A Uniquely Canadian Institution: The Copyright Board of Canada

Daniel J Gervais, Vanderbilt University
9. A uniquely Canadian institution: the Copyright Board of Canada

Daniel J. Gervais

What is uniquely Canadian? I first should apologize for putting the question so directly. I do not ask this question to fill the reader’s mind with images of the Rockies, canoes, Niagara Falls, Pier 21 in Halifax, igloos, old Quebec City or Prairie skies. Nor does this chapter argue that the Copyright Board of Canada should have made the list. Still, according to experts, Canadian uniqueness is a secret blend of efficiency, inexpensive clothes, and friendliness. Canadians are also law-abiding, and have a noted penchant for compromise and self-criticism. Arguably, there is no better environment to develop the best possible copyright regulatory scheme, especially with subfreezing temperatures helping cooler heads prevail. Perhaps it’s not a wonder, but this chapter will suggest that the Copyright Board is uniquely Canadian.

---

1 The author wishes to acknowledge the assistance and contribution of Mario Bouchard, Esq., General Counsel, Copyright Board of Canada, for his many helpful suggestions. However, the views expressed are the author’s own, as are any mistakes or omissions. The author wishes to acknowledge the financial contribution of Bell University Labs and the Social Sciences and Humanities Research Council of Canada (SSHRC).

2 Unofficially, the seven wonders of Canada. See <http://www.cbc.ca/seven-wonders/>.

3 Will Ferguson & Ian Ferguson, How to be Canadian (Vancouver: Douglas & McIntyre, 2001).

4 As illustrated by a recent report by the Conference Board according to which Canada is fast becoming a mediocre country, Heather Scofield ‘Canada a land of mediocrity, Conference Board says’ Globe and Mail (13 June 2007) A1. A note of reassurance to the reader of this book who is suddenly thinking of asking for a refund: if we were truly a mediocre nation, that report would not have been written, let alone published.

5 Interestingly, another great step forward in copyright history was made in another cool climate: the Nordic countries invented the extended repertoire system discussed in section II below. See Tarja Koskinen-Olsson, ‘Collective Management in the Nordic Countries’ in Daniel J. Gervais, ed., Collective Management of Copyright and Related Rights (The Hague: Kluwer, 2006).
With the maple leaf thus set as backdrop, let us now consider the context. Several countries have fostered the growth of Collective Management Organizations (CMOs) through legislative initiatives in the belief that CMOs offer a viable solution to the problems associated with individual licensing, collecting royalties and enforcing copyright against large numbers of users. In theory, collective licensing enables creators to exercise rights in a fair, efficient and accessible manner. It ensures copyright protection when individual management of it becomes difficult or impracticable. However, collective management is not a panacea, and questions have been raised about the efficiency and the transparency of CMOs and their continued relevancy in the digital age. A first set of criticisms targets structural issues such as governance, the absence of competition among CMOs and tariff-setting processes. A second set of issues, of a conjunctural or cyclical nature, includes fast-changing market conditions and online business models that have added to the pressure to adapt put on CMOs by their members, users of copyright material and regulators.

Can collective management work in the digital environment, and what if any is the role of regulators in optimizing its efficiency? It is with those questions in mind that this chapter attempts to demonstrate that Canada has developed one of the most efficient (though far from perfect) systems of collective management of rights and that a key vector of this relatively successful endeavour has been the Copyright Board.

In Part I of the chapter, we first take a snapshot of the current state of collective management in Canada and then at the establishment and functioning of the Copyright Board. In Part II, we consider the pros and cons of the

---

6 For example, tens of thousands of radio stations worldwide cannot possibly clear individually the rights of authors, composers, performers and producers of each song they play. That said, the concentration of media ownership in certain countries may progressively render centralized (direct) licensing less difficult to envisage.

7 For example, rights are often managed by multiple collective management societies within a particular territory. Coordination is required not only between national collective management societies, but then on an international basis between collective management societies. There is also a significant lack of standards among many collective management societies. Identification alone of an underlying right (and rightsholder(s)) can be a convoluted process.

8 This term is used generically in this chapter, even though some CMOs are not membership organizations proper.

9 Licensing, collecting and enforcing copyright may now be done on an individual basis through the aid of technologies such as digital rights management systems. While most authors do not adopt the view that collectives will no longer have a role to play in the digital environment, the point is that new technologies alleviate some concerns relating to the inefficiency of individual licensing, collecting and enforcement of copyright.
Canadian system and lessons that may be drawn to improve collective management in Canada generally and the functioning of the Board in particular.

I COLLECTIVE MANAGEMENT OF RIGHTS IN CANADA

The Four Legal Regimes in the Canadian Act

In 1997, bill C-32\(^{10}\) amended the Copyright Act by adding a definition of the expression ‘collective society’, as follows:

A ‘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 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.’ (Emphasis added)

This definition is important to create uniformity in the Canadian collective management regime, a uniformity greatly reinforced by the fact that all those regimes are subject to the supervisory authority of the Board. However, in spite of this conceptually-unifying definition and the breadth of the Board’s authority, the Act contains four legal regimes concerning the collective administration of copyright and neighbouring rights. These regimes (since 1997) are as follows:

- A regime for music performing rights (and certain neighbouring rights)
- A general (or ‘residual’) regime
- A ‘particular cases’ regime for retransmissions and certain uses by educational institutions; and
- A regime for private copying levies.

The formation of the four regimes stem in part from historical evolution –

\(^{10}\) S.C. 1997, c. 24 (assented to 25 April 1997).
notably the separate regime for music performing rights, which, as noted above, was the original realm of collectives. Yet those four regimes also reflect policy choices. The Canadian regulatory context is unique in that it differentiates the original/classical regime of music performing rights, from regimes based on compulsory licenses (that is, the particular cases regime), regimes based on voluntary assignments,\(^{11}\) and a regime for private copying of music under which collectives do not license. They are established to collect a compensatory remuneration for copying only on certain types of media.\(^{12}\) The copying is deemed uncontrollable, as a practical or normative matter, or both.

**Music performing rights and certain neighbouring rights**

The first regime concerns the *performance or telecommunication of musical works and sound recordings of musical works.*\(^{13}\) This type of collective management is regulated by s. 67 of the *Copyright Act.* CMOs active in this field grant licences for the public performance and communication to the public by telecommunication of music (the underlying musical work, the performer’s performance and the producer’s sound recording). In the case of authors, the Society of Composers, Authors and Music Publishers of Canada (SOCAN), the only collective representing copyright holders in this field,\(^{14}\) represents approximately 70,000 holders of an exclusive copyright under s. 3 of the *Act.* Authors voluntarily assign their rights to SOCAN. In theory, authors and publishers who own rights in musical works can avoid the application of the regime by managing their rights on their own.\(^{15}\) However, in practice, SOCAN’s repertoire includes virtually every musical work communicated or performed in Canada.

---

\(^{11}\) Which, as is discussed below, may include an extended repertoire or limited liability option.

