

University of Ottawa

From the Selected Works of Jeremy de Beer

2011

Twenty Years of Legal History (Making) at the Copyright Board of Canada

Jeremy de Beer, *University of Ottawa*



Available at: <https://works.bepress.com/jeremydebeer/51/>

SECTION 1

**Legal Concepts and
Procedural Issues /
Concepts juridiques et aspects
procéduraux**

Legal concepts

During the past 20 years, more or less, copyright has evolved from a relatively obscure area of specialized legal practice to a topic at the forefront of public consciousness and policy debates. This metamorphosis might be due to technological innovation, social practices, commercial developments, or, most likely, some combination of those and other things. Mainstream media coverage is probably the best barometer of copyright's growing importance, but there has also been a discernable increase in the judiciary's attention to the issues.

Professor de Beer's presentation seeks to underscore the crucial contributions of the Copyright Board on some of the most interesting and important copyright law matters decided during the past two decades. From conceptual challenges to the integrity of the collective management system to policy choices about the balancing of stakeholder interests to technical disputes about over statutory interpretation, the Board

Concepts juridiques

Au cours des vingt dernières années, le droit d'auteur a évolué, passant d'un champ de pratique spécialisé relativement obscur à un objet d'intérêt et de débats publics d'avant-plan. Cette métamorphose est peut-être due aux innovations technologiques, à l'évolution des pratiques sociales, aux avancées du marché ou, plus possiblement, à une combinaison de ces facteurs et d'autres causes. La couverture faite du droit d'auteur par les médias de masse est probablement le meilleur baromètre de son importance toujours grandissante, mais il est aussi possible de constater une augmentation grandissante de l'attention portée par le monde judiciaire à ces questions.

La présentation du professeur DeBeer cherche à souligner la contribution fondamentale de la Commission du droit d'auteur sur certains des enjeux les plus importants et intéressants du droit d'auteur des deux dernières décennies. Des défis conceptuels à l'intégrité du système de gestion collective, en passant par les choix politiques cherchant un équilibre entre les intérêts des parties concernées, jusqu'à des litiges

has been instrumental in defining the shape of copyright practice in Canada today. As new copyright challenges continue to arise over the coming decades, the Board's role is predicted to grow even larger.

techniques d'interprétation des lois, la Commission a joué un rôle de premier plan dans la définition du droit d'auteur canadien actuel. Alors que de nouvelles problématiques continueront de surgir au courant de la prochaine décennie, le rôle de la Commission ne peut qu'aller croissant.

Twenty Years of Legal History (Making) at the Copyright Board of Canada

Jeremy de Beer*

I. INTRODUCTION	7
II. LEGAL JURISDICTION	8
III. HIGH-PROFILE PUBLIC POLICY CONTRIBUTIONS	14
A. Peer-to-peer file sharing	14
B. Telecommunications network neutrality	23
IV. AREAS OF CURRENT AND FUTURE ENGAGEMENT	29
A. Fair dealing and other exceptions	29
B. Orphan works and unlocatable copyright owners	32
V. CONCLUSION	34

* Associate Professor, Faculty of Law, University of Ottawa. Thanks to the Law Foundation of Ontario and the Copyright Board of Canada for funding to support this research, and to Mario Bouchard, Claude Majeau and various participants at a public conference marking the Copyright Board's 20th anniversary for input on my ideas and drafts of this paper.

I. INTRODUCTION

The Copyright Board is probably not among Canada's most widely known administrative tribunals. Its decisions do not generally impact hot-button issues like fundamental freedoms or national security threats, like those of the Human Rights Commission or the Immigration and Refugee Board. It has avoided the controversial publicity garnered by some other agencies, such as the Nuclear Safety Commission. Its role as an "economic regulatory body" that mainly sets royalties for the use of copyrighted works¹ might seem modest and uncontroversial compared to some other government agencies.

But the twentieth anniversary of the Copyright Board of Canada presents an opportunity to reflect more deeply on its legal history. Even framing the discussion as legal history downplays the Board's contemporary and ongoing contribution to Canadian copyright law, policy and practice. Legal history *making*, at least in its field, is perhaps a more apt characterization of the significant ways in which the Copyright Board of Canada has impacted the evolution of Canadian copyright during the two decades around the turn of the twenty-first century. The central argument presented in this paper is that the Copyright Board plays a crucial but underappreciated role in shaping Canadian copyright policy. Its decisions have a substantial influence on legal, economic, technological and cultural matters of interest and importance to all Canadians.

