



COPYRIGHT BOARD: A RATIONALE FOR URGENT REVIEW

**Report of the Standing Senate Committee
on Banking, Trade and Commerce**

The Honourable David Tkachuk, P.C., Chair
The Honourable Joseph A. Day, Deputy Chair

November 2016



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ORDER OF REFERENCE

Extract from the *Journals of the Senate*, Wednesday, September 28, 2016:

The Honourable Senator Tkachuk moved, seconded by the Honourable Senator Nancy Ruth:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to study, and make recommendations on, the operation and practices of the Copyright Board of Canada.

That the committee submit its final report no later than Wednesday, November 30, 2016, and that the committee retain all powers necessary to publicize its findings until 180 days after the tabling of the final report.

After debate,

The question being put on the motion, it was adopted.

Clerk of the Senate

Charles Robert

MEMBERS

The Honourable Senators who participated in this study:

David Tkachuk, Chair,
Joseph A. Day, Deputy Chair

and

Douglas Black, Q.C., LL.B.
Larry W. Campbell
Tobias C. Enverga Jr.
Stephen Greene
Paul J. Massicotte
Pierrette Ringuette
Larry Smith
Scott Tannas

Ex-officio members of the committee:

The Honourable Senators Peter Harder, P.C., (or Diane Bellemare), and Claude Carignan, P.C., (or Yonah Martin).

Other Senator who has participated in this study:

The Honourable Senator Pamela Wallin.

Parliamentary Information and Research Service, Library of Parliament:

Brett Capstick and Michaël Lambert-Racine, Analysts.

Clerk of the committee:

Lynn Gordon

Senate Committees Directorate:

Julie Flannery, Administrative Assistant

EXECUTIVE SUMMARY

The Copyright Board of Canada (the Board) is an economic regulatory body with a mandate to set tariffs for Canada's cultural sector that are fair and equitable for both copyright owners and the users of copyright-protected works. The cultural sector is generally thought to comprise the creation, production and distribution of goods and services that are cultural in nature, and that are protected by intellectual property rights.

In advance of the 2017 statutory review of the [Copyright Act](#), which is to be undertaken by a committee of the Senate or of the House of Commons or of both, the Standing Senate Committee on Banking, Trade and Commerce undertook a brief study on the Board's operations and practices. The purpose of the study was to identify topics that the committee believes should be the subject of further examination during the upcoming [statutory review](#).

All of the committee's witnesses noted that the greatest challenge in relation to the Board is its lack of timely decision making. On average, the Board may take between 3.5 and 7 years to make a final decision, the result of which is uncertainty and diminished economic activity within Canada's cultural sector.

Witnesses identified a number of other challenges that require additional and thorough examination in the course of the forthcoming statutory review of the Act. The challenges are related to the Board's governing legislation and resources, the effect of evolving technologies, tariff filing and review processes, the practices of the parties that appear before the Board, and predictability of the Board's decisions.

Witnesses also debated a number of ideas for improvements to the Board that could be the focus of further study, including the imposition of deadlines in relation to the Board's decision making, the use of case management and simplified procedures, operating the Board on a full-time basis, the elimination of retroactive decisions and the use of public consultations.

In addition to these suggestions, witnesses noted that other regulatory bodies – domestically and internationally – should be examined with a view to seeking out best practices or support.

Many witnesses agreed that a review of the Board – either overall or in specific areas – should be undertaken during the forthcoming statutory review of the Act. Consequently, the committee strongly recommends that the mandate, practices and resources of the Copyright Board of Canada be the subject of in-depth study during the forthcoming statutory review of the [Copyright Act](#) by a committee of the Senate or of the House of Commons or of both.

INTRODUCTION

On September 28th, 2016, the Standing Senate Committee on Banking, Trade and Commerce (the committee) was authorized to undertake a study on the operations and practices of the [Copyright Board of Canada](#) (the Board), and to make related recommendations. Consequently, on November 2nd and 3rd, 2016, the committee studied selected aspects of the Board's operations and practices. Witnesses from the Board, collective societies, the cultural sector and academia spoke about the following topics in relation to the Board:

- the timeline for its decisions;
- the unpredictability of its decisions;
- problems with its practices; and
- other bodies that it could emulate or from which it could seek assistance.

The witnesses' comments about these topics convinced the committee that it is urgent to include the Board in the 2017 [statutory review](#) of the [Copyright Act](#), which is to be undertaken by a committee of the Senate, of the House of Commons or of both houses of Parliament.