\(^{12}\) *Copyright Act*, R.S.C. 1985, c. C-42, ss. 79–80 [*Copyright Act or Act*]. The royalty applies to blank recording medium, regardless of its material form, onto which a sound recording may be reproduced and that is of a kind ordinarily used by individual consumers for that purpose. This was interpreted as not including ‘devices’ (such as iPads) on which music may be stored. See *Canadian Private Copying Collective v. Canadian Storage Media Alliance* (2004), 36 C.P.R. (4th) 289, [2005] 2 F.C. 654 (F.C.A.).

\(^{13}\) *Copyright Act*, ss. 67 to 69.

\(^{14}\) SOCAN was formed in 1990 by the merger of its two predecessors: The Composers, Authors and Publishers Association of Canada (CAPAC) and the Performing Rights Organization of Canada (PROCAN).

\(^{15}\) That option is not open to performers and record producers, since only a collective can collect royalties for the performance or telecommunication of sound recordings of musical works: *Copyright Act*, s. 19(2)(a). The remuneration right for the performance or telecommunication of other sound recordings can be paid to either the performer or the record producer: *Copyright Act*, s. 19(2)(b).
The Act imposes collective management of the rights to remuneration of performers and makers of sound recordings. The Neighbouring Rights Collective of Canada (NRCC), a non-profit umbrella collective, was established in 1997 to administer such rights. NRCC does not directly deal with individual rights holders, however. It has five member collectives.

Collective management of rights for dramatic and literary works contained in sound recordings (notably through Artisti) is voluntary.

In fixing tariffs in this area, the Act imposes specific criteria to be applied by the Copyright Board, including a single payment for the equitable remuneration of producers and performers. All tariffs must be certified by the Copyright Board before they can be enforced. CMOs who do not file proposed tariffs for a given use or market are no longer allowed to seek legal redress for that use or market and a user who offers to pay the appropriate tariff cannot be prosecuted for violation of copyright, even if the CMO refuses to issue a licence. Given the nature of the powers of the Board under this regime, it has been argued that agreements between a collective and a user are null and void as a matter of public policy.

The general regime
The regime that governs CMOs in s. 70.1 and following is known as the general (or residual) regime because it applies to all voluntary licensing

---

16 Copyright Act, s. 19(1) and (2).
17 Namely, the American Federation of Musicians and the ACTRA Performers’ Rights Society, which receive royalties for the benefit of most performers; Artisti, which manages the rights of some 600 performers (mostly singers) from the province of Québec; and Soproq and ARLA, which receive the producers’ share are described below. In 2004, NRCC collected some CAN $12M and distributed CAN $10.2M.
19 Copyright Act, s. 68(2).
20 Absent a tariff, an action may be commenced with the permission of the relevant Minister: Act, ibid., s. 67.1(4). In practice, however, that permission has never been sought, and, barring exceptional circumstances, would not be granted.
21 Copyright Act, s. 68.2(2). SOCAN still can enjoin a person who does not conform to the tariff from using its repertoire: see e.g., Society of Composers, Authors and Music Publishers of Canada v. Kicks Roadhouse Inc. (c.o.b. How-Dee’s) (2005), 39 C.P.R. (4th) 238 at para. 27 (F.C.T.D.).
22 Stéphane Gilker, ‘Statut des ententes négociées hors du processus de la Commission’ in Ysolde Gendreau, ed., Copyright Administrative Institutions (Montreal: Yvon Blais, 2002) at 140–1. In practice, SOCAN does have agreements with a variety of users. They clarify which tariffs apply to certain uses, offer discounts on the rates set out in the tariffs or even set prices for uses that are outside any of the tariffs certified by the Board.
schemes other than those of s. 67 just described and unless another regime applies. It is important to note, however, that in terms of financial flows, s. 67 CMOs (under the first regime above) collect and distribute more money than all s. 70.1 collectives combined.

In theory, this regime applies to all voluntary collective management of the rights of reproduction, adaptation, rental, publication and public performance in the area of copyright (s. 3) and to the rights of performers concerning the first fixation of their performances, reproduction and communication to the public of live performances (s. 15) and to certain rights of sound recording producers (s. 18) and broadcasters (s. 21). In practice, however, it applies to:

- Reprography, where the two main societies are the Access Copyright (previously CANCOPY) and the Société québécoise de gestion collective des droits de reproduction (COPIBEC).
- Mechanical rights. CMOs such as (a) the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC), which ‘administers royalties stemming from the reproduction of musical works’; and (b) the Canadian Musical Reproduction Rights Agency (CMRRA), ‘a Canadian centralized licensing and collecting agency for the reproduction rights of musical works in Canada.’ The two CMOs are collaborating in certain areas, including online use of music through a joint agency known as CMRRA/SODRAC Inc. (CSI).

---

23 Or more precisely any CMO which operates ‘a licensing scheme, applicable in relation to a repertoire of works of more than one author, pursuant to which the society sets out the classes of uses for which and the royalties and terms and conditions on which it agrees to authorize the doing of’ a protected act: Act, s. 70.1.

24 According to one author, some forms of collective management may escape that definition: ‘[a] company that licenses the use of the works of multiple authors to users can avoid the application of the general regime]...if that company does not deal with users on a general tariff basis but negotiates each use individually.’ See Peter Grant, ‘Competition and the Collectives in Canada: New Developments in the Relationship between Copyright and Antitrust Law’ (1990–91) 1 Media and Communications Law Review 191 at 199.

25 <http://www.accesscopyright.ca>.

26 <http://www.copibec.qc.ca>.

27 <http://www.sodrac.ca>.


29 ‘CSI (CMRRA/SODRAC Inc.) is an administrative entity established by CMRRA and SODRAC, enabling these two organizations, through CSI, to negotiate agreements with users for various reproduction rights and issue licences to them, as well as to submit tariff proposals to the Copyright Board. CSI also facilitates the payment process for users, enabling the user to issue only one payment instead of two’: Canadian Heritage, CSI, online: <http://music.gc.ca/enreg_fichi_Creat_csi_e.asp>.
Visual arts. The Canadian Artists' Representation Copyright Collective (CARCC) was established in 1990 to create opportunities for increased income for visual and media artists. The services it provides to artists include negotiating the terms for copyright use and issuing an appropriate license to the use.\(^{30}\) This area also includes previously-mentioned SODRAC and the Société de droits d'auteur en arts visuels (SODART) 'created by the Regroupement des artistes en arts visuels du Québec (RAAV) and responsible for collecting rights on behalf of visual artists. It negotiates agreements with organizations that use visual arts, such as museums, exhibition centres, magazines, publishers, audio-visual producers, etc. SODART issues licences to these organizations and collects royalties due to the artists it represents.\(^{31}\)

Sound recordings and music videos. Here, the Société de gestion collective des droits des producteurs de phonogrammes et vidéosagrammes du Québec (SOPROQ) represents mostly Francophone record producers from Québec while the major record companies, many independent labels, performers and producers are [Audio-Video Licensing Agency] AVLA members. AVLA members represent 95% of all sound recordings and music videos produced and/or distributed in Canada.\(^{32}\) Both collectives administer the copyright in master audio and music video recordings. Both license the exhibition and reproduction of music videos and the reproduction of audio recordings for commercial use. Both receive a part of the makers' share of neighbouring rights royalties and private copying levies.

