Copyright Board Canada | Commission du droit d'auteur du Canada

Understanding the Unlocatable Copyright Owners Licensing Program

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Outline of the Presentation

1. The legal framework
2. The application process
3. Some interesting statistics
4. Some interesting decisions and applications

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The Legal Framework

The Copyright Board

In general, the Board's mandate is defined in the *Copyright Act* across 3 areas:

Tariffs of General Application

Setting **royalties payable** for use of works where rights are managed by collective societies.

Individual Cases

When requested, settling individual cases where parties disagree.

Unlocatable Owners

Granting licences for the use of works when the right owners cannot be located.

Section 77 of the Copyright Act

Circumstances in which a licence may be issued by Board

77 (1) Where, on application to the Board by a person who wishes to obtain a licence to use

(a) a published work,
(b) a fixation of a performer's performance,
(c) a published sound recording, or
(d) a fixation of a communication signal

in which copyright subsists, the Board is satisfied that the applicant has made reasonable efforts to locate the owner of the copyright, and that the owner cannot be located, the Board may issue to the applicant a licence to do an act mentioned in section 3, 15, 18 or 21, as the case may be.

Conditions of licence

(2) A licence issued under subsection (1) is non-exclusive and is subject to such terms and conditions as the Board may establish.

Payment to owner

(3) The owner of a copyright may, not later than five years after the expiration of a licence issued pursuant to subsection (1) in respect of the copyright, collect the royalties fixed in the licence or, in default of their payment, commence an action to recover them in a court of competent jurisdiction.

Regulations

(4) The Copyright Board may make regulations governing the issuance of licences under subsection (1).
1997, c. 24, s. 50.

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The Process

Context

What to do when the copyright owner of a work cannot be found?

1. Use the work without permission
   - Involves risk (statutory damages)
   - Undermines respect for the law
2. Refrain from using the work
   - Frustrates users
   - Rightsholder get nothing
   - Prevents circulation of works
3. Apply for a section 77 licence with the Board

Applying for a licence

- Applications are submitted online on the Board's website
- The applicant must provide information about the work(s), intended use(s) and efforts made to locate the copyright owner
- There is no fee associated with an application
- Throughout the application process, the Secretariat (Board staff) analyses the application and the proof of research, conducts additional research, communicates with the applicant.
- Once the application file is considered complete:
  - it is referred to a Board Member for decision.
  - the Board has 45 business days to render a decision (service standards)

Does the application meet the s. 77 criteria?

The Board may issue licences where:

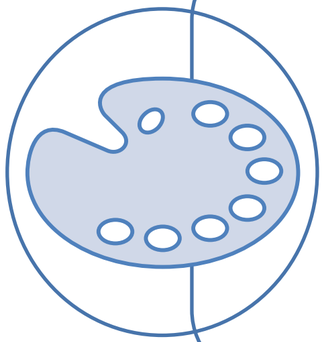
- ✓ The work is published,
- ✓ The work is protected by copyright,
- ✓ A licence is required, and
- ✓ Reasonable efforts have been made to locate copyright owner, without success.

Analysis (1/3)

Is the work published?

Section 2.2 of the *Copyright Act* explains what is meant by "published" in this context.

Was the publication made with the copyright owner's consent?



Works that are not considered published

- A work that has been published only on the web
- A work that has only been performed in public
- A work of art that that has only been exhibited in public

Section 2 of the Copyright Act

2.2 (1) For the purposes of this Act, **publication means**

(a) in relation to works,

(i) making copies of a work available to the public,

(ii) the construction of an architectural work, and

(iii) the incorporation of an artistic work into an architectural work, and

(b) in relation to sound recordings, making copies of a sound recording available to the public,

but does not include

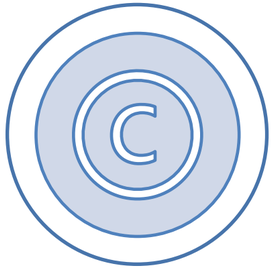
(c) the performance in public, or the communication to the public by telecommunication, of a literary, dramatic, musical or artistic work or a sound recording, or

(d) the exhibition in public of an artistic work.

