Copyright Board Canada

Commission du droit d'auteur Canada

Speech given by
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Celebrating the Twentieth Anniversary of the Copyright Board

This is the fourth time I have spoken to this seminar and, as always, it is a pleasure to be here. Last year, I provided you with an overview of the Board and its work. This year, in the midst of national consultations on copyright law reform, I find it fitting to highlight the challenges faced by the Board during the last 20 years and to show how legislative and judicial reforms of copyright law have influenced the past 20 years or challenges the Board faced in setting tariffs and issuing licences for the use of works when the owner of a published work cannot be located. I will also suggest that there are some issues that need special attention.

But first, let me bring you, if you haven't already heard, some good news. Mr. Claude Majeau has been appointed Vice-Chairman and CEO of the Board for a term of five years. This is great news for the Board and the copyright community in general. Mr. Majeau has distinguished himself as Secretary General of the Board for the last 16 years and will bring new energy and vision to the Board in his new position.

Mr. Majeau has replaced Stephen Callary who was the VP and CEO for the last 10 years. Given the terms of the *Copyright Act*, he was not eligible for reappointment. I would like to thank him on behalf of all members of the Board and myself personally for his dedicated service at the Board and his contribution as a member and to the industry as a whole. I would also like to thank Ms. Sylvie Charron, who also could not be reappointed, for her service as a member of the Board for the past 10 years.

We still have two positions to fill for the newly created part-time member positions and have been assured by the Government that they move quickly to fill those positions.

Legislating Copyright

The task of updating and modernizing copyright legislation to keep up with technological change is not a small or easy matter. History speaks for itself. It took Canada 57 years after Confederation to adopt its own copyright law. Then, between 1924 and 1988, the *Copyright Act* remained essentially unchanged, despite the emergence of technological advances such as television, photocopiers, computers, and other devices, which challenged the existing copyright regime. The only significant changes occurred between 1931 and 1936, when Parliament established the Copyright Appeal Board, and in response to the emergence of radio, adopted what became the compulsory certification of music performing rights tariffs by the Copyright Appeal Board.

After much consultation and many studies, copyright reform was finally begun and resulted in Phase One, as it came to be known, coming into force in 1989. This was a watershed. First, the Copyright Board was created to replace the Copyright Appeal Board, and it was empowered to supervise dealings between collectives and individual users or groups of users in areas others than music performing rights, through the creation of the general/arbitration regime. The use of protected works in retransmitted distant radio and television signals became subject to a compulsory licensing scheme according to which rights holders could seek remuneration only through a collective society. Second, collective management was legitimized and its relationship

with competition law was somewhat clarified.

More significantly, while the Board's primary function is to fix tariffs in order to regulate the balance of market power between rights holders and users, the Courts found that the Board can decide complex legal issues as a necessary incident of its rate- setting power.

This is a sea change from the regime that existed under the Copyright Appeal Board when it had no staff and no resources. In 1989, the Board consisted of the Vice-Chairman and CEO, Mr. Michel Hétu, and an administrative assistant. Much has changed over the following years. Today we have a staff 13 people, including lawyers, economist, etc.

As a necessary incident of its rate-setting power, the Board has ruled, as you will see, on issues as diverse as whether a sports game is protected by copyright, whether a broadcast signal is a compilation protected by copyright, what constitutes the act of authorizing a performance of a work, when is a movie published, when a communication over the Internet occurs in Canada and whether a collective society can impose in its licences conditions similar to the *droit de suite*.

In 1997, Phase Two was legislated and collective management received further recognition. The basic framework created in 1989 was expanded. All collective societies were either allowed by a modified general regime or required to secure tariffs that would apply to all current and future users. Parliament used collective management in areas where access had to be guaranteed in exchange for a form of compensation, including music neighbouring rights, educational uses of television programs, private copying and some forms of ephemeral recordings and transfer of format. These developments, along with a new definition in the Act of collective societies, led to an increase in the number of collectives, and to a significant expansion of the role of the Copyright Board in regulating the relationship between collectives and users and to a greater number of hearings.

The 1997 amendments also provided for a periodic review of the Act. This review process resulted in the tabling of Bill C-60 in 2005. But by then, technological advances were once again outstripping the principles underlying the existing legislation. An election was called, and the Bill died. In 2008, the government introduced Bill C-61. It met the same fate as Bill C-60. That brings us to where we are today.

The federal government is currently soliciting the public's views on copyright law reform and has hinted at the tabling of "son of Bill C-61" ... "Bill C-62". The last time Canadians were consulted on copyright was in 2001, at a time when file-sharing was just beginning, iTunes was still two years away, it was three months before the iPod was launched, DRM was not part of the lay person's jargon and nobody had heard of Facebook, My Space or Twitter. Needless to say, technology has evolved and continues to transform the way the public consumes protected works or other objects of copyright, which in turn, challenges the fundamental rules of copyright as well as the existing business models.