Audiovisual and multimedia rights where the Directors Rights Collective of Canada (DRCC) acts for film and television directors; and the Producers Audiovisual Collective of Canada collects royalties on behalf of producers for the sale of blank audiovisual media for the rental and lending of video recordings. In both cases, royalties are mostly from foreign sources. The Société civile des auteurs multimédia (SCAM), a French collective, administers reproduction rights of literary works intended for audio-visual media such as cinema, television and radio.

Off-Air Program Taping. Two collectives license off-air taping of television and radio programs. The Educational Rights Collective of Canada (ERCC), established in 1998, collects royalties pursuant to a tariff that is set by the Copyright Board, for the off-air taping and public performance of television and radio programs by educational institutions. It collected

\(^{30}\) <http://www.carfac.ca>.

\(^{31}\) <http://www.raav.org/sodart>.

less than CAN $20,000 in 2004.\textsuperscript{33} The Canadian Broadcasters Rights Agency (CBRA) licenses the use of programs owned by Canadian private television and radio broadcasters by media monitoring firms and by government entities that operate in-house monitoring services, pursuant to a combination of individual licences and a tariff set by the Copyright Board. CBRA’s media monitoring royalties are in the order of CAN $800,000 per year.

- **Other Areas.** A variety of other CMOs play a role in distributing royalties collected in Canada or elsewhere. The Canadian Screenwriters Collection Society (CSCS) deals in royalties payable to film and television writers under Canadian and foreign copyright legislation, including retransmission royalties.\textsuperscript{34} The Playwrights Union of Canada, a service organization for professional playwrights, also acts as agent for the distribution of rights and collection of royalties. SACD, a French collective, represents authors, composers and choreographers of dramatic and audiovisual works. SOQAD redistributes royalties (around CAN $90,000) agreed to with the Ministry of Education of the Province of Québec to playwrights whose works are performed in pre-school, primary and secondary schools.

CMOs operating under the general regime can file tariffs for approval by the Board\textsuperscript{35} or conclude agreements with users\textsuperscript{36} that will take precedence over tariffs.\textsuperscript{37} A CMO may, under this regime, file a copy of an agreement concluded with a user with the Board, which prevents the application of s. 45 of the *Competition Act*\textsuperscript{38} (dealing with conspiracies to limit competition). The Board then sets the royalties payable under the agreement, as well as the related terms and conditions. However, the Commissioner of Competition may

\textsuperscript{33} Educational institutions apparently prefer to deal with specialized distributors, who supply pre-recorded videocassettes along with the right to perform the underlying work in the classroom, rather than to make use of the tariff set by the Board.

\textsuperscript{34} CSCS receives retransmission royalties through another collective society, CRC.

\textsuperscript{35} *Copyright Act*, s. 70.3 and following. To date, the Board has certified tariffs pursuant to this aspect of the general regime for the reproduction of radio and television programs for the purpose of media monitoring as well as the reproduction of musical works by radio stations by distributors of video-copies of feature films (and the music they contain). Tariffs currently under examination target the reproduction of musical works in a variety of contexts (podcasting, Internet use) and the reprographic reproduction of literary works by educational institutions.

\textsuperscript{36} *Copyright Act*, s. 70.12(b).

\textsuperscript{37} *Copyright Act*, s. 70.191.

\textsuperscript{38} R.S.C. 1985, c. C-34.
ask the Copyright Board to examine the agreement if he considers it is contrary to the public interest. The Board may also be asked to determine the royalty applicable in individual cases (arbitration). To date, the Board has issued only one decision pursuant to this aspect of the regime.

Retransmissions and certain uses by educational institutions (section 71)
The third regime applies to non-voluntary licences for the retransmission of distant radio and television signals as well as for the reproduction and public performance by educational institutions, of radio or television programs, for educational or training purposes. No royalties can be collected except pursuant to a tariff certified by the Copyright Board and all royalties must transit through one or more CMOs, each of which collects a share set by the Board in the tariff.

There are eight retransmission CMOs who operate in whole or in part under this regime. Each gets a share of the royalties set in a single tariff, certified by the Copyright Board. They are:

- Border Broadcasters’ Inc. (BBI);
- Canadian Broadcasters Rights Agency (CBRA);
- Canadian Retransmission Collective (CRC);
- Canadian Retransmission Right Association (CRRA);
- Copyright Collective of Canada (CCC);
- FWS Joint Sports Claimants (FWS).

---

39 *Copyright Act*, s. 70.5(2) to (5). As of this writing, this has never been done.
40 *Copyright Act*, s. 70.2. If an agreement is reached between the parties, the Board ‘shall not proceed’; s. 70.3.
42 *Copyright Act*, ss. 71 to 76.
44 Border Broadcasters Inc. (BBI) represents US border broadcasters.
45 <http://www.cbra.ca>.
46 <http://www.crc-srcc.ca>.
47 An association representing the Canadian Broadcasting Corporation (CBC), the American Broadcasting Company (ABC), the National Broadcasting Company (NBC), the Columbia Broadcasting System (CBS) and Télé-Québec.
48 It represents copyright owners (producers and distributors) of the US independent motion picture and television production industry. Should not be confused with the United States Copyright Clearance Center, Inc. (CCC – <http://www.copyright.com>), the US Reproduction Rights (reprography) Organization (RRO).
49 It represents a number of major sports leagues.
• Major League Baseball Collective of Canada (MLB); and the Society of Composers, Authors and Music Publishers of Canada (SOCAN).

Another collective, the Educational Rights Collective of Canada (ERCC) licenses copy and use of radio or television programs for educational use in classrooms except for news and news commentary programs copied and played at school within the period of one year from the time that the program was copied. This regime is another illustration of the Board's jurisdiction beyond tariffs and the uniqueness of the Canadian regime. Here, it is given clear regulatory powers by the Act. Section 29.9(2) reads as follows:

The Board may, with the approval of the Governor in Council, make regulations
(a) prescribing the information in relation to the making, destruction, performance and marking of copies that must be kept under subsection (1),
(b) prescribing the manner and form in which records referred to in that subsection must be kept and copies destroyed or marked, and
(c) respecting the sending of information to collective societies referred to in section 71.

Non-member rightsholders may claim royalties collected on the basis of an approved tariff, subject to conditions applicable to member rightsholders.