(2) For the purpose of subsection (1), the issue of photographs and engravings of sculptures and architectural works is not deemed to be publication of those works

(3) For the purposes of this Act, other than in respect of infringement of copyright, **a work or other subject-matter is not deemed to be published or performed in public or communicated to the public by telecommunication if that act is done without the consent of the owner of the copyright.**

Analysis (2/3)



Is the work protected by copyright?

Is a licence required?

- Is the work part of the public domain?
- Is it a non-substantial part of a work?
- Could the applicant benefit from an exception listed in the Act?

Has sufficient research been done to locate the copyright owner?

- There is no definition of what constitutes “reasonable efforts”.
- Assessed on a case-by-case basis, depending on the information available about the work and the author.
- The Board considers the following to determine if the threshold has been met:
  - Nature of the contemplated use
  - Sophistication of the applicant
  - Unreachable is not unlocatable

Analysis (3/3)

What should the licence fee be?

- A licence fee (royalties) is required pursuant to Section 77
- Based on the work and intended uses at hand, the royalties are established by:

  1) Seeking a recommendation from a Collective Society: The fee is payable to the collective, who may dispose of the amount "as it sees fit for the general benefit of its members" and who undertakes to reimburse the copyright owner.

  2) Setting the fee internally: The fee is payable to the copyright owner upon request.

Should the Board use its discretionary powers?

- Section 77(1): "the Board *may* issue to the applicant a licence"
- Stepping into the owner's shoes (against the author's values)
- Limits (disputable uses, even if author known to support)

Issuing a Decision

The application meets the Section 77 requirements

- The Board issues a licence
- The licence is non-exclusive and valid only in Canada

The application does not meet the Section 77 requirements

- The Board issues reasons for refusal
- A refusal does not necessarily mean that the work cannot be used (e.g., public domain)