My argument unfolds in three parts. First, the paper builds on the small body of existing scholarly literature analyzing the legal jurisdiction of the Copyright Board of Canada.² The goal is not to provide a comprehensive description of the Board's structure and pow-

-
1. Copyright Board of Canada, "Our Mandate" (July 2001), online: <<http://www.cb-cda.gc.ca/about-apropos/mandate-mandat-e.html>>.
 2. See e.g. Daniel Gervais, "A Uniquely Canadian Institution: The Copyright Board of Canada" in Ysolde Gendreau, ed., *An Emerging Intellectual Property Paradigm: Perspectives from Canada* (Cheltenham: Edward Elgar, 2008); Howard Knopf, "Canadian Copyright Collectives and the Copyright Board: A Snap Shot in 2008" (LSUC Continuing Legal Education Program, February 28, 2008), online:

ers, but to highlight the most interesting aspects of the relationship between the Board and the legislative and judicial branches of government. Second, the paper contains a narrative account of two specific examples of the Board's impact on high-profile public policy issues, peer-to-peer file sharing and telecommunications regulation including network neutrality. This demonstrates the connections among legal issues decided by the Copyright Board and some of Canada's most significant cultural and technological policymaking challenges. Third, the paper concludes with foresight into future areas where Canadians' everyday activities may be influenced by the Board's actions. The conclusion is that the Copyright Board of Canada's impact is likely to expand over time.

II. LEGAL JURISDICTION

An administrative tribunal has existed to address copyright licensing and royalty issues in Canada since 1936, when Parliament created the Copyright Appeal Board with relatively narrow jurisdiction relating to performing rights societies.³ But it was not until 1989 that the modern Copyright Board of Canada was established.⁴ The new tribunal had permanent staff, office space and other practical capacities necessary to operationalize its mandate. It became responsible for not only setting new kinds of tariffs but also for supervising aspects of collective copyright administration generally. Less than a decade later, in 1997, the Board's reach grew when copyright was substantially expanded to protect performers, record makers and broadcasters, and new rights were granted to provide remuneration for various activities related to the outputs of these new rights holders.⁵ It was the Copyright Board's job to oversee collective administration of new rights, and to set tariffs of royalties or levies accordingly. Further, statutory reforms have been proposed (though not enacted) repeatedly in the past five years.⁶

http://www.moffatco.com/pages/publications/Knopf_Canadian_Copyright_Collectives_Copyright_Board_Feb2008.pdf; Mario Bouchard, "Collective Management in Commonwealth Jurisdictions: Comparing Canada with Australia" in Daniel Gervais, ed., *Collective Management of Copyright and Related Rights* (The Netherlands: Kluwer, 2006).

3. *An Act to Amend the Copyright Act, 1931*, S.C. 1936, c. 28, s. 10A(2).

4. *An Act to Amend the Copyright Act*, S.C. 1988, c. 15, s. 48.

5. *An Act to Amend the Copyright Act*, S.C. 1997, c. 32, online: <http://www2.parl.gc.ca/content/hoc/Bills/352/Government/C-32/C-32_3/C-32_3.pdf>.

6. Bill C-60, *An Act to Amend the Copyright Act*, (20 June 2005, first reading), online: <http://www2.parl.gc.ca/Sites/LOP/LegislativeSummaries/Bills_ls.asp?lang=e&source=library_prb&Parl=38&Ses=1&ls=C60>; Bill C-61, *An Act to Amend the*

Because the structure and mandate of the Copyright Board of Canada changed so significantly in 1989, and its role expanded again in 1997, a large number of cases decided over the past twenty years have helped to define its legal powers. Though the authority of the Board, like every administrative tribunal, is grounded in legislation,⁷ the courts have played a major role setting the legal boundaries within which the Board operates. More particularly, the Federal Court of Appeal has been called upon regularly to interpret whether the Board has appropriately exercised its statutory mandate.⁸ Decisions of many Canadian federal tribunals are appealable or reviewable by the Federal Court Trial Division, but the Copyright Board's decisions proceed directly to the Court of Appeal for judicial review.⁹