Private copying
A specific regime was put in place in 1998 concerning the private copying of sound recordings. As noted in the introductory part of this section, the regime only applies to music and to limited types of media. It does not involve licensing as such, but rather remuneration designed to compensate rightsholders for a use of musical works, performances and sound recordings that is made non-infringing by a parallel exception allowing users to make copies of

---

50 It collects for the retransmission of major league baseball games in Canada.
51 Copyright Act, s. 29.6(2), which was added by S.C. 1997, c. 24, s. 18(1). It came into force on 1 January 1999.
52 See <http://www.erc.ca> and Statement of Royalties to be Collected by ERCC from Educational Institutions in Canada, for the Reproduction and Performance of Works or Other Subject-Matters Communicated to the Public by Telecommunication for the Years 2003 to 2006 (14 January 2005), Copyright Board, online: <http://www.cda-cb.gc.ca/decisions/e14012005-b.pdf>.
53 Added by S.C. 1997, c. 24, s. 18(1). In force 1 January 1999.
54 Copyright Act, s. 76. See also Re SARDEC (1998), 86 C.P.R. (3d) 481 (Cop. Bd.).
55 Copyright Act, s. 79–88, added by S.C. 1997, c. 24, s. 50 and came into force 19 March 1998.
music for private use.\textsuperscript{56} The scheme replicates the retransmission (third) regime in all relevant respects but two. First, the levy must be collected through a single collecting body designated by the Board.\textsuperscript{57} Second, rather than apportioning royalties among collectives, the Board sets the share of the levies to which all eligible authors, eligible performers and eligible makers (or record producers) are respectively entitled;\textsuperscript{58} how these shares are then divided within each college of rights holders is up to the relevant collectives.

The CMOs entitled to receive a share of this remuneration created the Canadian Private Copying Collective (CPCC), which is responsible for distributing the funds generated by the levy to the collective societies representing eligible authors, performers and makers of sound recordings. The member collectives of the CPCC are the previously-mentioned CMRRA, SODRAC, SOCAN and NRCC (itself an umbrella organization).

**The Establishment of the Board**

Though the origins of copyright tribunals in Commonwealth jurisdictions can be traced back to the findings of a Parliamentary Select Committee set up in the UK in 1929,\textsuperscript{59} the creation of a copyright tribunal\textsuperscript{60} in that country was deferred until the 1956 Copyright Act.\textsuperscript{61}

Hence, the Canadian oversight authority was established first. This means there was no obvious model to follow at the time. Consequently, the Canadian model, and the transition from a traditional regulatory tribunal (the model in place in the UK and several Commonwealth jurisdictions whose ‘primary task

\textsuperscript{56} Copyright Act, s. 80(1).

\textsuperscript{57} Copyright Act, s. 83(8)(d).

\textsuperscript{58} Copyright Act, s. 84.


\textsuperscript{60} Originally known as the ‘Performing Right Tribunal’, its function was ‘to determine disputes arising between licensing bodies and persons requiring licences or organisations claiming to be representative of such persons’ [...], the Tribunal’s jurisdiction was limited, to public performance, broadcasting and cable diffusion licences. Ibid. at 289.

\textsuperscript{61} Freegard traces the impact of the UK model on several jurisdictions, Australia, Ireland, South Africa, but also to a lesser degree Bangladesh, Hong Kong, India, Jamaica, Pakistan, Singapore and Zimbabwe, and a number of others with distinct ‘competent authority’ (though not referred to as a Board or tribunal). Ibid. at 290–1. For a much more detailed review of the functioning of copyright tribunals and oversight authorities in a number of jurisdictions, see Gendreau, supra note 22. The book also contains several interesting papers on the operations and history of the Canadian Board (some of which are mentioned in other notes) and is recommended reading for anyone wishing to learn more about the topic discussed in this chapter.
...is to determine the amount of the licence fee payable for the exploitation of certain rights in copyright works\(^{62}\) to a professional body consisting of full-time members and research staff, may properly be considered unique. It is also unique among Commonwealth member States because, as we shall see below, its jurisdiction far exceeds what Continental European commentators view as *de minimis* control by copyright tribunals essentially limited to tariffs and terms of the licence.\(^{63}\)

In 1931, the *Copyright Act*\(^{64}\) was amended to require that the CPRS (the Canadian 'subsidiary' of the British Performing Rights Society (PRS)) file its statements of royalties. Cabinet could modify the statements following an investigation and report by a commission of inquiry.\(^{65}\) In 1936, following a recommendation of a Commission,\(^ {66}\) the Act was further amended so that performing rights tariffs would have to be certified by a new administrative agency, the Copyright Appeal Tribunal, before coming into force, and a CMO could not commence infringement proceedings it if refused or neglected to file a statement of royalties.\(^{67}\) Following the establishment of the tribunal, the oversight of collective management organizations in Canada proceeded fairly smoothly, with the Tribunal concentrating its time and efforts on tariffs.

The year 1989 represented something of a watershed for Canadian CMOs. The Act was amended in two important respects. First, the Copyright Appeal Tribunal was replaced by the Copyright Board. The government recognized at the time that the growth of collective management, both in the importance of


Changes to the regulatory situation in the European Union will induce changes in the UK system. See Lucie Guibault & Stef van Gompel, 'Collective Management in the European Union' in Gervais, *supra* note 5.

\[^{64}\] At the time R.S.C. 1927, c. 32.

\[^{65}\] *Copyright Amendment Act, 1931*, S.C. 1931, c. 8, ss. 5, 10.

\[^{66}\] *Report of the Royal Commission appointed to investigate the activities of the Canadian Performing Rights Society, Limited, and similar societies* (Ottawa: King's Printer, 1935) (Chair: James Parker).

\[^{67}\] *An Act to Amend the Copyright Act, 1931*, S.C. 1936, c. 28, s. 2. The Canadian Tribunal thus predates the British Performing Rights Tribunal by some 21 years.
the monies collected and the increasing breadth of its reach (even more so in 1997 with the formation of collectives in the field of reprography, and the formation of new collectives to administer the rights introduced in respect of neighbouring rights and private copying\(^{68}\), required a supervisory authority empowered to look beyond mere tariff setting and beyond a legalistic approach based strictly on evidence adduced by parties to a tariff case. The new Board was empowered to supervise dealings between collectives and individual users or groups of users in areas other than music performing rights. Collective management was thus recognized as an integral part of the system and its relationship with competition law was somewhat clarified.

In 1997, collective management received further recognition. CMOs were no longer limited to dealing with users on a case-by-case basis; they could secure tariffs that would apply to all current and future users. Even more significantly, Parliament used collective management as the tool of choice in dealing with a number of areas where access had to be guaranteed in exchange for a form of compensation, including music neighbouring rights,\(^{69}\) educational uses of television programs,\(^{70}\) private copying\(^{71}\) and some forms of ephemeral recordings and transfer of format.\(^{72}\) These developments led to a further increase in the number of collectives, and to a significant expansion of the role the Copyright Board was asked to play in regulating the relationship between collectives and users.

---

\(^{68}\) In the 1989 amendments, the use of protected works in retransmitted distant radio and television signals was subjected to a compulsory licensing scheme according to which rights holders could seek remuneration only through a CMO; in that area, collective management became the only possible course of action.

