, the Board routinely rules on procedural matters such as interrogatory disputes (the Board's somewhat analogous procedure to discoveries - except that there is no oral examination). There are often significant disputes as to what is relevant or too burdensome. In the past, the Board provided few, if any, reasons for its procedural rulings. Not surprisingly, it has begun to provide somewhat more substantial reasons.

Justice Evan's decision should not result in greater delays in the release of decisions by the Board. There is already criticism that the Board often takes well over a year following a hearing to render a decision. Moreover, the lead up to the hearing can be a couple of years or more. The "pendency" issue will be discussed below.

The next step in the follow up to the FCA's decision requiring adequate reasons has now taken place. The Board has just issued a decision on the rehearing required by the FCA. Notably, the Board has come to the same conclusion as it did before, but for different reasons.[78]

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[76] ***Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers,*** [2004] 2 S.C.R. 427 para. 49.

[77] e.g. retransmission and private copying regimes.

[78] ***Statement of Royalties to Be Collected by SOCAN and NRCC in Respect of Commercial Radio for the Years 2003 to 2007 [Re-determination]***, February 22, 2008. http://cb-cda.gc.ca/decisions/m20080222-b.pdf

The Copyright Board has now reiterated its conclusion from its decision October 14, 2005 to grant a substantial increase to SOCAN for its commercial radio tariff and a corresponding increase to NRCC. In the words of the Board's press release of February 22, 2008:

> *Mr. Claude Majeau, Secretary General to the Board, explained that "parties submitted new evidence that allowed the Board to assess the value of the music to broadcasters from different viewpoints. Using the methodology put forward by the broadcasters, and after a number of adjustments, the Board revisited the factors it identified in 2005 to justify the royalty increase, and came to the same conclusions.*[79]

The Board's new decision,[80] which provides SOCAN a 32% increase, comes almost four years after the hearing in May 2004 and reaches the same conclusion, but for different reasons. Basically, this time around the Board adopted the CAB's economic expert's methodology "with several modifications", with the resulting arithmetic working against the CAB, and with lots of detail as to why.

The Need to Follow Decisions of the Federal Court of Appeal

An unusual situation developed on 2007 in which the Copyright Board appeared to challenge the FCA. The Board was persuaded to hear a tariff application for levies on "digital audio recorders" despite the fact that the FCA had ruled[81] in 2004 that "a digital audio recorder is not a medium." The Board's challenge came in the form of its July 19, 2007 decision[82] in which it held that it had the jurisdiction to proceed to set a tariff on digital audio recorders, notwithstanding that the FCA had ruled in 2004 that:

> *160] **A digital audio recorder is not a medium**; the CPCC recognized so much when it asked that the levy be applied on the memory found therein but not on the recorder itself. The Board erred when it held that it could certify a levy on the memory integrated into a digital audio recorder.*
>
> *[161] Subsection 82(1) of the Act imposes a levy on manufacturers and importers of blank media. By the words of paragraph (a) thereof, the liability for the payment of the levy can only arise "on selling or otherwise disposing of those blank audio recording*

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79 http://cb-cda.gc.ca/news/pr-commercialradio20032007-e.pdf

80 http://cb-cda.gc.ca/decisions/m20080222-b.pdf

81 ***Canadian Private Copying Collective v. Canadian Storage Media Alliance et al*** (F.C.A.) [2005] 2 F.C. 654, : 2004 FCA 424

82 http://cb-cda.gc.ca/decisions/c19072007-b.pdf I acted as counsel to the Retail Council of Canada in this matter.