The technical distinction between an appeal and a judicial review of an administrative decision can be significant. In practice, it has resulted often in judicial deference to the Board's expertise, particularly on complex economic issues. But in the only judicial review of a Copyright Board decision to reach the Supreme Court of Canada in the Board's first twenty years of existence,¹⁰ the Court held that the Board's analyses of most legal issues must be more than reasonable; they must be correct.¹¹ To better understand when the Board's decisions are entitled to deference, and when they are not, it is helpful to revisit some of the key cases impacting what exactly the Board is empowered to do in respect of the legal issues it faces.

Copyright Act, (12 June 2008, first reading), online: <<http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=3570473&file=4>>; Bill C-32, Copyright Modernization Act (5 November 2010, second reading), online: <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=4580265>>.

7. See the *Copyright Act*, R.S.C. 1985, c. C-42, Part VII, online: <<http://laws.justice.gc.ca/eng/C-42/index.html>>.
8. See Marie-Hélène Blais *et al.*, *Standards of Review of Federal Administrative Tribunals* (Markham: Lexis-Nexis, 2007) at ch. 9.
9. *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 27(1)(j).
10. Two previous cases dealt indirectly with the legal jurisdiction of the Copyright Appeal Board: *Maple Leaf Broadcasting v. Composers, Authors and Publishers Association of Canada Ltd.*, [1954] S.C.R. 624, online: <<http://scc.lexum.org/en/1954/1954scr0-624/1954scr0-624.html>>; *Composers, Authors and Publishers Association of Canada, Ltd. v. Sandholm Holdings Ltd., Sandler and Holmes* (1955), 24 C.P.R. 58.
11. *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers*, 2004 SCC 45 at para. 48, online: <<http://scc.lexum.org/en/2004/2004scc45/2004scc45.html>>.

In the early 1990s, not long after the Board was constituted and began hearing cases, a question arose about its ability to even consider legal as opposed to economic issues. Federal Court of Appeal Justice Letourneau decided that the Board may indeed decide legal issues: it “possesses the incidental powers which are necessary and inexorably linked to the exercise of its function which is of fixing the rates which the performing rights societies can charge. This may entail deciding preliminary or collateral issues and questions of fact or of law.”¹² This sensible conclusion stems from recognition that the Board would be practically handcuffed without the ability to take on legal issues related to its mandate. Precisely what kinds of legal questions the Board may address is a slightly different matter. When an injunction was sought to stop the Board from proceeding with hearings under the allegedly unconstitutional private copying regime, Justice Rothstein (then of the Federal Court of Appeal) declined to rule definitively on the scope of the Board’s authority to decide constitutional questions, but did suggest that practicalities support the existence of such concomitant power.¹³

Since then, the Board has tackled a diverse array of dozens of legal issues. Just a few examples are: Do satellite radio services authorize reproductions effected by their subscribers?¹⁴ Can photocopies made by students following their teachers’ instructions qualify as fair dealing for the purpose of research or private study?¹⁵ Do foreign cell phone ringtone suppliers have a real and substantial connection to Canada that makes them liable for royalty payments?¹⁶ Is an iPod an “audio recording medium”?¹⁷ Such technical questions can sometimes seem insignificant in the context of the Canadian copyright landscape generally, but some of these issues can have enor-

12. *CTV Television Network Ltd. v. Canada (Copyright Board)*, [1993] 2 F.C. 115 at p. 123-4, online: <<http://www.canlii.org/en/ca/fca/doc/1993/1993canlii2922/1993canlii2922.html>>.

13. *Evangelical Fellowship of Canada v. Canadian Musical Reproduction Rights Agency*, [2000] 1 F.C. 586, at para. 34, online: <<http://www.canlii.org/en/ca/fca/doc/1999/1999canlii8288/1999canlii8288.html>>.

14. *Satellite Radio Services*, (Copyright Board of Canada, 8 April 2009), online: <<http://www.cb-cda.gc.ca/decisions/2009/20090408-m-b.pdf>>.