\(^{69}\) Those neighbouring rights in this context were rights of performers and producers (makers) of sound recordings to a remuneration for the broadcasting of their performances and recordings, respectively and to prohibit the reproduction of fixations of performances and recordings (Copyright Act, ss. 15, 18 and 19(2)(a)).

\(^{70}\) Copyright Act, ss. 71–76.

\(^{71}\) Copyright Act, ss. 79–88. The private copying regime introduced an exception for private copies made on certain audio media but remuneration on blank media was introduced to compensate rightsholders. The right to collect this remuneration is necessarily managed by a collective, namely the Canadian Private Copying Collective (see <http://www.cpcc.ca>).

\(^{72}\) Copyright Act, ss. 30.8(8) and 30.9(6); pursuant to these provisions, exceptions that allow broadcasters to make ephemeral and transfer of format copies do not apply if a CMO offers a licence for the use of the relevant work, performance or sound recording.
The Copyright Board Today.

Administration
The Copyright Board of Canada is an independent administrative tribunal. It consists of not more than five members, appointed by the government for a set term of up to five years. Members can serve either full-time or part-time; in practice, all members except the Chairman serve full-time. The Board has a small permanent staff which includes a Secretary General, a General Counsel and a Director of Research and Analysis. Copyright tribunals often do not and must thus rely on the parties’ evidence and analysis, which may limit their ability to factor in broader public policy considerations, especially those requiring empirical data not provided by the parties. In addition, not being a traditional tribunal, over the past 15 years, more hearings of the Canadian Board have been chaired by one of two Vice-Chairmen, including a non-lawyer, than by one of three judicial Chairmen.

With respect to the participation of experts and other persons not representing one of the parties, the Canadian Board’s policy has been extremely liberal. It has made full use of its ability to control its own proceedings to allow interventions from persons or groups who are not directly interested but who are likely to provide a useful point of view.

The Board presents two unique characteristics among Canadian regulatory agencies. First, for historical rather than practical reasons, the Chairman is a sitting or retired judge of a superior court. Second, because the Chairman thus usually serves part-time, the Board’s direction is two-headed: the Chairman directs the work of the Board, but the Vice-Chairman is its Chief Executive Officer.

Procedures before the Copyright Board
The procedure leading to the certification of a tariff is similar in all four regimes. A proposed tariff is filed on or before 31 March of the year preceding the year in which the tariff is to come into effect. The Board publishes the proposal in the Canada Gazette and users or their representatives may object to the proposal within 60 days of the publication. The Board then issues a

---

73 Copyright Act, ss. 66–66.5.
74 When the Copyright Appeal Tribunal was set up in 1936, it was a common practice in Canada to ask a judge to preside over the deliberations of administrative tribunals. This is no longer the case.
75 Copyright Act, ss. 67.1, 68 (performing rights regime); 70.13–70.15 (general regime, tariffs); 71–73 (statutory licences); 83(1)–83(10) (private copying).
76 In the private copying regime, anyone is entitled to object.
directive on procedure and sets a timetable for the proceedings.\textsuperscript{77} The CMO and objectors are given the opportunity to argue their case in a hearing before a panel usually constituted of three members.\textsuperscript{78}

The nature of the evidence offered varies considerably and the Board is not bound by specific rules of evidence.\textsuperscript{79} After deliberations, the Board certifies the tariff, publishes it in the \textit{Canada Gazette} and provides written reasons for its decision.\textsuperscript{80} A tariff comes into effect on 1 January following the date by which the proposed tariff was filed and is effective for one or more calendar years.\textsuperscript{81}

\textbf{The powers of the Board}

Further to an important decision by the Federal Court of Appeal which recognized the broad discretion of the Board,\textsuperscript{82} the Board redefined its role from simply protecting users against the potential misuse of monopoly power by CMOs (a view which still seems to inform the work of several national copyright tribunals) to regulating the balance of market power between copyright holders and users. This was perhaps the defining moment of what made the Canadian Board so unique. The Board has asserted not only that a market price is only one of several possible rational bases for a tariff, but that in certain circumstances, public policy would lead it to ignore market considerations altogether.\textsuperscript{83}

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{77} The Board has the power to adopt rules of procedure, but has not exercised it.
\item\textsuperscript{78} In exceptional cases, no hearing will be held if proceeding in writing accommodates a small user or if the issues at hand do not warrant a hearing. The hearing is also dispensed with on most preliminary or interim issues.
\item\textsuperscript{79} According to the Supreme Court of Canada, a Canadian administrative tribunal that blindly follows the rules of evidence applicable to ordinary courts of law may unduly fetter its discretion: \textit{Université du Québec à Trois-Rivières v. Larocque}, [1993] 1 S.C.R. 471.
\item\textsuperscript{80} Board decisions are available online: <http://www.cba-cda.gc.ca/decisions/index-e.html>.
\item\textsuperscript{81} \textit{Copyright Act}, ss. 67.1(3), 70.14, 71(4) and 83(5).

\begin{quote}
The Board properly understood its function when it stated that it had to regulate the balance of market power between copyright owners and users...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.
\end{quote}

\item\textsuperscript{83} \textit{SOCAN Tariff 2.A, 1993}, \textit{ibid.} at 34 b–c, 39 c–d.
\end{itemize}
\end{footnotesize}
There are no conditions in the Act respecting the corporate structure of a CMO (as a for-profit entity, a membership organization, etc), the manner in which it secures the repertoire it administers or the nature of its relationship with rights holders or users or the way in which it surveys and distributes the income collected on behalf of rights holders. Not surprisingly, then, practices vary considerably, and interactions between CMOs are sometimes complex. Somewhat surprisingly given the centrality of its role, the Board has no direct powers over any of those aspects. Hence, subject to the intervention of Canadian competition authorities, rights holders are free to organize their affairs as they wish; even when a compulsory licensing scheme applies, nothing forces them to join a given collective or to organize CMOs along predetermined rules; as a result eight retransmission CMOs, some of which administer similar rights, receive a share of the royalties directly from copyright users. While no authorization from the Board or any other governmental entity is required to establish a new collective, the Board does have two obligations that influence the ability of a CMO to enter a market; as noted earlier, the Board must ensure that the payment of royalties for the performance or communication of sound recordings of musical works is made in a single payment and that the levy on blank media to compensate for private copying is collected by a single collecting body. In addition, as is shown below, by using its discretion on setting conditions associated with monetary and other aspects of tariffs, the Board indirectly regulates a number of aspects that affect the governance of Canadian CMOs.

Indeed, as with any administrative tribunal, the Copyright Board has powers of a substantive and procedural nature. Some are expressly granted; others are implicit. Thus the Act grants the Board the power to issue interim decisions, to vary earlier decisions, to make regulations governing its procedure and to cause the publication and distribution of notices. The Board also enjoys some of the powers of a superior court of record; for example, it can compel the production of evidence or the appearance of witnesses. The Board even can formulate its own objections to proposed tariffs. However, contrary to most Commonwealth copyright tribunals, the Board does not have the power to award costs. The Board has some implicit powers, such as to regulate its proceedings, to decide questions of law that are necessarily incidental to the exercise of its core function and even to set royalties at a higher rate than requested by the CMO.