Decisions are published on the Board's website in both official languages

Some interesting statistics

Applications Filed

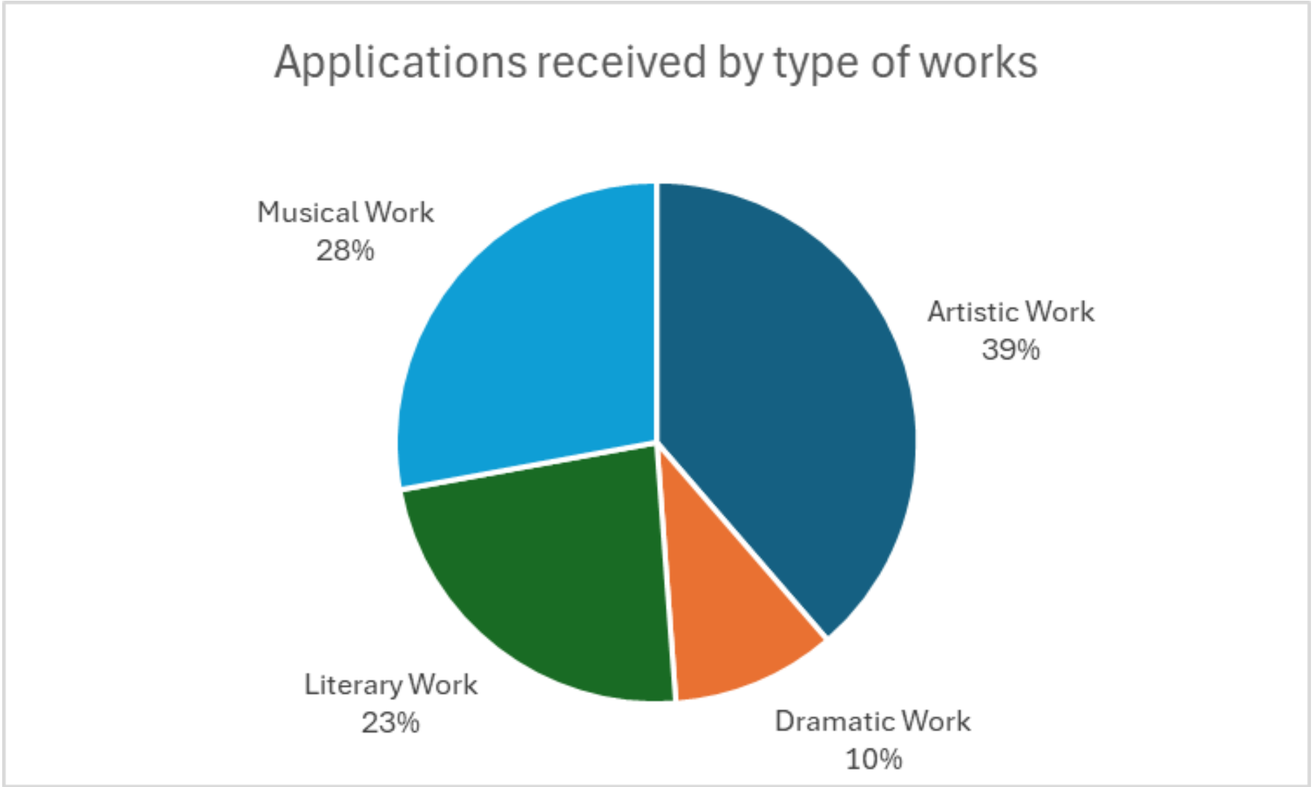
- Internal research was conducted on applications filed between 2012 and 2025.
- During that period, 344 applications were filed, an average of 26 applications per year.
- Of these, almost 70% were withdrawn for various reasons. Licences were issued in 22% of the cases and refusals in 8% of the cases.
- On average, approximately 6 licences are issued every year.

	Licences	Refusals	Withdrawals	Total
2012-2013	8		15	23
2013-2014	8		9	17
2014-2015	8		16	24
2015-2016	7		28	35
2016-2017	7	2	18	27
2017-2018	4	7	19	30
2018-2019	4	7	18	29
2019-2020	9	3	17	29
2020-2021	1	5	14	20
2021-2022	2	1	23	26
2022-2023	6	1	17	24
2023-2024	5	3	20	28
2024-2025	8		24	32
Total	**77**	**29**	**238**	**344**
Share of total	22.4%	8.4%	69.2%	