> *media".*
>
> *[162] The Board therefore had to look at what was being sold or disposed of by the importers (it is common ground that there are no manufacturers of digital audio recorders in Canada), and determine whether the subject matter of the sale or disposition came within the ambit of the definition.*
>
> *[163] The Board did not ask itself that question. However, it seems clear that if it had, the subject matter of the sale or disposition was a digital audio recorder or a device as the Board called it, but not a medium as defined. In the absence of such a sale, no liability can arise for the levy.*
>
> *[164]* ***In my respectful view, it is for Parliament to decide whether digital audio recorders such as MP3 players are to be brought within the class of items that can be levied under Part VIII****. As Part VIII now reads, there is no authority for certifying a levy on such devices or the memory embedded therein.*[83]
> (Emphasis added)

Despite this ruling from the FCA, the CPCC filed a tariff in 2007 for "digital audio recorders." Upon motion made by the objectors and despite strenuous objection by the objectors,[84] the Copyright Board ruled on July 19, 2007 in lengthy reasons[85] that the above quoted paragraphs 160 and 164 from the FCA were *obiter dicta*, and decided to proceed with a hearing on a tariff on - what else? - "digital audio recorders." At the risk of oversimplification, the essence of the CPCC's submission was that it had sought a levy in 2003 on the memory "*incorporated into an MP3 player or into any similar device*", which the Board thereupon called a "digital audio recorder", and that it was now asking for a tariff on digital audio recorders themselves and not the memory permanently embedded in them, and that this was now, somehow, a different ball game. It is noteworthy that the CPCC had sought leave to appeal to the Supreme Court of Canada in 2005 on the FCA's previous ruling, but leave was denied, as usual without reasons.

Not surprisingly, judicial review was sought by the objectors on an expedited basis from the July 19, 2007 ruling of the Copyright Board in order to avoid what would have been a very costly hearing on levies for iPods and other digital audio recorders, with enormous amounts of money at stake. The CPCC was seeking up to $75 per digital audio recorder. The FCA hearing took place

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[83] 2004 FCA 424

[84] Including the Retail Council of Canada which I represented.

[85] http://cb-cda.gc.ca/decisions/c19072007-b.pdf

on January 9, 2008. Less than 24 hours later, the FCA on January 10, 2008 decisively quashed[86] the Board's ruling of July 19, 2007.[87] Despite much learned discussion in the briefs to the FCA about "*res judicata*" and the other issues raised and considered in detail by the Board, the FCA simply ruled in six terse paragraphs that its 2004 ruling was "dispositive", and that this was the end of the matter. In Justice Sharlow's words:

> *[3] The applicants, supported by the intervener, have submitted a number of different legal arguments in support of their challenge to the decision of the Copyright Board, but in my view it is necessary to consider only the principle established in Canadian Private Copying Collective v. Canadian Storage Media Alliance (C.A.), [2005] 2 F.C.R. 654, which is* ***dispositive****. I read that case as authority for the proposition that the Copyright Board has no legal authority to certify a tariff on digital audio recorders or on the memory permanently embedded in digital audio recorders.* ***That proposition is binding on the Copyright Board:*** *Canada v. Hollinger Inc. (C.A.), [2000] 1 F.C. 227, at paragraph 30.*
> (Emphasis added)

The FCA also referred the matter back to the Board "for reconsideration and disposition in accordance with these reasons." It remains to be seen how the Board will deal with this aspect of the ruling, which clearly requires some response from the Board.

Although the FCA's decision was one of its shortest on record regarding the Copyright Board, it is possibly one of the most significant. It clearly indicates that the FCA regards its decisions as "dispositive" and that its rulings are binding as stated, unless reversed by the Supreme Court of Canada. The FCA decision gained much media attention and resulted in a very blunt masthead editorial in the National Post.[88] The CPCC has chosen not to seek leave to appeal this decision to the Supreme Court of Canada. It is generally believed that it would have been exceedingly unlikely for leave to have been granted in this instance.

Not all of the Board's recent decisions have been reversed by the FCA. In fact, on the same day that the "iPod Tax" case was heard, namely January 9, 2008, the FCA (also in a decision written by Sharlow, J.A.) upheld a controversial ruling of the Board that the delivery of ringtones

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[86] ***Apple et al v. Canadian Private Copying Collective,*** 2008 FCA 9. http://decisions.fca-caf.gc.ca/en/2008/2008fca9/2008fca9.html

[87] I represented the Retail Council of Canada, one of the successful parties in the FCA on this matter.