84 See infra note 93 and accompanying text.
85 Copyright Act, ss. 66.51, 66.52, 66.6 and 66.71 respectively.
86 Ibid., s. 66.7(1).
87 Ibid., ss. 68(1), 70.14, 72(2) and 83(7).
The Board's powers are obviously constrained not only by the Act, but also by regulations, general principles of administrative law and court decisions. The government can, by regulation, issue policy directions to the Board and establish general criteria that the Board must apply or have regard to. In certain cases, as noted above, it is expressly empowered to issue regulations.

The Board has made ample use of its power to certify royalties and their related terms and conditions with such alterations as the Board considers necessary to influence the structure of CMO markets. It has carved new tariffs out of existing ones to suit the purposes of certain groups of users, imposed reporting requirement, authorized audits and imposed interest on late payment. The Board is allowed to develop a tariff structure that is completely different from the one proposed by the collective or the users. In the first retransmission proceedings, the Board set aside 11 separate proposals to adopt a single tariff based on a tariff formula that it developed. The Board has imposed identical tariff structures on separate collectives; in the case of the performing rights tariff for commercial radio, for example, until SOCAN became the sole collective, an overall rate was set and then apportioned, instead of dealing with each collective's tariff separately. The Board has even certified single tariffs for the combined use of the repertoires of SOCAN and

---

90 For example, the Act provides that performing rights tariffs must not place broadcasters at a financial disadvantage because of linguistic or content requirements imposed pursuant to the Broadcasting Act, S.C. 1991, c. 11, that the neighbouring rights royalties must be made in a single payment, that the private copying levy must be collected by a single body and that small cable systems are entitled to preferential rates (Copyright Act, ss. 68(2)(a)(iii) (single payment), 83(8)(d) (single collecting body) and 68.1(4), 74(1) (preferential rate)).

91 That power has been exercised with respect to retransmission royalties: see Retransmission Royalties Criteria Regulations, SOR/91-690, 28 November 1991.

92 See supra note 53 and accompanying text.

93 E.g., Copyright Act, ss. 68(3) and 70.15(1).


96 Re Royalties for Retransmission Rights Of Distant Radio and Television Signals (1990), 32 C.P.R. (3d) 97 (Cop. Bd.).

97 SOCAN was formed in 1990 as a result of the merger of two former Canadian performing rights societies: The Composers, Authors and Publishers Association of Canada (CAPAC) and the Performing Rights Organization of Canada (PROCAN).
NRCC. Perhaps the Board could even impose a single payment rule in retransmission or even merge tariffs filed pursuant to separate regimes.

**The Board and interaction among CMOs**

Canadian CMOs often form strategic alliances. Sometimes, these are dictated by the structure of the regulatory regimes: this explains in part the creation of CPCC and NRCC as umbrella collectives. Others respond to the structure of the market. It is considerably easier for CMRRA and SODRAC to jointly seek a tariff for commercial radio stations, since the use of their respective repertoires varies considerably between French- and English-speaking stations. It is also easier for Access Copyright and COPIBEC to act for each other in their respective ‘home territories’. Other alliances probably are perceived by the relevant CMOs as arranged marriages (imposed by the Board): such is arguably the case with SOCAN and NRCC in those markets where the Board has certified a single tariff for both collectives.

Alliances between CMOs can be used to prevent the Copyright Board from dealing with an issue. When two performing rights societies merged to form SOCAN, the need to allocate royalties between them disappeared. By filing a single tariff that applies to commercial radio stations irrespective of their relative use of the repertoires of CMRRA and SODRAC, the two collectives are free to apportion between them as they see fit the royalties collected pursuant to the tariff certified by the Board. Having joined CPCC, CMRRA, SODRAC and SOCAN removed from the Board the determination of their individual share of music creators’ remuneration for private copying.

Rights holders also can bring to the table divergent points of view, either through the relevant CMOs or the associated industry associations. Makers of

---


100 The neighbouring rights regime, under which NRCC operates, requires a single payment for the use of a given sound recording: *Copyright Act*, s. 68(2)(a)(iii). The private copying regime, under which CPCC operates, requires that a single body be designated to collect the levy (*ibid.*, s. 83(8)(d)).

sound recordings\(^{102}\) recently opposed a request by CMRRA and SODRAC for the tariff that applies to the licensing of online music services. The variety of Canadian retransmission collectives is explained in part by the fact that some rights holders wished to convince the Board to attribute a higher value for the viewing of certain programs than to others.\(^{103}\) One CMO, representing scriptwriters, even filed a proposed tariff with the intention of having the Board determine the share of a television program’s royalties that should be paid to the program’s scriptwriter.\(^{104}\)

II ANALYSIS

The Copyright Board of Canada has had a significant degree of success is ensuring that ‘copyright works’. Any analysis of the causes of its successes, and of its shortcomings, is partly speculative of course, but may nonetheless offer lessons on how collective management should be overseen by governments, and which measures could be adopted to further improve the Canadian system.

Advantages of the Canadian System

When compared to its Australian and UK counterparts,\(^{105}\) the Canadian regulatory framework for collective management may work better for at least three sets of reasons. First, its structure as an administrative agency not tied by the strict rules of evidence and procedure (beyond the few rules contained in the Act and fundamental principles of natural justice) allows the Board to consider data that would not necessarily be seen (either because no party is its possessor or is willing to bring it forward) or admitted (for example, as hearsay). We suggest that this is actually more in keeping with the role that the Board should

\(^{102}\) Represented by the Canadian Recording Industry Association (CRIA), online: <http://www.cria.ca>.

\(^{103}\) These attempts were unsuccessful: FWS Joint Sports Claimants Inc. v. Border Broadcasters Inc. (2001), 16 C.P.R. (4th) 61 (F.C.A.).

\(^{104}\) See Statement of Proposed Royalties to be Collected by CSOC for the Retransmission of Distant Television Signals, in Canada, in 2002 and 2003 (14 April 2001), Copyright Board, online: <http://www.cb-cda.gc.ca/tariffs/proposed/r14042000-b.pdf>. The issue was eventually settled between the association representing scriptwriters and the CMO of which they previously had been members.