While Parliament has been slow to respond to these challenges, the courts have moved to fill the vacuum. Since 2002, the Supreme Court of Canada has issued five decisions that deal mostly with copyright: *Théberge*, *CCH Canadian Ltd.*, *SOCAN v. CAIP*, *Robertson* and *Euro-Excellence*. Some of these decisions have dramatically changed the way we think about copyright.

In *Théberge*, a painter who has an international reputation, assigned the right to print posters representing certain of his works to a publisher. The defendants purchased some of these posters, lifted the ink and the image using a process which permitted them to transfer the image onto a canvas. This secondary "reproduction" was not authorized in the original contract. This process leaves the poster blank with the result that there is no increase in the total number of reproductions. Based on those facts, the Court found there was no violation of copyright and made a number of general statements about the nature of copyright:

- First, the Court introduced the concept of the balancing of rights, between rights holders and users.

- Second, Canadian copyright law ought not to live in isolation from the rest of the world and held it was desirable, within the limits permitted by our own legislation, to harmonize our interpretation of copyright protection with other like-minded jurisdictions.

- Third, the Court resorted to the historical scope of the notion of "reproduction".

In *CCH*, the Supreme Court found that exceptions to copyright infringement are more properly defined as users' rights rather than exceptions. The starting point was not controversial: those who deal fairly with a work for the purpose of research, private study, criticism, review or news reporting, do not infringe copyright. The next step was novel: if exceptions are users' rights, they ought not be interpreted restrictively, so that interpreting fair dealing requires "to interpret the scope of both owners' and users' rights under the *Copyright Act*".

This led to a rather liberal interpretation of the notion of research in the context of the fair dealing exception. For example, profit-driven research may constitute fair dealing. Also, the person who facilitates another person's fair dealing may be entitled to the same protection under the Act as the first person.

Finally, in *SOCAN v. CAIP*, the Court made a number of important findings, one of which has had direct impact on the Board's work. In assessing whether or not Internet service providers could be deemed to authorize the communication of protected works, the Court pointed out "that copyright liability may well attach if the activities of the Internet Service Provider cease to be content neutral, e.g. if it has notice that a content provider has posted infringing material on its system and fails to take remedial action." The Board relying on CAIP, in its recent Satellite Radio Services decision, found that since the satellite services' activities are not content neutral, they are liable for the reproductions effected by their subscribers.

I could go on but I think you get the point. The Supreme Court is "doing" more copyright law than

Parliament. One may ask: is this the Court's domain? Fair minded persons may disagree on this. Professor Daniel Gervais, for one, argues that in effect, things are moving so fast in the copyright world that absent parliamentary action, the court feels it necessary to fill in the gaps. I might add, this is not unusual. Courts frequently move to fill vacuums when the legislators fail to act. Two notable examples are gay rights under Human Rights legislation and abortion in the field of criminal law.

The impact of the decisions of the Supreme Court on the work of the Board is another issue. For example, shortly after *CCH* was rendered, the Board noted that "until subsequent judgements clarify the scope of the *CCH* decision, this leaves open the possibility that certain activities of media monitors may not constitute protected uses for which they would require a licence." In other words, the Board said that if the Great Library is dealing fairly with a legal commentary when sending a copy of it to a lawyer who will then use it to advise a client on how to conduct her business so as to minimize taxes, then Bowdens, the largest media monitoring service, may well be dealing fairly with a news clip when sending a copy of it to a policy advisor who will use it to advise a minister on how to approach the Question Period.

The Board, as an incident of its rate-setting power, has ruled on a number of other legal issues as a result of the decisions of the Supreme Court. Among them:

- Does buffering involve the reproduction of a substantial part of a musical work? The Board said it does (Satellite Radio).

- What is a substantial part of a work? It does not take much (Breakthrough Films, decided by a panel of five - the only time a five-person panel was struck).

- Is listening to previews while shopping on iTunes research? Yes (SOCAN Tariff 22.A).

- Is reading an article when instructed by a teacher research? No (Access Copyright).

- Does a ringtone have a material form? It does (Ringtones).

- Do satellite radio services authorize reproductions made by their subscribers? As I said earlier, the Board said that they do (Satellite Radio).

- When a person located in Canada sends a signal to a person located in the United States that results in a copy being made on a server located in the United States, is the reproduction right engaged in Canada? No (Satellite Radio).

- When a ten-year old explains to a classroom why Harry Potter is totally uncool, is she engaged in criticism? Probably (Access Copyright).

- Is the transmission of a musical download or of a ringtone a communication to the public by telecommunication of a musical work? Yes (Ringtones and SOCAN Tariff 22.A).

As you can readily appreciate those decisions of the Supreme Court have greatly increased the work of the Board. The Board is dealing with many and varied complex issues in setting tariffs.

The Supreme Court is not the only court attempting to fill perceived gaps in the *Copyright Act*. The Federal Court of Appeal has attempted on at least two occasions to reconcile the wording of the Act with the contemporary reality (means of consuming protected works or objects of copyright).

In 2004, the Court ruled the Board was wrong to conclude that the permanently embedded or non-removable memory, incorporated into a digital audio recorder or the device itself, was "an audio recording medium ordinarily used by individuals to copy music".