15. *Reprography by Educational Institutions*, (Copyright Board of Canada, 26 June 2009), online: <<http://www.cb-cda.gc.ca/decisions/2009/Access-Copyright-2005-2009-Schools.pdf>>.

16. *SOCAN Tariff 24 – Ringtones*, (Copyright Board of Canada, 18 August 2006), online: <<http://www.cb-cda.gc.ca/decisions/2006/20060818-m-f.pdf>>.

17. *Private Copying 2003-2004*, (Copyright Board of Canada, December 12, 2003) online: <<http://www.cb-cda.gc.ca/decisions/2003/20031212-c-b.pdf>>.

mous consequences for widespread industry practices and major copyright law and policy problems.

Though the Board may address legal issues, courts are not obliged to defer to its legal opinions. At the same time, judges recognize that the Board deals with often complicated and/or conflicting economic evidence, which would be inappropriate for appellate courts to revisit. In one case concerning royalties for music broadcast on television, Justice Robertson of the Federal Court of Appeal stated that the Board's tariff-setting decisions could be overturned on judicial review only if they were patently unreasonable.¹⁸ This very deferential stance affirmed the rulings in earlier, related cases.¹⁹

The high water mark in judicial deference to the Board came just after its tenth anniversary, in a review of the Board's first major private copyright decision. Justice Linden decided not to interfere with the Board's reasonable, but allegedly incorrect, interpretation of key provisions of the *Copyright Act*, because the Board "should know the industry it is regulating better than the court."²⁰ Similar leeway was given to the Board by Justice Evans in the Federal Court of Appeal's 2003 judicial review of a decision to merge two tariffs proposed by different collective societies.²¹ Even Justice Robertson's highly deferential decision in the commercial television case referenced above required the Board to decide questions related to its jurisdiction under the *Act* correctly, not just reasonably.²²

Some confusion surrounding this topic was sorted out a few years later when the issue reached Canada's highest court. When confronted with the question whether internet service providers are liable to pay a tariff in respect of music communicated via the Internet, the Supreme Court of Canada's first task was to determine

18. *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Broadcasters* (1999), 1 C.P.R. (4th) 80; 1999 CanLII 7720 (F.C.A.), online: <<http://www.canlii.org/en/ca/fca/doc/1999/1999canlii7720/1999canlii7720.html>>.

19. *Canadian Assn. of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada* (1994), 58 C.P.R. (3d) 190; *Les Réseaux Premier Choix Inc. v. Canadian Cable Television Association et al.*, [1997] F.C.J. No. 1723 (C.A.).

20. *AVS Technologies Inc. v. Canadian Mechanical Reproduction Rights Agency*, 2000 CanLII 15571 (F.C.A.) at para. 5, <<http://www.canlii.org/en/ca/fca/doc/2000/2000canlii15571/2000canlii15571.html>>.

21. *Neighbouring Rights Collective of Canada v. Society of Composers, Authors and Music Publishers of Canada*, 2003 FCA 302, <<http://www.canlii.org/en/ca/fca/doc/2003/2003fca302/2003fca302.html>>.

22. *SOCAN v. CAB*, *supra* note 18 at paras. 10, 12.

how much deference to give the Copyright Board's opinion on the matter. Justice Binnie affirmed the ruling of the Federal Court of Appeal, in which Justice Evans held that the Board's *interpretation* of the law must be correct while its *application* of the law need only be reasonable.²³ According to Justice Evans (with whom Justices Linden and Sharlow agreed on this point), the key determinant of the standard of review of the Board's legal decisions is not whether the issue goes to the Board's jurisdiction, but whether or not the same legal question might also arise before an ordinary court of law, in an infringement proceeding for example.²⁴

This is an important point to emphasize. Though the Copyright Board may decide legal issues as a necessary corollary to its economic regulatory mandate, its rulings should not be construed as definitive statements of the law. As I demonstrate through narratives described in the next section of this paper, however, this legal technicality does little to undermine the Board's significant influence in shaping at least perceptions if not the substance of Canadian copyright law.