Applications by Type of Works

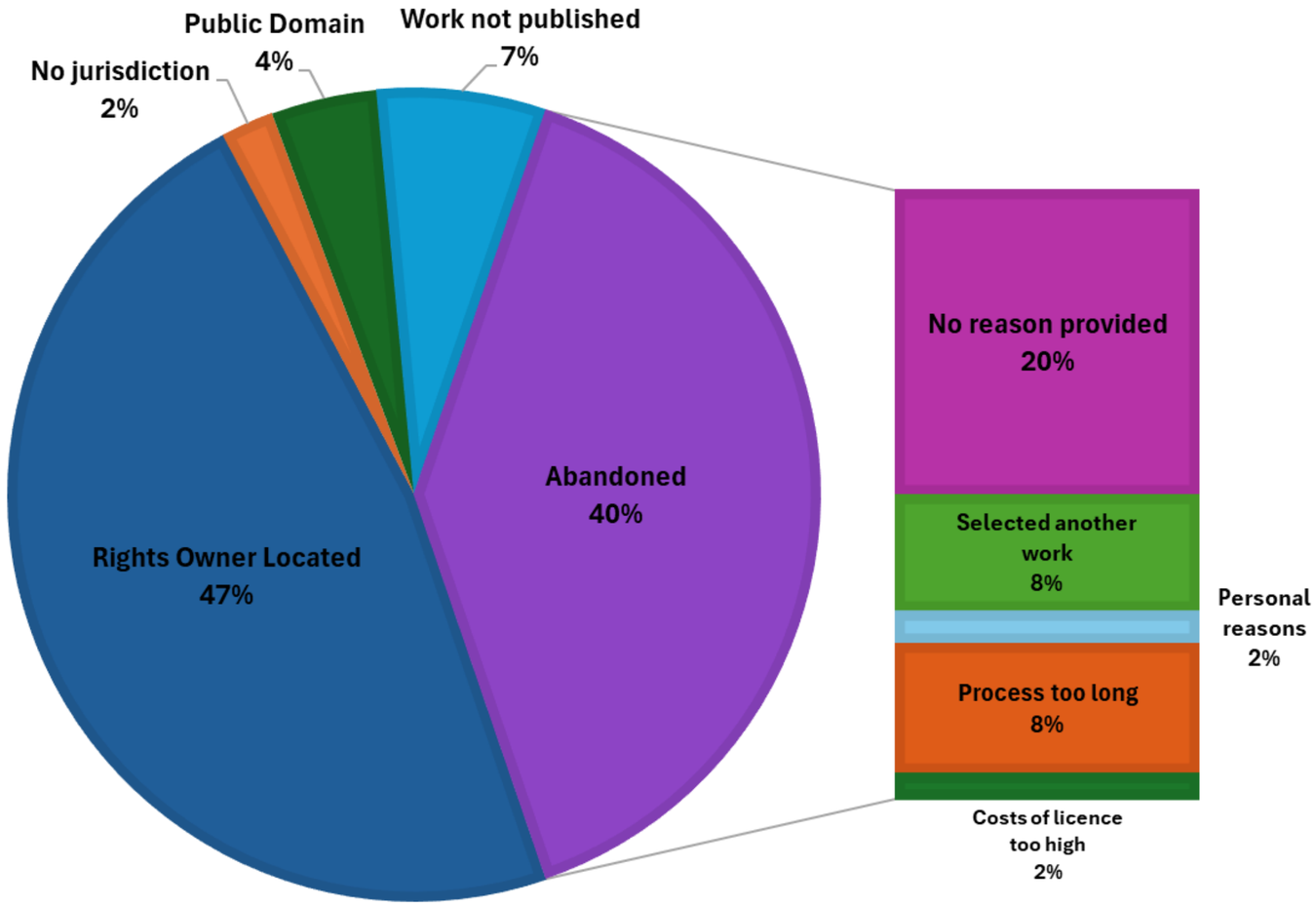
- As shown, most applications pertain to artistic and musical works, but all categories of works are represented:
  - **Artistic** (paintings, drawings, maps, charts, photographs, sculptures)
  - **Dramatic** (films, TV shows, plays)
  - **Literary** (books, film scripts, tables of information, software code)
  - **Musical** (songs, albums, soundtracks)

- This distribution remains almost identical for applications, licences issued and withdrawals.



Withdrawals

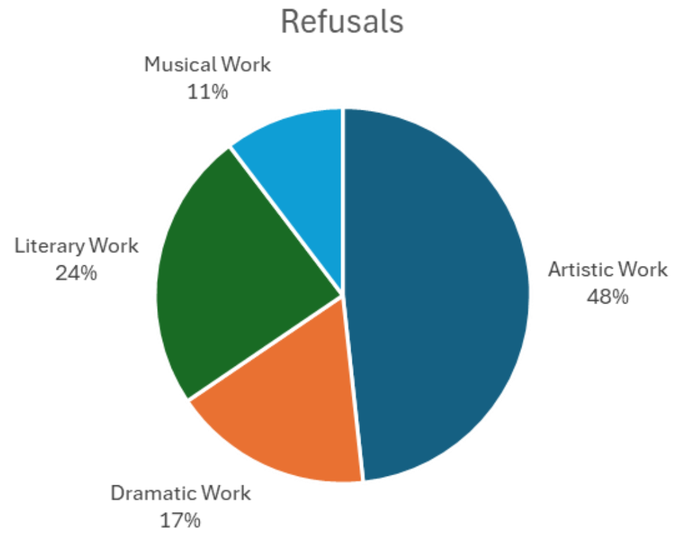
- There are on average 18 applications withdrawn or abandoned per year, for a variety of reasons:
  - The rights owner is located (47%);
  - There is no proof of publication (7%)
  - The work is likely in the public domain (4%)
  - Not for use in Canada (2%)
  - Applicants change their mind (40%). Half of the time, no reason is provided.



