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Pre-Imagining the Copyright Board

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The Copyright Board of Canada: Which Way Ahead?
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‘Cheshire Puss,’ Prof. Gendreau began, rather timidly, … ’Would you tell me, please, which way ought the Copyright Board to go from here?’

‘That depends a good deal on where you want to get to,’ said the Cat.

‘And why you even want to go in the first place,’ intervened Professor Katz. ‘And bring a good compass’, he added.
Re-imagining the Copyright Board

✧ Depends on why we have a copyright board;
✧ What we want it to do;
✧ Need to *Pre-Imagine* the Board, before we can *Re-Imagine* it.
So, why do we have a copyright board?

What’s the Board’s theory of regulation?
Between eighty and ninety per cent of the popular and semi-classical music [that] the music user require is under the control of Canadian Performing Right Society, and unless the user obtains a licence to perform the repertoire of Canadian Performing Right Society, he has no other supply available and the public are denied the pleasure of hearing music.

Competition no longer exists. A monopoly, or super-monopoly, has arisen.

No one quarrels with the author, composer and publisher pooling their rights and placing them in a central bureau for the purpose of collecting a fair fee for the same and of preventing infringement thereof.

It it an inevitable monopoly existing for the convenience of the owner and the user; but it should not be exercised arbitrarily and without restraint.
It is evident that the legislature realized in 1931 that this business in which [CMOs] were engaged is a business affected with a public interest; and it was felt to be unfair and unjust that [CMOs] should possess the power so to control such performing rights as to enable them to exact from people ... such tolls as it might please them to exact.

[CMOs] are engaged in a trade which is affected with a public interest and may, therefore, conformably to a universally accepted canon, be properly subjected to public regulation.
Since 1994 the Board and FCA announce a new regulatory (undefined) goal

“[I]t 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. …

the Board properly understood its function when it stated that it had to regulate the balance of market power between copyright owners and users.”

*CAB v. SOCAN* [1994] 58 C.P.R. (3d) 190
The Board also says:

- The Board is an economic regulatory body empowered to establish … the royalties to be paid for the use of copyrighted works, when the administration of such copyright is entrusted to a collective society.

  - Annual Report, 2014-14

- The Copyright Board of Canada is an independent, quasi-judicial tribunal created under the Copyright Act to establish the royalties to be paid for the use of works … protected by copyright, when the administration of these rights is entrusted to a collective society.


- The Copyright Board’s principal mandate is to set royalties which are fair and equitable for both copyright owners and users of copyright-protected works …

  - Copyright Board, Future-oriented Statements 2015-2016
Not very helpful; Describes “What?”, not “Why?”
What’s the Board’s theory of regulation?

- What are fair and equitable royalties?
- When will royalties be unfair and inequitable?
- How to distinguish?
[T]he courts ... have set sail on a sea of doubt, and have assumed the power to say ... how much restraint of competition is in the public interest, and how much is not.

The manifest danger in the administration of justice according to so shifting, vague, and indeterminate a standard would seem to be a strong reason against adopting it.

*U.S. v. Addyston Pipe & Steel Co.* (1898) (Taft, J.)
Start with first principles
Price regulation is rare

“the Copyright Act is an important marketplace framework …”

Preamble, Copyright Modernization Act

- Why don’t we let the “marketplace” determine royalties?
- Why do we need a regulator?
- Further, why do we need a price regulator?
Three general reasons for price regulation

- Seller sets prices that are too high—monopoly;
- Buyer sets prices that are too low—monopsony;
- Distributional goals (e.g., universal access).
Why do we regulate the prices of CMOs?

- Concern that CMOs could exercise excessive market power—charge too much? or
- To allow copyright owners to get more than they’d get in a competitive market? or
- Distributional goals (what would those be)?
- Different regulatory goals
  - Different regulatory schemes
    - Different institutional designs
    - Different economic questions
  - Different procedures
    - Different data
      - Different skills and competences
        - Even determine the constitutional competence of the regulator
Natural monopoly paradigm

- Transaction costs for non-collective administration are too high;
- CMOs reduce transaction costs, but lack of competition creates a real economic monopoly;
- Solution: let CMO operate by regulate them.
Collective Management of Copyright and Related Rights

But individual management of rights is practically impossible for certain types of use. An author cannot contact every single radio or television station to negotiate licenses and remuneration for the use of his works. Conversely, it is not practical for a broadcasting organization to seek specific permission from every author for the use of every copyrighted work. The impracticability of managing these activities individually - both for the owner of rights and for the user - creates a need for collective management organizations (CMOs). These organizations ensure that creators receive payment for the use of their works.

illustrate how the owners of the rights can exercise their rights in person.