Aside from its engagement directly or indirectly with the high profile matters of public policy to be discussed below, the Board also exercises influence over the copyright-related legal practices in somewhat more subtle ways. Strictly speaking, the procedures through which cases are heard and decided by the Copyright Board could be characterized as legal issues on which courts should have the final say. But sometimes, the Board deals with seemingly technical issues, such as the "terms and conditions" of a tariff, that have major substantive implications without interference from reviewing courts. An example is the Board's decision, referenced above, to merge two tariffs proposed by different collective societies on behalf of different rights holders into a single tariff, so as to streamline users' royalty payment and accounting obligations. The Federal Court of Appeal deferred to the Board's judgment on the benefits of that approach.²⁵

23. *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, at paras. 48-50, affirming 2002 FCA 166 at para. 36, online: <<http://canlii.org/en/ca/fca/doc/2002/2002fca166/2002fca166.html>>.

24. *SOCAN v. CAIP* (F.C.A.), *supra* note 23 at para. 104. In reaching this conclusion, Justice Evans explicitly rejected (at paras. 54, 59, 105) the reasoning of Justices Linden and Robertson in the separate cases of *SOCAN v. CAB*, *supra* note 18, and *AVS Technologies*, *supra* note 20.

25. *NRCC v. SOCAN*, *supra* note 21 at para. 66.

In another case, the Board was permitted to establish a higher but more simply structured royalty rate than had been proposed by the collective society, without running afoul of the *ultra petita* principle normally preventing adjudicators from granting relief beyond that requested by the parties.²⁶

The Board's freedom to maneuver in this respect is not, however, unlimited. In a controversial 2006 decision, the Federal Court of Appeal granted an application for judicial review of a Board decision to increase royalties payable by commercial radio stations, on the ground that the Board's reasoning was inadequate.²⁷ The Court held it was not enough for the Board to say (as phrased by Court), "We are the experts. This is the figure: trust us."²⁸ Interestingly, the insufficient reasons for raising royalty rates criticized in this case weren't very different from the reasons accepted by the court when reviewing the Board's 1999 decision to lower royalty rates for television stations.²⁹ In another recent decision, the Federal Court of Appeal tersely dismissed many pages of nuanced legal analysis conducted by the Copyright Board on the applicability of Canada's private copying regime and related cases to digital audio recorders as, essentially, legal sophistry.³⁰ Though the court didn't use that term – its language was far less blunt – the subtext of its decision was unambiguous to observers familiar with the case's history.

Conflicting messages from the courts make Copyright Board like Goldilocks when it comes to supporting its decisions, where either too little or too much reasoning can jeopardize a ruling. The courts, moreover, are not the only ones reading the Board's opinions with increasing scrutiny. The Board has over the past twenty years had a profound influence on the contours of copyright law, policy and practices relating to several high profile matters of public policy.

26. *Canadian Private Copying Collective v. Canadian Storage Media Alliance*, 2004 FCA 424 at para. 179, online: <<http://decisions.fca-caf.gc.ca/en/2004/2004fca424/2004fca424.html>>.

27. *Canadian Association of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada*, 2006 FCA 337, online: <<http://decisions.fca-caf.gc.ca/en/2006/2006fca337/2006fca337.html>>.

28. *CAB v. SOCAN*, *supra* note 27 at para. 17.

29. *SOCAN v. CAB*, *supra* note 18 at para. 6.

30. *Apple Canada Inc. v. Canadian Private Copying Collective*, 2008 FCA 9, online: <<http://decisions.fca-caf.gc.ca/en/2008/2008fca9/2008fca9.html>>.

III. HIGH-PROFILE PUBLIC POLICY CONTRIBUTIONS

A. Peer-to-peer file sharing

There are few if any policy issues intersecting law, economics, culture and technology that have garnered more attention in Canada lately than peer-to-peer file sharing of copyright protected content. Canada's reputation as a piracy haven has resulted in part from newspaper editorials and public discussions criticizing Canadian copyright law.³¹ Even more problematically, foreign diplomats and other government officials have alleged that our legislation is badly outdated and incapable of dealing with contemporary challenges such as internet piracy. Among the first public remarks given by the United States' newest ambassador to Canada, David Jacobson, for example, was a scolding about Canada's lax laws.³² Perhaps most significantly, in 2009 Canada was elevated to the United States Trade Representative's "priority watch list" of countries with Intellectual Property systems judged to be inadequate.³³ These criticisms are, in my opinion, mostly unwarranted.