This report provides a brief description of the Board, and summarizes the witnesses' views about the four topics outlined above.

THE COPYRIGHT BOARD OF CANADA

The Board was established on February 1st, 1989 as the successor to the Copyright Appeal Board, and is an economic regulatory body that establishes the royalties – or tariffs – to be paid for the use of copyrighted works when the administration of such copyright is entrusted to a collective society. [Section 2](#) of the [Copyright Act](#) defines a collective society – or copyright collective – as an organization that collectively administers the rights of several copyright owners. As a centralized body, a collective society grants permission to use the owners' works, set the conditions for that use and collect tariffs on behalf of the copyright owners that it represents. The Board also has the right to supervise agreements between copyright users and licencing bodies, and to issue licences when the copyright owner cannot be located.

Overall, the Board's objective is to set tariffs that are fair and equitable for both copyright owners and the users of copyright-protected works within Canada's cultural sector. This sector is generally thought to comprise the creation, production and distribution of goods and services that are cultural in nature, and that are protected by intellectual property rights.

In November 2012, the Board established the Working Committee on the Operations, Procedures and Processes of the Copyright Board. The committee finalized a [discussion paper](#) in December 2014; it was released for public consultations in February 2015. According to the Board's [2016–17](#)

[Report on Plans and Priorities](#), consultations are ongoing and the Board will make public any changes that it decides to implement.

According to the committee's witnesses, the public consultations begun by the Board in February 2015 are "on hold." They noted that the consultations predominantly involved the stakeholders' external legal counsel, and that collective societies did not play an active role in the consultations, although they were invited to make submissions.

THE TIMELINE FOR DECISIONS BY THE COPYRIGHT BOARD OF CANADA

All of the committee's witnesses believed that the greatest challenge in relation to the Board is its lack of timely decision making. In highlighting their experiences with the Board, a number of witnesses indicated that the Board has taken – or is taking – many years to render decisions. Some witnesses mentioned a 2015 study authored by University of Ottawa Professor Jeremy de Beer. Entitled [Canada's Copyright Tariff Setting Process: An Empirical Review](#), this study found that – on average – the time between the filing of a tariff proposal and the Board's decision regarding that tariff was 3.5 years. Mr. de Beer, who appeared before the committee as an individual, commented that this length of time is likely rising because the number of undecided tariffs is continuing to grow. In his view, the current average length of time between the filing and the Board's rendering of its decision is seven years.

Witnesses agreed that the Board's lack of timely decisions causes uncertainty while the cultural sector awaits a decision about a particular tariff; in particular, businesses must either proceed without definitive information about the pricing and/or permitted uses of their products or services, or – as some witnesses indicated – decide not to enter the Canadian cultural market. According to Google Canada, this uncertainty has a disproportionately negative effect on smaller businesses and curtails the development of new services.

Moreover, Access Copyright stated that, because of the Board's lack of timely decisions, rights-holders may be inhibited from renewing or re-negotiating licences, and artists and publishers may be without revenue for many years while they await the Board's decision about a tariff. Furthermore, Google Canada and Macera & Jarzyna LLP's Howard Knopf, who appeared as an individual, noted that the legal costs associated with this lack of timely decision making can be prohibitive. According to them, the parties appearing before the Board may lack the financial capacity to participate fully throughout the process.

Witnesses spoke about the underlying reasons for the Board's lack of timely decision making, and highlighted the following: the Board's governing legislation and resources; evolving technologies; the Board's tariff filing and review processes; and the practices of collective societies.

1. Governing Legislation and Resources

A number of witnesses commented on the 1997 legislative changes that significantly expanded the Board's jurisdiction to include the administration of copyright tariffs regarding collective societies that are involved in performers' performances, sound recordings and television broadcasters'

communication signals. The Board, Mr. de Beer and the Society of Composers, Authors and Music Publishers of Canada (SOCAN) explained that this expansion was not accompanied by an equivalent increase in the Board's size or resources, which has created operational difficulties for it. This issue needs to be examined further.

According to witnesses, when it came into force in November 2012, the [Copyright Modernization Act](#) led to further operational difficulties for the Board. As well, the Canadian Musical Reproduction Rights Agency (CMRRA) and SOCAN suggested that recent Supreme Court of Canada decisions have established new legal principles with which the Board must comply. As a consequence of these developments, witnesses believed that the Board's workload has increased substantially.