[88] National Post editorial: ***Striking down the iPod tax*** Monday, January 14, 2008 available at http://www.nationalpost.com/news/world/Story.html?id=235987

constitutes a "communication by telecommunication."[89] It is probably safe to assume that the ringtone objectors will seek leave to appeal to the Supreme Court of Canada, and a number of other Board rulings and pending judicial reviews could be affected if the Supreme Court grants leave and ultimately reverses the Board's decision on this this issue.

The Effect of the Recent FCA Decisions

These recent decisions of the FCA may be particularly important because many substantive decisions of the Copyright Board in recent times have been the subject of judicial review. Although the FCA will doubtless continue to defer to the Board, to some extent at least, on "core" matters relating to fact finding and rate calculation, it would seem that there will be no deference and increasing decisiveness on any matters related to legal reasoning. Moreover, even on the matters for which deference will be accorded, the Board must now give adequate reasoning. In summary, the clear trend is that the FCA will be according less rather than more deference to the Board and the Board will have to justify even its factual findings and procedural decisions with adequate reasons.

ASPECTS OF THE COPYRIGHT BOARD THAT COULD BE IMPROVED

While practice before the Copyright Board is very creatively challenging and satisfying for many reasons and while the Board does many things very well despite, there are aspects where improvement would be helpful. I believe that the Board is aware of this and is doing its best to move forward. Hopefully, the following suggestions will be taken as a constructive contribution to this process.

The Pendency of Copyright Board Decisions

Even in recent times, the Copyright Board has been known to take as much as 18 months to render a decision from the time the hearing is over, which may in turn be some years after the tariff was originally filed. The SOCAN/NRCC Commercial Radio decision noted above took about 18 months to deliver.[90] The rehearing required by the FCA took place in June of 2007 and the resulting decision was just released on February 22, 2008, about eight months later.

In the ringtones decision, the Board required 14 months of deliberation with a result that effectively ends up being the average of the rate proposed by SOCAN (10%) and the rate proposed by the objectors (1.5%). The exact arithmetical average would have been 5.75%. The Board ended up with 6%, although it had an admittedly more complex way of getting to that conclusion. On the key legal issue of whether there was a "communication by

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[89] ***Canadian Wireless Telecommunication Association v. SOCAN***, 2008 FCA 6.

[90] http://excesscopyright.blogspot.com/2006/10/cab-gets-socan-nrcc-radio-increase.html

telecommunication", the objectors conceded at the Board stage that there was not.[91]

The Tariff 22 hearing, depending on how one calculates these matters, is somewhere between 10 months and 12 years in the making. The first part[92] of the latest round of required decisions in the file were issued about six months after the hearing in April and May of 2007, but the rest have yet to come.

The Board's current Chairman, Mr. Justice Vancise from the Saskatchewan Court of Appeal is trying to reduce the pendency of the Board's decisions to six months. In 2006, the Chairman stated that:

> *I am not at all happy with the time it takes to render a final decision. I have tried to address the issue and I can assure you it will be resolved.* ***If the Supreme Court of Canada can render a decision within six months of a hearing****, there is no reason why this Board cannot do the same. My goal is to see that this occurs.*[93]
> (Emphasis added)

It is, of course, not easy to compare statistics or to make comparisons with the courts, particularly the Supreme Court of Canada.[94] The Board's hearings are normally of a duration of a few days[95] or two or three weeks at most for a complex "inaugural" or substantially new tariff. The longest ever Board hearing was 57 days for the first retransmission tariff, which was very complex. Often, the legal issues facing the Board are not particularly complex and the Board's decisions do not make frequent reference to case law. Invariably, only three of the five members sit on contested hearings, of which there are usually no more and often less than half a dozen per year.