\(^{105}\) Paul L. C. Torremans, ‘Collective Management in the United Kingdom (and Ireland)’ in Gervais, supra note 5 at 227; and Mario Bouchard, ‘Collective Management in Commonwealth Jurisdictions: Comparing Canada with Australia’ in ibid. at 283.
play in taking account not just of the immediate interests of those involved in a proceeding, but also more broadly the interests of the general public and the operation of the market for copyright material. Information and ideational goods are public goods, or at least they behave as such in the marketplace. As such, any restriction on their use (as an ex ante incentive or ex post reward for their creation) is likely to generate negative welfare outcomes, which may be necessary but should form part of the policy equation examined by the Board in setting tariffs. On a more mundane level perhaps, a tariff imposed on a corporate user (for example, a broadcaster, hotel or online music delivery service) may ultimately be reflected in the price paid by the consumer. Because consumers and other groups may not always be able to participate in Board proceedings, it is certainly valuable and arguably essential to provide the Board with the necessary leeway and discretion to ensure that all interests, including those of the public (which is not formally represented at Board hearings), are adequately protected. The regulation of the balance of market power between copyright holders and users requires no less.\textsuperscript{106}

A second set of reasons revolve around the organization of the Board, with its full-time commissioners and a (albeit small) research staff. The permanent nature of the commissioners’ appointment allows them to gain appreciable expertise in the various complex issues at play.\textsuperscript{107} The Board’s role, as explained above, greatly exceeds the function of a competition law safety valve, and its decisions exceed finding the right ‘number’ for a given tariff in the absence of an agreement between CMOs and users. An administrative body of this type with its own internal research and ability to contract out for additional expertise seems better suited to tackle questions of this nature than a traditional tribunal limited to an adversarial process. This may in turn have generated the restraint shown by the Federal Court of Appeal\textsuperscript{108} in revising the Board’s decision, especially in matters concerning the specialized nature of the Board’s work, such as tariffs.\textsuperscript{109} The Board has also striven to give detailed

\textsuperscript{106} See supra note 82 and accompanying text.
\textsuperscript{107} The complexity follows at least in part from the Board’s own decision to move beyond the role of a competition law safety valve into a much broader market regulation body.
\textsuperscript{108} According to s. 28(1)(j) of the \textit{Federal Courts Act}, R.S.C. 1985, c. F-7, that Court has exclusive jurisdiction for any revision of a decision rendered by the Board.

Parliament established the Copyright Board to administer the scheme by approving royalties and invested it with the powers necessary for it to discharge its regulatory responsibilities in a complex area. Rapid and profound technological developments
reasons on the legal aspects of its decisions and has not hesitated to produce original decisions, such as its 1999 decision on the application of copyright to online transmissions of music,\(^{110}\) the first decision of its kind on the merits anywhere in the world, most findings of which were later upheld by the Supreme Court of Canada.\(^{111}\)

The third set of reasons is the extent of the powers given to the Board under the Act. As indicated above, there is a significant degree of public interest in copyright tariff-setting processes and outcomes, and in the operation of the copyright system. Whether and on which terms users can access copyright works they need, for business, academic or personal use, ultimately affects everyone. To limit the powers of the oversight authority to a strict ‘numbers game’ may obscurate the real questions or at least the complete picture. The ‘conditions’ that attach to the tariff itself (defined as payment for access to a repertory for a limited period of time) are probably as important as the price to be paid, perhaps more. The amount and purpose of authorized use is directly relevant of course, but also the reporting requirements (which are necessary to survey usage in order to pay rights holders accordingly but impose an additional burden on users), the collection mechanism (for example, a single payment for one economic use independently of the number of rights holders involved), and the efficiency and transparency of the CMO concerned, which reassures rights holders that they will get the appropriate payment in due course but also the users, many of whom probably prefer not to pay into a ‘black hole’. The Board’s powers to merge tariffs and tariff hearings, the publication of decisions, reports, proposed tariffs and so on, its ability to obtain information about and from CMOs and users and more broadly to engage the various stakeholders has resulted in greater transparency.

With the transition from a tribunal to a board, the Copyright Board moved copyright regulation into the sphere of public law in the sense that (a) its functions are best viewed as regulatory rather than adjudicatory; and (b) its

---

\(^{110}\) SOCAN – Tariff 22 (Transmission of Musical Works to Subscribers via a Telecommunications Service not covered under Tariff Nos. 16 or 17) (1999), 1 C.P.R. (4th) 417 (Cop. Bd.).

normative profile moved beyond the interests or even the requests of the litigants to those of the public interest in a fair and well-functioning copyright system. 112 Given the broad impact of copyright tariffs on culture, media and society at large, this may, in this author's opinion, be seen as a positive development.

Disadvantages and Shortcomings of the Canadian System

The Canadian system, including the Copyright Board, is not perfect, far from it, even though it seems better equipped legally, structurally and organisationally to perform its duties in the interests of all those concerned, including the public when compared to more traditional tribunals.

The Board has been criticized by a number of stakeholders. The costs and duration of proceedings, including the delay to get a hearing date are most often mentioned.

The criticism levelled at the Board is surprisingly not as much about the tariffs as about its operations – in particular the long delays in setting up hearings and the costs associated with long hearings. While part of the criticism is well-founded – it may take close to two years to obtain hearing dates (from the date of filing of a proposed tariff), which means that any certification would necessarily be retroactive (when counted from the decision date) – the Board is of course not responsible for delays in the appeal process. 113 Part of the delays may be due to inadequate and insufficient staffing. Other delays are caused by the sheer number of parties who wish to be heard, though this problem has been lessened somewhat by combining hearings on certain tariffs.

Other issues are structural. For example, some CMOs have no choice but to apply for a tariff, thus increasing the workload. Additionally, the inability of the Board to award costs has sometimes resulted in it having to deal with matters that could have been addressed more expeditiously. Conversely, the fact that some Canadian CMOs must obtain a tariff from the Board before collecting any royalties seems to have had positive effects. This sometimes has accelerated the process leading to the effective implementation of a collective in a market. In Canada, a retransmission tariff was in place less than ten

112 The Board may take account of 'any factor that it considers appropriate' (s. 68(2)(b) – but see also 66.71, 68(1), 70.14, 70.16 in fine, 72(2), 83(7), 68(3), 70.15(1), 73(1)(ii), and 83(8)(ii)) and may decide beyond the proposed tariff, in spite of the traditional rule of ultra petita. See Canadian Private Copying Collective v. Canadian Storage Media Alliance, supra note 12 at para 7.

113 In that connection, Parliament has already eliminated one step (the Trial Division of the Federal Court).
months after royalties became payable. The Board can also ensure a certain level of uniformity in the terms and conditions of the various tariffs without having to wait for a dispute to arise between a collective and its users.

As to the delays in setting up hearings, there is no published data on the delays caused by one party (for example, not being available or asking for a postponement) as opposed to those created by the Board’s inability to work faster. If the problem is the latter, one would need an administrative audit process to determine whether there are administrative deficiencies or simply a lack of resources. If this author may venture a personal opinion based on observations of the Board’s operations, the second factor is certainly part of the explanation.

The length of hearings (from a few days to several weeks) likely stems from good intentions: letting everyone speak, in order to increase transparency and engender respect for the decisions. Perhaps some parties abuse the process and the Board’s rules could most probably be improved to streamline the process. That said, while those are important organizational matters for stakeholders, especially those who must pay the bills associated with submissions to the Board and hearings, the bigger picture of a well-functioning copyright system seems paramount. There may, however, be a few ways in which processes could be improved, including awarding costs to parties who at great expense have presented a valid case to the Board or against any party who is considered to have abused the process.