In 2007, CPCC tried again and the Board was asked to determine whether the recorder itself was a recording medium as defined in the Act. It said yes in a long and well reasoned decision. The Federal Court of Appeal, once again on judicial review, overturned the Board. This time, the Court in six turgid paragraphs found its decision of 2004 dealt with the matter and was binding on the Board. I still wonder how the Federal Court of Appeal came to that conclusion when the question of whether the device itself was subject to a levy had not even been an issue in the previous decision and the comments of Noel J.A. were *obiter* and contained in what can only be called a "throw away line." A throw away line that has had extreme consequences, not the least of which is at least 10's of millions of dollars in royalties that have not been paid to authors, composers and performers and threatens to destroy the private copy regime.

Another example is the Federal Court decision in *Éros-Équipe de Recherche Opérationnelle en Santé inc.*, where the plaintiff owned the copyright in a group of forms used to assess the health care needs of elderly individuals. The court found that the creation by the defendant of software containing the plaintiff's forms infringed copyright.

As noted, the Board's primary function is not to interpret copyright law but to fix tariffs in order to regulate the balance of market power between copyright owners and users.

In dealing with all these legal questions, the Board strives to balance the interests of the parties and to provide workable solutions. The Board is mindful of the comments of the Supreme Court in *CCH* and *Théberge* that the stated purpose of copyright law is to balance the public interest in promoting the encouragement and dissemination of works of arts and intellect and obtaining a just reward for the creator.

Why has there been such a need for the Supreme Court, the Federal Court and the Board to address such a large number of legal issues? The answer may lie in part in the fact that the potential targets for copyright enforcement have shifted. According to Professor Gervais and others, our copyright regime was designed to regulate dealings between professional creators and professional users. Today, the line separating the professional and private spheres in copyright dealings is blurred.

The Internet has revolutionized the way in which objects of copyright are created and how users deal with these objects. It enables individuals to minimize their dependency on professional intermediaries to create and consume objects of copyright. Consequently, the rules that previously made sense are challenged, questioned and finally ignored in part because the rules make less sense (suing fans is no way to conduct a music business) and in part because technology makes this so easy. Patching up the holes technology has created will not solve the problem because technology constantly evolves.

This was the very dilemma the Board faced in its recent decision dealing with SOCAN Internet Tariffs. The majority of the panel declined to set any tariff for a significant number of users described as "others", some potentially large, that did not fit within the model the panel decided to use for this purpose. The decision was based in large part on the fact that these uses were almost impossible to calibrate and that there was no evidence of the value of music used on these divers sites. Whether the Board had the power to decline to set a tariff is now the subject of judicial review and in any event, is not what is relevant for my purposes. What is important is that the Board found the Internet to be "such a fluid, yet omnipresent phenomenon that it would be foolhardy to attempt to set a tariff when we fear that the consequences might be overwhelming and ... socially unfair". The multiplication of uses and platforms and increase in bandwidth only serve to compound the issue.

On a brighter note, the Board succeeded in obtaining a permanent increase in its budget of $430,000 which will permit us to hire additional professional and support staff. That will enable us to fulfil our mandate, more efficiently and more quickly.

What then, of the current consultations on copyright reforms? Will they help new solutions to emerge? Possibly. Will they result in legislative changes that will bring our copyright laws in line with current technological realities? Maybe. What are the chances of "Bill C-62" dying on the order paper because of an election call? You are as well positioned as I am to guess. That being said, please allow me in conclusion to allude to a few of the issues that I suspect will need to be addressed decisively if our copyright regime is to regain its credibility.

First, we have to recognize that sometimes a strange brew of copyright, ubiquitous technology and traffic control creates real privacy issues. Copyright should not be the means by which control is exercised in the private sphere. Copyright should therefore continue to focus on professionals and on the public sphere.

Second, we will have to recognize market failures where they exist. Where they do, tough choices will have to be made. In some cases, the law will have to allow uses for free and copyright owners will have to live with it. In others, it will be possible to monetize copyright uses either voluntarily or through compulsory regimes. To do so, it may become necessary to impose liability on some participants in the chain of copyright consumption who currently enjoy immunity: just as it was possible to make the case that blank CD manufacturers should pay a levy for the copies of music made by those who use their CDs, it should be possible to make the case that Internet service providers should pay a levy for their clients' use of copyrighted works.

Third, parliament will have to be consistent in the choices it makes. It may be politically expedient to monetize the use of music on the Internet but not to monetize the use of movies. To do one without the other makes no sense. It also makes no sense to impose a private copying levy on blank CDs but not on iPods: either you impose a levy on both, or you remove it from both. The removal of both would potentially mean the end of the private copying regime. It seems to me that only if parliament shows such consistency, will it be able to convince consumers and others that the law makes some sense.

Time will tell how the Government reacts to the consultation and recommendations. Whatever happens the Board will continue to exercise its rate-setting function and balance the interests of rights holders and users as it has done for the past 20 years.