Consequently, comparisons are difficult. While Copyright Board matters can be factually complex, so too are many matters that routinely come before the courts. Most judges spend far more time than Copyright Board members in actually hearing cases. Needless to say, judges in the trial courts sit alone and bear full and sole responsibility for their work Most judges, even Supreme Court judges with their own clerks, are also very actively involved in writing decisions,

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91 http://excesscopyright.blogspot.com/2006/08/ringtones-observations-on-6-solution.html

92 http://cb-cda.gc.ca/decisions/m20071018-b.pdf

93 http://cb-cda.gc.ca/aboutus/speeches/20060823.pdf

94 The SCC has heard no less than 72 and as many as 118 appeals per annum from 1996 to 2006. During this period, it has considered as many as 658 leave to appeal applications in one year, which can be quite complex and voluminous in and of themselves. See: http://scc-csc.gc.ca/information/statistics/download/ecourt.pdf

95 Sometimes only a day or so.

which is a very time consuming and extraordinarily important activity.

The long pendency of Copyright Board hearings can cause serious problems for future cases, other parties and the public interest. As noted above, it took the Board 14 months after a hearing to rule that ringtones involve a "communication by telecommunication", a point that was, for whatever reason, conceded by counsel at the Board stage. This was promptly challenged, and the impact could effect several subsequent decisions. While the FCA has since ruled[96] that the Copyright Board was not wrong in this instance, the matter may yet wind up in the SCC and be overturned. As noted above, a possible reversal by the Supreme Court of Canada could affect subsequent decisions.

In any event, Justice Vancise is clearly seized of this pendency issue and is trying to do something about it.

Retroactive Tariffs

Partly because of the long time lines between the filing of a tariff, its hearing, and particularly the rendering of a decision, some tariffs have a pronounced retroactive effect. For example, the recent NRCC Background Music Tariff was filed on May 11, 2002 for the years 2003 to 2009 but was decided by the Board only on October 21, 2006 and was, not surprisingly in view of Board practice, retroactive.

Many users were caught completely by surprise, since very few businesses in Canada retain copyright lawyers with instructions to monitor the Canada Gazette and the Board's website for proposed new tariffs. This was a totally new tariff that can be potentially very costly for many businesses, especially if NRCC aggressively seeks to apply it retroactively.

In my view, there may be good arguments as to why it cannot be enforced retroactively - at least before October 21, 2006, However, I will keep these views to myself for the time being.

However the Board somehow needs to deal generally with this problem. If the Board does not, the Courts, or the Governor in Council, or possibly even Parliament may do so.

Difficulties in the Interrogatory Process

One of the most widely discussed problematic aspects of Board practice has concerned the interrogatory process. Fortunately, there are some signs that this is improving. However, in the past, the Board has allowed certain collectives to use and arguably abuse this process to the point of driving substantial corporate objectors into withdrawing from hearings to which they could

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[96] 2008 FCA 6.

have and were willing to have contributed substantially.[97] Even the Canadian Recording Industry Association (CRIA) has objected to the interrogatory process, when faced with it on the receiving end.[98]

The problem has arisen because collectives often seek extremely confidential financial information from objectors, which may additionally be very onerous to obtain because it does not already exist. It may be of little and arguably no relevance because the objector's ability to pay may be irrelevant. The value of a tariff will usually have nothing to do with the financial data from a large and diversified corporation. This is especially so if the tariff is not calculated on the basis of any reference to the revenues of the objector.

Some objectors are understandably very concerned about the confidential nature of the material sought, and the fact that it is provided to a small number of "regular" consultants. In this digital era, it is all too easy for confidential information to inadvertently leak, perhaps from a lost or stolen laptop or a mistakenly addressed e-mail. Even a "solicitors eyes only" regime does not fully address these concerns, and invariably, the information is not restricted to "solicitors eyes only."

Very often, the massive amounts of material provided in interrogatories never see the light of day in a hearing, much less in a decision of the Board. While the Board faces an admittedly difficult dilemma here, the withdrawal of some prominent objectors should serve as a clear signal that things need to change.

This is an area where regulations from the Board might be useful, for example specifying under what circumstances financial information from objectors is or is not required. Once again, if the Board does not deal with this problem, the Courts or the government may need to do so.