The Board, Mr. de Beers and SOCAN said that the Board's decisions are subject to appeal by the Federal Court, which has returned decisions for reconsideration when finding that the Board lacked sufficient reasons for reaching its decision. Witnesses observed that, as a consequence of these court decisions, the Board's current practice is to seek additional input from the parties after their hearing has concluded but before the decision is rendered. They noted that this practice is uncommon in legal and administrative proceedings, and delays the Board's decisions.

However, Mr. Knopf felt that the legislative changes that have affected the Board and the possibility of Federal Court review of the Board's decisions should not provide an excuse for the lack of timely decision making. He noted that courts of law and other administrative bodies are similarly subject to legislative changes and appellate court review, and render timely decisions.

Most witnesses commented that the Board requires – but does not have – adequate resources to enable it both to fulfil its mandate, and to acquire the specialized legal and economic staff that would allow it to do so. The Board said that its attempts to expand its resources to meet the requirements of its growing workload have been unsuccessful. It also noted that, because of resource constraints, it must prioritize cases that are complex or highly pertinent to the cultural sector, with the result that the Board does not examine some tariff proposals for several years. According to the Board, in cases such as these, interim decisions on tariffs continue to apply until a final decision is rendered. However, there was some disagreement about whether resources are the issue.

Music Canada and Mr. Knopf did not believe that the Board requires additional resources. In their view, the Board's mandate should be re-examined in order to reassess the manner in which the Board should be fulfilling that mandate. According to University of Toronto Professor Ariel Katz, who appeared as an individual, any examination of the Board's practices should begin with a re-examination of its mandate to determine if the existing mandate is in the best interests of the cultural sector. The Board suggested that it is not opposed to such a re-examination.

Music Canada commented that the Board's current mandate requires it to examine the overall fairness of tariff agreements. In its view, when making its decisions, the Board may be better served by relying on benchmarks established by the free market.

Most witnesses agreed that the Board's overall duty is to prevent monopolies from arising in the cultural sector. However, they had different views about whether certain of the Board's duties are

necessary, and questioned whether limiting the Board's mandate and/or allowing a greater degree of market interaction in certain areas would result in a monopoly or market failure in those areas.

2. Evolving Technologies

There was disagreement among witnesses about whether emerging technologies contribute to the Board's lack of timely decisions. La Société du droit de reproduction des auteurs, compositeurs et éditeurs au Canada (SODRAC) and the CMRRA believed that Canada's copyright framework is technologically neutral, and should easily accommodate evolving technologies. For example, in their view, the reproduction of a musical composition is an issue of reproduction rights, regardless of whether it is reproduced on a record or an MP3.

However, other witnesses suggested that evolving technologies could be a challenge for the Board because it would have to comprehend new technologies and their resulting implications prior to rendering a decision on a tariff. A more comprehensive review of the Board is needed to resolve this issue.

3. Tariff Filing and Review Processes

Google Canada, SOCAN and SODRAC explained that, in some instances, the Board's decision regarding a tariff's use or price will be effective for several years; however, certain tariffs must be filed annually, and these filings may simply replicate proposals made in previous years. They also said that, in certain situations, collective societies may choose the number of years that they would like a tariff to apply; as a consequence of the current system and the Board's lengthy decision-making process, collective societies may be submitting tariffs proposals for periods of time that are shorter than is necessary and/or desirable. The practice of submitting shorter-term tariff proposals increases the number of proposals that the Board must review.

Witnesses noted that the Board must certify certain tariff agreements even when the parties agree on the tariff proposal's terms. The Board explained that this certification is a result of its mandate to protect the public interest; consent among two or more parties does not necessarily mean that the proposal's terms are beneficial to the cultural sector as a whole. Witnesses disagreed whether unequal bargaining power typically exists between parties that reach a tariff agreement among themselves, and whether it ought to be the Board's role to protect certain parties or the public interest when rendering its decisions.

4. The Practices of Collective Societies

The collective societies that appeared as witnesses were questioned about the contribution that they make to the time taken by the Board to render its decisions. Some witnesses noted that they share best practices with their international counterparts, and have a forward-looking approach that is designed to anticipate evolving technologies in order to get a "head start" on the tariffs applicable to those areas.