Refusals

- There are fewer refusals: an average of 3 per year, and only for the period 2016-17 to 2023-2024.
- Refusals differ from withdrawals as they represent a formal Board decision.
- Artistic works represent almost half of refusals. This is closely linked with the difficulty in confirming publication.

	Number
2016-2017	2
2017-2018	7
2018-2019	7
2019-2020	3
2020-2021	5
2021-2022	1
2022-2023	1
2023-2024	3
Total	**29**



Reasons	Number	% of Total
Licence Not Required	1	3%
Works in Public Domain	12	41%
Works Not Published	16	55%
Total	**29**	**100%**

Duration

- No application is complete when filed. The time between when an application is submitted and when it is considered complete varies considerably from case to case.
- Several factors can influence this time frame, such as the time the applicant can devote to their research or delays in submitting the requested information.
- Once applications are complete, the Board has a service standard of 45 business days to issue the decision.
- The table shows the results over the years and illustrates how much variation can occur from one case to another.
- The Board was faster than its service standard in 10 years out of 13 since 2012-2013.
- In the other three years, the Board faced capacity issues due to its limited staff and conflicting priorities that took precedence.

Time to render decision*

Fiscal year	Number of decisions	Number of business days		
		Average	Minimum	Maximum
2012-2013	8	18	8	27
2013-2014	8	19	4	47
2014-2015	8	17	9	32
2015-2016	7	15	2	26
2016-2017	9	17	8	23
2017-2018	11	51	13	129
2018-2019	11	62	5	158
2019-2020	12	49	8	124
2020-2021	6	18	7	30
2021-2022	3	28	18	34
2022-2023	7	29	11	72
2023-2024	8	23	8	45
2024-2025	8	33	12	51
Total	**106**	**32**	**2**	**158**

*Decision = licence or refusal

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Some interesting decisions and applications

Decisions denying application are the most interesting… : overview of 5 files

Hany Ouichou, 2016-UO/TI-08 [CB-CDA 2017-42] May 11, 2017

- Applicant requested a licence to use three video excerpts posted on YouTube in the documentary *Ceux qui font les révolutions à moitié n'ont fait que se creuser un tombeau*

- Subsection 77(1) allows Board to issue a licence in respect of works that have been published:

  Where, on application to the Board by a person who wishes to obtain a licence to use
  (a) a published work, [...]
  in which copyright subsists, [...] the Board may issue to the applicant a licence to do an act mentioned in Section 3 [...]

- But... subsection 2.2 (1) states that:

  For the purposes of this Act, publication means

  (a) in relation to works,
  (i) making copies of a work available to the public [...]

  but does not include

  (c) the performance in public, or the communication to the public by telecommunication, of a literary, dramatic, musical or artistic work or a sound recording

Hany Ouichou, 2016-UO/TI-08 (continued)

- Due to the exclusion, a mere communication to the public by telecommunication of a work is not a publication

- What of the “making available” of the work that takes place before such a communication to the public?

- Subsection 2.4(1.1) of the Act states that:

> […] communication of a work […] to the public by telecommunication includes making it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public.