The Multiplicity of Hearings

Individual collectives with different rights often wish to have separate hearings, even when the use involved is the same act by the user. This is partly a problem of the legislation, which has provided numerous new rights, particularly neighbouring rights, ephemeral rights, communications and performing rights that may all impact a particular commercial practice and be claimed by many different collectives. It is a complex situation. It has arisen in part because there is very little incentive for the wealthier collectives to economize on legal fees and

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[97] See ***Groupe Archambault Inc. v. CMRRA/SODRAC Inc. et al.*** (2005) 53 C.P.R. (4th) 290 and H. Knopf, ***"Fallout" at the Copyright Board***, March 2, 2006, http://excesscopyright.blogspot.com/2006/03/fallout-at-copyright-board.html

[98] See H. Knopf, CRIA Rebuffed from the Bench, October 10, 2006, http://excesscopyright.blogspot.com/2006/10/cria-rebuffed-from-bench_30.html and ***Canadian Recording Industry Association v. AG Canada***, 2006 FCA 336

disbursements for experts. Some of these collectives are spending seven figures a year on tariff related costs. Invariably, the objectors have many other matters to worry about and cannot match this type of spending.

The Board has commendably started to force consolidation of these multiple hearings. Naturally, a consolidated hearing will be longer than a hearing on one matter, and some objectors may not realize any economies. However, the Board has also recognized that hearings can be structured in such a way that objectors should be able to come and go as efficiently as possible.

This is also an area where the Board might productively regulate, giving some comfort and certainty to all concerned.

Oversight of Collectives

It is arguable the Board has sufficient powers under current legislation and in view of the cases mentioned above and many more to exercise more power of oversight over the internal workings of collectives. This could include:

- distribution mechanisms
- review of administration costs
- transparency and reporting of key financial information, including management, legal and other professional expenses.

There is little point in imposing tariffs that are high by any standard, and in some cases relatively higher than in countries such as the USA, when the funds are often distributed years late and in a mystical manner and method, if indeed there is any adequate method. Such a tariff may not have the appearance of being "fair and equitable."

It is an insufficient answer to rely on member democracy and accountability, since there is very little of this in the corporate governance of many of Canada's collectives. Even the provision of a requirement of minimum transparency would serve to enable at least the chance for assertion of members' rights and better governance.

The Board arguably could and should scrutinize the expenditures and efficiency of collectives. Collectives exist not to reward their staff, consultants and lawyers but to collect and to distribute the royalties earned and deserved by their members. If Parliament is going to empower these collectives with monopoly rights, there needs to be sufficient accountability. This is an area where the Board could potentially regulate to some degree. If the Board believes it lacks jurisdiction to do so, then the Governor in Council[99] or Parliament should do what is required.

To the Board's credit, it has on occasion told collectives to take better care of certain classes of

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[99] See s. 66.91 of the ***Copyright Act***.

members. For example, in 1994 it told SOCAN that the proposed concert tariff was too low to be in the interests of its members:

> *The Board hopes, however, that SOCAN will give due consideration to filing its proposed concert tariff for 1995 at a rate higher than that in the SOCAN/CAMP agreement. The Board is of the view that unless this course is followed, the interests of SOCAN's members will not be properly served.*[100]

Recently, the Board looked out for the interests of the independent members of the Canadian Recording Industry Association ("CRIA") and was decisively upheld by the FCA in brief reasons delivered from the bench.[101]

A More Inquisitorial and "Public Interest" Role for the Board

Just as the interests of actual creators (in contrast to collectives) are not always fully represented and considered at the Board, the public interest is also not necessarily taken into account. Because proceedings at the Board are often rather adversarial and invariably expensive, there is virtually no room for public interest advocacy.

The Board has eschewed, as recently as February 22, 2008, any role as an inquisitorial tribunal.[102] But the fact is that the Board sometimes steps in and tells parties to provide additional information on various points. It has the power and it uses it on occasion. It should do so more often.