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Not a labour-collective bargaining paradigm

- That’s what the status of the artist legislation (QC & Federal) is for;

<table>
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<tr>
<th>Collective admin of copyright</th>
<th>Collective bargaining</th>
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<td>Regulating copyright owner— federal jurisdiction</td>
<td>Regulating specific users— jurisdiction depends on type of user</td>
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Not a redistribution paradigm

- Parliament could impose new payment obligations on users subject to federal jurisdictions (e.g., broadcasters, telcos);
- But Act of Parliament required, not subordinate regulation (2012 CRTC Reference);
- Parliament may not regulate specific industries not subject to federal jurisdiction;
- Limitation on taxation power.
Sensible regulation of CMOs

- Identify the problem (why CMOs exist, and why we want regulation), and design the regulatory scheme accordingly;

- Assuming CMOs exist to reduce t-costs and we regulate them to control their market power, then:
3 elements of sensible regulation of CMOs

1. Screening
2. Minimal impairment of competition
3. Periodical review and reversibility
Screening

- Identify which markets will indeed benefit from collective vs competitive licensing;
- Distinguish between CMOs that genuinely increase efficiency and those that do not;
- Ask:
  - Are transaction costs involved in competitive licensing in particular market indeed prohibitively costly?
  - Why right holders administer some rights competitively but not others?
  - Is source licensing (through-to-the-audience) feasible? If not why?
Design minimally impairing collective admin scheme (1)

- CMOs that pass screening should still remain responsive to market discipline as much as possible:
  - CMOs should only act as non-exclusive licensees;
  - Right holders and users should not be limited or discouraged from using alternative licensing models, including through other intermediaries;
  - Make ownership databases open and transparent;
  - Require CMOs to grant “mini” per-use blanket licences;
  - Competition between CMOs?
Design minimally impairing collective admin scheme (2)

- Regulation should focus more on increasing competitive discipline, and less only on setting prices;
- Burden should be on CMOs to explain and justify rates, related terms, and any restrictive practice;
- CMOs can exercise market power not only over users but also over their members.
Periodical review and reversibility

- Technological change and new business models may enable competitive licensing;
- Our understanding of the costs and benefits of CMOs may develop;
- What might have been justified in the past may no longer be justified;
- Institutionalize re-evaluation and sunsetting.
Who can do it (and why statutory reform isn’t necessary)?
The Copyright Board can:

- Royalties that are fixed collectively, where they could be determined competitively, cannot be considered “fair and equitable”;

- It would be unreasonable for the Board to certify tariffs for collective administration that isn’t justified and is not minimally impairing.
The Competition Bureau can assist the Board

- Commissioner of Competition can examine agreements between CMOs and users, filed under ss 70.5-70.6 of the Copyright Act;

- S 125 (1) of the Competition Act
  
  “The Commissioner, at the request of any federal board, commission or other tribunal or on his own initiative, may,
  
  and on direction from the Minister shall,

  make representations to and call evidence before the board, commission or other tribunal in respect of competition, whenever such representations are, or evidence is, relevant to a matter before the board, commission or other tribunal,

  and to the factors that the board, commission or other tribunal is entitled to take into consideration in determining the matter.”
The Competition Bureau can act independently (1)

- S 70.5 of the *Copyright Act* immunizes only the vertical aspects of agreements between CMOs and users. The horizontal aspects are not immune from s 45 of the *Competition Act*;

- Regulatory conduct defence is not sweeping;

- Collective administration is “something more” than mere exercise of copyright;

- Collective administration that is more than minimally-impairing is “something more” than mere exercise of copyright;
The Competition Bureau can act independently (2)

S. 90.1 (enacted 2009):

(1) If, on application by the Commissioner, the Tribunal finds that an agreement or arrangement — whether existing or proposed — between persons two or more of whom are competitors prevents or lessens, or is likely to prevent or lessen, competition substantially in a market, the Tribunal may make an order

(a) prohibiting any person — whether or not a party to the agreement or arrangement — from doing anything under the agreement or arrangement; or

(b) requiring any person — whether or not a party to the agreement or arrangement — with the consent of that person and the Commissioner, to take any other action.
Conclusion

- The Board should have concrete (constitutionally valid) regulatory goals;
- An articulable theory of regulation;
- Powers, structure, procedure, etc. designed to achieve them.
Conclusion

- The “natural monopoly” is the only theory that has basis in the legislative history, and Supreme Court case law (and has solid constitutional footing);

- Sensible regulation should comprise 3 elements:
  - Screening
  - Minimal impairment of competition
  - Review and reversibility
Now we can start re-imagining
Thank you