Finally, the flip side of the move from a rather limited adjudicatory function to a regulatory one mentioned as an advantage earlier, and the Board’s embracing of the broader ‘public interest’ and other criteria ‘as it sees fit’ (as opposed to a strict limit to what is argued before it) and its ability to go beyond what is requested by the parties (that is, the traditional rule of ultra petita does not apply) is necessarily accompanied by a certain normative fuzziness, which theoretically may lead to unpredictability of outcomes. This, however, has not generally been observed.

**Future Growth**

Given the growing importance of copyright in the Canadian economy (and more generally in the global knowledge economy) as a key determining factor

---

114 Collectives subject to the general regime have even started to use the filing of a proposed tariff as a tool to enter a market and force recalcitrant users to the bargaining table: see *Statement of Royalties to be Collected by CBRA for the Fixation and Reproduction of Works and Communication Signals, in Canada, by Commercial Media Monitors for the Years 2000–2005 and Non-commercial Media Monitors for the Years 2001–2005* (2005), 39 C.P.R. (4th) 152 (Cop. Bd.).
in the extent and depth of knowledge, art, entertainment and information production, dissemination and use in Canada, the Board should be given both additional resources and additional powers. Its supervisory function of CMOs could be enhanced by helping CMOs (other than well-established CMOs in the music field) secure the necessary authority to license, that is, the right to authorize the use of a complete (or appropriate) repertoire (of works, performances or recordings). The inability to license works, performances or recordings is frustrating for users (who may then claim that the copyright system is broken), but leads to losses for rightholders when that inability is not a (a priori legitimate) use of their right to prohibit the use but the fact that the CMO was unable to find them to obtain the authority to represent them.\(^{115}\)

One specific suggestion contained in a study published in 2003 by Heritage Canada\(^ {116}\) (which shares responsibility for copyright policy with Industry Canada) has been to allow Canadian CMOs to apply for world-wide extension of their repertoire. Under such a system, the CMO's repertoire (of rights administered) becomes 'opt out' rather than 'opt in', once a CMO can show that (a) it has obtained the voluntary support of a substantial number of Canadian rights holders of the category concerned by its proposed licensing scheme; and (b) that it is in the public interest to do so. This system, known as extended repertoire (or extended licensing) has been in use for almost 40 years in Northern Europe where apparently it has worked rather well because those countries use a significant amount of foreign material – in respect of which obtaining licensing authority is often far more complicated. If such a system were introduced, CMOs would have to apply to the Board to show that they should get the extension.

There are other ways in which the role of the Board may be expanded even further over the coming years. To mention but one, for the first time since the establishment of CMOs to administer reprographic rights, no agreement was reached between one such CMO (Access Copyright) and educational institutions in Western provinces, thus leading to a hearing and a first tariff to be set by the Board, probably towards the end of 2007. Educational uses are increasingly contentious, and interventions by the Board (and perhaps also by Parliament) are on the policy radar screen.

Independently of those possible changes, it seems that 'blanket' or repertory-based solutions to license massive online uses are likely to grow expo-

\(^{115}\) Daniel J. Gervais, 'The Changing Role of Copyright Collectives' in Gervais, supra note 5 at xx–xxi.

nentially. Collectives may be able to offer the rights associated with online content, as some have already begun to do. Collective licensing is a fair alternative between prohibition and free use, at least for uses for which imposing an exception would be unfair to creators and publishers (for example, an educational exception to allow free use of textbooks and other forms of academic material) and a violation of the international norm known as the three-step test. On the other hand, prohibition of use on the Internet (a) is very difficult to achieve technologically; and (b) does not generate revenue for authors and other rights holders, at least not directly.

In 2001, the US Supreme Court upheld the rights of freelance journalists to control the electronic reuse of texts submitted to newspaper and periodical publishers, including the New York Times, for publication in their paper edition. The decision is interesting because, while the Court fully recognized that copyright vests in the author (absent an express transfer), it refused to enjoin the publishers from using the material. Instead, it ‘forced’ the parties to negotiate:

...it hardly follows from today’s decision that an injunction against the inclusion of these [freelance] Articles in the [publisher] Databases (much less all freelance articles in any databases) must issue. [...] The Parties (Authors and Publishers) may enter into an agreement allowing continued electronic reproduction of the Authors’ works; they, and if necessary the courts and Congress, may draw on numerous models for distributing copyrighted works and remunerating authors for their distribution.

The only ‘model’ the US Supreme Court referred to in that decision was the licensing of musical works for broadcast use, that is, collective management. The decision implicitly recognized that properly functioning collective licensing models can reduce the transaction costs associated with obtaining an authorization to use copyright material, while allowing authors and other rightsholders to benefit economically, thus ensuring that the historical reward and incentive function of copyright is fulfilled.

---


120 Ibid. at 2393 [Emphasis added].

121 Unfortunately, though perhaps not surprisingly in that jurisdiction, the matter led to further litigation and a tendency on the part of publishers to ask for full assign...
CONCLUSION

In Canada, the growth of collective management has been significant, as is the number of areas in which CMOs operate, especially for a common law jurisdiction. This seems to be the result of deliberate policy choices on the part of successive Canadian governments, combined with the ability of the Copyright Board to develop some of the tools that allow it to best implement those choices. In effect, it would seem that the rapid evolution of collective management in Canada has been intimately linked to the emergence, in the Act, of mechanisms to oversee the relationship between collectives and copyright users.

The main oversight mechanism is the Copyright Board of Canada. By functioning as an administrative body with permanent staff, somewhat more liberal rules than law courts, and its own research resources, the Board has been able to consider facts and opinions not limited to evidence presented by parties to a hearing, and to render decisions that take account of the broader public interest at play in most recent copyright-related debates. The Board’s ability to examine the functioning of Collective Management Organizations beyond the strict financial aspects of tariffs has allowed the rationalization of both tariff-setting processes and tariffs, including the determination of some of the conditions of operation of CMOs, for example, to ensure transparency and thus build trust in the system by users and the general public. Comparatively speaking, the Board seems to have performed significantly better as a copyright regulator than entities functioning as pure, generally part-time tribunals.

More needs to be done. The Board needs additional resources and perhaps internal process reviews to streamline hearings. This could include the possibility of awarding costs. But overall the Board has achieved many of its goals and ensured that Canadians can have access on reasonable terms to the music, films, books and other copyright material they want and love. This is largely due to a structure that gives it broad powers and its own resource – and, some might add, a policy role, or at least one that clearly goes well beyond that of a tariff tribunal and competition law safety valve. As copyright law is called upon to regulate more and more individ-
ual uses and reuses of copyright material, especially in the online environment, the management of copyright by individual rightsholders becomes more difficult, at least for mass uses. This may lead to an increased reliance on collective management and an increasingly more visible role for the Board.