However, the Board stated that parties to the same tariff proposal often do not harmonize their submissions to the Board, or standardize the language used within their submissions; consequently,

the Board must harmonize the parties' submissions prior to considering the substantive elements of the proposal. This lack of harmonized submissions and language delays the Board's rendering of a decision.

According to Mr. de Beers, parties that regularly interact with the Board are able to use its practices and lengthy decision times for their own benefit. Mr. Katz indicated that collective societies may be taking advantage of the Board's practices and legislative requirements, and may themselves be creating inefficiencies in the tariff-setting process in order to create new revenue streams. These varying views need to be sorted out.

THE UNPREDICTABILITY OF THE COPYRIGHT BOARD OF CANADA'S DECISIONS

Certain witnesses spoke about the predictability of the Board's decisions. According to Music Canada, the Board's decisions are unpredictable, and the Board has occasionally substituted its own expert evidence for that provided by the parties to the proposal. However, University of Ottawa Professor Michael Geist, who appeared as an individual, suggested that parties disagree with the quality of the Board's decisions – such as their predictability and use of evidence – only when those decisions do not align with their own interests. So which is it?

ISSUES THAT NEED FURTHER REVIEW REGARDING THE COPYRIGHT BOARD OF CANADA'S PRACTICES

The committee's witnesses proposed measures that could address the Board's lack of timely decision making, or could otherwise improve its practices. While some witnesses felt that the Board could implement such measures without Parliament's intervention, most witnesses – including the Board – advocated a study of the legislative and/or regulatory framework governing the Board's operations. In Mr. de Beer's opinion, a review of that framework – and any changes to it – should carefully consider the extent to which proposed changes would lengthen the time that the Board takes to make its decisions. For example, he spoke about the 1997 and 2012 introduction of new requirements to which the Board had to adapt.

Witnesses identified the imposition of deadlines, case management and simplified Board procedures, more full-time staff, the elimination of retroactive decisions and increased public consultation as possible improvements to the Board's practices.

1. Imposition of Deadlines

A number of witnesses suggested that the Board should be required to make decisions in accordance with pre-determined deadlines. Furthermore, because inefficiencies in the pre-hearing phase may add to the time that the Board takes to make a decision, witnesses discussed the possibility of administrative deadlines for parties during this phase.

Most witnesses agreed that faster decisions that are "good enough" would be preferred to the current practice of waiting longer periods for "better" decisions. However, Mr. de Beers suggested that certain parties appearing before the Board would not accept decisions of the former type if those decisions would prejudice their business interests.

Recognizing that complexity differs across tariff applications, witnesses had varying opinions about the timeline for Board decisions that might be considered “reasonable.” A number of witnesses believed that a system of imposed deadlines, with the ability for parties to consent to extended deadlines in complex situations, may be a viable option.

The Board and Mr. de Beers suggested that the Board’s legislated structure would not allow the integration of deadlines in relation to its decision making without substantial corresponding changes to that structure. In their view, decisions that are subject to a forced deadline may provide less opportunity for the Board to obtain additional information from the parties after the hearing. The Board and Mr. de Beers explained that parties are aware that the Federal Court has imposed rigorous standards of informed decision making on the Board; if they are denied an opportunity to provide additional information, they would likely appeal to that court to determine whether those standards have been satisfied. Therefore, without the placement of limitations on the ability of the parties to make an appeal, the imposition of deadlines would likely result in the courts ordering the Board to re-examine its decisions; from that perspective, the overall result would not be a more timely decision.

Regarding the imposition of administrative deadlines on the parties to a tariff application, the Board commented that it has been too lenient on parties that wish to reschedule proceedings or that do not abide by administrative timelines suggested by the Board.

2. Case Management and Simplified Board Procedures

Overall, witnesses supported front-end case management, with stricter guidelines and the co-ordination of tariff applications by the Board prior to a hearing, as a potential way in which to reduce the time that the Board takes to render a decision. A number of witnesses discussed the possibility of imposing penalties on parties that unnecessarily delay the tariff application process or the Board’s proceedings. However, SOCAN believed that such a system could unduly prejudice parties that are required to file applications annually.

As an alternative to imposing such penalties, some witnesses supported a simplified tariff-setting process that could be implemented in certain instances, such as a “fast track” process for simple tariff applications or certifications. According to them, rather than penalizing disagreement, such a system would provide an incentive for collaboration between parties. However, Mr. de Beers noted that parties have traditionally initiated federal appeals or judicial review proceedings when the Board has attempted to streamline its proceedings.