- Therefore, since communication of a work by telecommunication—itself excluded from the definition of “publication” — includes the act of making available, the posting of a work on a website is also excluded from publication pursuant to paragraph 2.2(1)(c)

- Not a matter of discretion: the Board does not have the jurisdiction to issue a licence under section 77 in this matter

Royal Canadian Mint, 2017-UO/TI-19, CB-CDA 2018-007, January 17, 2018

- RCM sought licence to reproduce, on one of its coins, the image of the Angel of Victory sculpture (C. McCarthy)

- Three castings from a mold of the statue were made and exposed in public places (train stations)

- Subsection 77(1) of the Act provides that:

> Where, on application to the Board by a person who wishes to obtain a licence to
>
> a) use a published work [...] in which copyright subsists, the Board is satisfied that the applicant has made reasonable efforts to locate the owner of the copyright and that the owner cannot be located, the Board may issue to the applicant a licence to do an act mentioned in section 3[...]

- But subsection 2.2 (1) states that:

> For the purposes of this Act, publication means
>
> (a) in relation to works,
> (i) making copies of a work available to the public [...]
>
> but does not include[...]
>
> (d) the exhibition in public of an artistic work

- The Board could not grant a licence because, while it could be argued that copies had been made available, the Act excludes from publication “the exhibition in public of an artistic work”

- Furthermore, the act of publication must be done with the consent of the copyright owner and that did not seem to be the case (subsection 2.2(3))

Tsimshian Welcome Chant, 2017-UO/TI-01, CB-CDA , February 22, 2018

- Application for the reproduction of the musical work Tsimshian Welcome Chant (First Nations)

- The Tsimshian Welcome Chant is an ancestral chant which has been passed along for many generations

- Application denied: Board determined that the application does not meet the requirements set out in the Act
  - No licence is required as the work is in the public domain.

Musical work “Kolybelnaya” 2023-UO/TI-10, August 17, 2023

- Application to adapt a musical work (2005) by Polina Sergeyevna Gagarina
- Author represented by SOCAN in Canada, however SOCAN cannot not authorize the adaptation of a work: applicant must obtain permission from the author
- Since February 2, 2023, author is listed in Schedule 1 of the *Special Economic Measures (Russia) Regulations* (SOR/2014-58)
- Section 3 of the Regulations specifies that:

  It is prohibited for any person in Canada and any Canadian outside Canada to

  (a) deal in any property, wherever situated, that is owned, held or controlled by or on behalf of a designated person whose name is listed in Schedule 1;
  (b) enter into or facilitate, directly or indirectly, any transaction related to a dealing referred to in paragraph (a).
- Board denied application based on discretionary power under s. 77 (“The Board may issue […] a licence”)
- Board concluded that issuing a licence would go against the spirit of the Regulations:

  “it could appear that the Board authorizes or facilitates the use of a work (a property) held by a person who is being sanctioned by the Canadian government”

2013-UO/TI-09 National Film Board (NFB) – Symphony of the Planets, NASA sound recordings

- NFB wanted to use excerpts of sound recording *Symphonies of the Planets 1. – Nasa Voyager Recordings* in documentary *Autoportrait sans moi* (Danic Champoux)

- Sound recording consisted of sounds recorded in space by NASA ; DC released by Laser Light Digital, which no longer existed. The company that had purchased the assets said it did not have the rights and referred NFB to NASA

- On its web site, NASA says that no permission is needed to use its sounds recordings

- Nonetheless, applicant wanted a confirmation from NASA, but did not obtain it

- Applicant withdrew application:
  - NASA appeared to be the copyright holder
  - The owner was not unlocatable

Conclusion

Recent and Upcoming Changes

New generic email inbox

- Launched as one point of contact for applications and requests regarding Unlocatables

Information on the Board's website

- The page "General information" now includes a clearer explanation of the application process
- Applicants will know what to expect between the licence application and the decision, including the requirements for their research and for the Board to issue a licence

Guidance for applicants on sources to consult

- A "search checklist" will soon be published to guide applicants in their research
- The checklist will need to be completed prior to filing the application
- Objective is to improve the number of complete files upon application
- Completing thorough research may result in finding the copyright owner before filing an application

Improved application form

- Small changes will be made to improve user experience
- Uploading the research checklist will be mandatory

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Thank you

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