It should use this power even more so to press questions from the standpoint of the public interest. Given the fact that there are very relatively few actual hearing days in any given year, and that the members have a great deal of time to prepare, there would appear to be no impediment to them asserting a more active role in setting out required issues and questions they would like to see answered, preferably well before, but if necessary during, a hearing in order to ensure that the record is complete.

Objectors are not necessarily proxies for the public interest. They cannot be counted upon to raise or pursue all the public interest issues that might come to mind. Sometimes, potential objectors can substantially pass any increased costs along to the public, and thus may not be motivated to object at all, or to the fullest possible extent. Copyright Board hearings are very expensive and often onerous for the management of the objecting party.

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100 **1991-13, 1992-PM/EM-1 and 1994 p. 418.** http://cb-cda.gc.ca/decisions/m12081994-b.pdf

101 ***Canadian Recording Industry Association v. AG Canada***, 2006 FCA 336.

102 http://cb-cda.gc.ca/decisions/m20080222-b.pdf

A more active role by the Board's members itself would reassure the public that the Board is acting in the public interest, which is its mandate at the end of the day, given the purpose of copyright law and recent pronouncements from the Supreme Court of Canada, such as this from Justice Binnie:

> *The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them.*[103]

This may require a modest increase in research staff, or perhaps the appointment of one or more members with expertise in economics. But nothing prevents the Board members from assuming a more proactive role if they choose, provided that they do so within well established norms of natural justice.[104]

This is not to suggest that the Board become a new CRTC. However, a moderately increased level of inquisitorial activity in the public interest would surely be welcomed by all concerned, particularly the public.

Pre-Hearing Conferences

Under the current system, the proponent of a tariff need only file the prosed tariff at the outset and the objector need only object in a cursory and perfunctory manner. Most objections state little more than that the tariff sought is "excessive and exorbitant" or words to this effect. There is no requirement on either party to state more at the outset and usually very little incentive to do so.

Thus, under the current procedure, the Board itself may have no knowledge of the actual issues that will be raised in a hearing until the parties file their statements of case, which will take place in some instances just weeks or a few months at most before the hearing, culminating a process that could take years from the initial filing of the proposed tariff and objection.

It may be useful for the parties and the Board to have an early and intermediate pre-hearing conference where the known issues are required to be clearly laid out on the table. This would also enable the Board to take a more active inquisitorial role by, at the very least, suggesting or even formally requiring that certain issues be dealt with in the public interest or simply to ensure a fair and equitable tariff as between the parties.

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103 ***Théberge v. Galerie d'Art du Petit Champlain Inc.***, [2002] 2 S.C.R. 336, 2002 SCC 34, para. 31.

104 ***Canadian Cable Television Assn. - Association Canadienne De Television Par Cable v. American College Sports Collective of Canada, Inc. et. al.*** (1991) 36 C.P.R. (3d) 455 (FCA).

Such a procedure might also allow the Board to inject a useful and more transparent measure of case management than it now is able to exercise.

CONCLUSIONS

Canada's system of collective administration of copyright has both many strengths and weaknesses. This is also the case in most other countries. Improvements are possible and necessary. Some of these can come from collectives themselves. Others will need to come from the Copyright Board, or the Government itself in the form of regulation or legislation.

Canada's Copyright Board plays a greater role in the collective administration of copyright than comparable tribunals in Australia, the USA, UK and other common law countries, and probably all other major developed countries. It appears to have more full time members and staff than its counterparts in any comparable country. It has a long and rich history of which it can mostly be very proud. However, that is not to say that improvements cannot be made. This appears to be recognized.

Canada's Federal Court of Appeal, and on occasion the Supreme Court of Canada, have played a vital role in reviewing all of this activity and in ensuring that the public interest element inherent in copyright law is kept in mind.

Much more work needs to be done. Perhaps it is time for another commission along the lines of those chaired by Justice Parker and Justice Ilsley to look at all of this along with other copyright issues more fully and in the interests of the Canadian public.

Ottawa, February 27, 2008