3. Full-Time Staff

In the view of some witnesses, the Board’s current composition may be contributing to its lack of timely decision making; at present, the Board comprises one full-time vice-chair, two part-time positions and two vacant posts. Witnesses noted that a full-time and fully staffed Board could contribute to more timely decisions. When questioned about whether the part-time status of its members impeded its work, the Board said that these part-time individuals contribute as much time as is required of them and its effectiveness is not affected.

4. Retroactivity of Decisions

Google Canada, Music Canada and Access Copyright suggested that the Board should eliminate the practice of applying its decisions retroactively. In their view, this practice contributes to market uncertainty and may exacerbate copyright infringement claims.

5. Public Consultations

Mr. Geist suggested that the Canadian public – which is an interested party in the Board’s decisions regarding tariff use and pricing – should be consulted during the Board’s tariff deliberations.

OTHER BODIES THAT THE COPYRIGHT BOARD OF CANADA COULD EMULATE OR FROM WHICH IT COULD SEEK ASSISTANCE

The committee’s witnesses provided comments about the practices of foreign regulatory bodies that are similar to the Board; their particular focus was the United States’ Copyright Royalty Board. Google Canada and Mr. de Beers noted that, while strict decision-making timelines exist, the Copyright Royalty Board is not directly comparable to the Board; the former functions exclusively as an appellate board and has a much smaller workload. McCarthy Tétrault LLP’s Daniel Glover, who appeared as an individual, said that Canada is not unique in its need for copyright regulation, and that careful study of international jurisdictions could provide the Board with solutions to the issues that it is facing.

Mr. Katz and Mr. Knopf identified Canada’s Competition Bureau as both a comparable body from which the Board could seek best practices, and a body that could assist the Board with its current duties.

RECOMMENDATION

The Copyright Board of Canada plays a pivotal role in Canada’s cultural sector. Yet, from what the committee heard, the Board is dated, dysfunctional and in dire need of reform. Whether the reasons are statutory, structural or otherwise, the Board did not – or could not – provide the committee with solutions to the problems that were identified by witnesses. The concerns outlined in this report require further investigation and timely action.

The next statutory review of the *Copyright Act* will take place in 2017, as stipulated in the legislation. That same legislation also requires the review to be conducted by a committee of the Senate, of the House of Commons or of both. The committee therefore recommends that:

The forthcoming, five-year statutory review of the *Copyright Act* should include a thorough, in-depth examination of the Copyright Board of Canada’s mandate, practices and resources.

APPENDIX A – LIST OF WITNESSES

November 2, 2016	
Society of Composers, Authors and Music Publishers of Canada	Gilles Daigle General Counsel, Legal Services
Access Copyright	Erin Finlay Director Legal and Government Relations, General Counsel
Music Canada	Graham Henderson President and CEO
Google Canada	Jason J. Kee Public Policy and Government Relations Counsel
Society for Reproduction Rights of Authors, Composers and Publishers in Canada	Martin Lavallée Legal Counsel Director, Licensing and Legal Affairs
Re:Sound Music Licensing Company	Ian MacKay President
Canadian Music Publishers Association	Margaret McGuffin Executive Director
Canadian Musical Reproduction Rights Agency	Caroline Rioux President
November 3, 2016	
As an Individual	Paul Daly Senior Lecturer in Public Law University of Cambridge and the Derek Bowett Fellow in Law, Queens' College, Cambridge
As an Individual	Jeremy de Beer Full Professor, University of Ottawa - Faculty of Law
As an Individual	Michael A. Geist Canada Research Chair in Internet and E-commerce Law University of Ottawa - Faculty of Law
As an Individual	Daniel Glover Partner Intellectual Property, McCarthy Tétrault LLP
As an Individual	Ariel Katz Associate Professor Innovation Chair—Electronic Commerce University of Toronto - Faculty of Law

As an Individual	Howard P. Knopf Counsel Macera & Jarzyna LLP/Moffat & Co Patent & TM Agents
Copyright Board of Canada	Claude Majeau Vice-Chairman and Chief Executive Officer Gilles McDougall Secretary General

APPENDIX B – BRIEFS

Received Date	Submitter Organization	Submitter
November 1, 2016	Songwriters Association of Canada	Isabel Crack Managing Director
November 7, 2016	Canadian Federation of Musicians	Alan Willaert Vice President from Canada