What does this have to do with the Copyright Board of Canada? The ostensible justifications for Canada's inclusion on the United States' blacklist related to our thrice-failed efforts to implement the 1996 WIPO internet treaties into domestic law, and the inability of Canadian customs officials to seize goods suspected to violate IP rights without a court order.³⁴ While it is true that those political and legislative matters are beyond the purview of the Copyright Board, it is hard to deny that Canada's broader reputation as a piracy haven has a lot to do with the media reporting of key court decisions about downloading music from the internet. In 2004, headlines across Canada and around the world made stunning statements such as,

31. See, for example, Barry Sookman and Stephen Stohn, "What happens when copyright goes digital: Time to end Canada's piracy haven" *National Post* (August 6, 2009), online: <<http://www.nationalpost.com/todays-paper/story.html?id=1863819>>; Barry Sookman and Eric Schwartz, "Internet piracy: Copyright Law in Canada and the United States" presented by Woodrow Wilson International Center for Scholars (October 14, 2009), online: <http://www.wilsoncenter.org/index.cfm?fuseaction=events.print&event_id=549898&stoplayout=true>.

32. Vito Pilieci, "Canada in talks over copyright laws with bite" *Ottawa Citizen* (Thursday, November 5, 2009).

33. United States Trade Representative, "2009 Special 301 Report" (April 30, 2009), online: <<http://www.ustr.gov/sites/default/files/Full%20Version%20of%20the%202009%20SPECIAL%20301%20REPORT.pdf>>.

34. *Ibid.* at 17-18.

“Judge: File sharing legal in Canada,”³⁵ “New Haven for free music: Canada,”³⁶ “Will Canada become the Vanuatu of the north?”³⁷ “Canada has taken flight as music swapper’s paradise,”³⁸ “Music downloads OK,”³⁹ “Downloading not ‘stealing’ in Canada,”⁴⁰ “Canada could become Kazaa capital of the world”⁴¹ and so on and so on. The Copyright Board has never said anything to justify such headlines, but nevertheless, at the root of those reports lies one of the Board’s most significant decisions in the past twenty years – a decision interpreting the scope of Canada’s private copying levy.

One of the many articles reporting on the peer-to-peer story in 2004 described the connection like this: “Canada’s debate over file swapping flared last December, when the country’s Copyright Board, which regulates intellectual property issues, ruled that downloading songs from a peer-to-peer network for personal use – but not necessarily uploading – appeared to be legal.”⁴² The Board decision referenced in the article was itself the subject of extensive media coverage when it was released in 2003. Then, the headlines (erroneously or, at least, misleadingly) touted, for example: “Canada deems P2P downloading legal,”⁴³ and “Copyright Board, CRIA at odds over downloading.”⁴⁴ The stories themselves contained typically superficial and hyperbolic analysis of aspects of the Board’s ruling. According to the *National Post*, “[...] the Copyright Board of Canada gave the green light to downloading music as part of a decision last week [...] For PC users aware of the Copyright Board’s decision, the gates are appar-

-
35. John Borland, “Judge: File sharing legal in Canada” *CNet News* (March 31, 2004), online: <http://news.cnet.com/2100-1027_3-5182641.html>.
36. Doug Alexander and Peter Ford, “New haven for free music: Canada” *Christian Science Monitor* (April 2, 2004), online: <<http://www.csmonitor.com/2004/0402/p06s01-woam.html>>.
37. Elliot Simcoe and Patrick Reimer, “Will Canada become the Vanuatu of the north?” *Managing Intellectual Property* (June 2004) at p. 1.
38. Charles Moore, “Canada has taken flight as music swapper’s paradise” *St. John Telegraph Journal* (April 6, 2004).
39. Gillian Shaw, “Music downloads OK” *Edmonton Journal* (April 1, 2004) at p. A1.
40. Kevin O’Connor, “Downloading not ‘stealing’ in Canada” *The Vancouver Sun* (August 20, 2004) at p. D10.
41. Mark Evans, “Canada could become Kazaa capital of the world” *National Post* (April 1, 2004) at p. FP1.
42. Borland, *supra* note 35.
43. John Borland, “Canada deems P2P downloading legal” *CNet News* (December 12, 2003), online: <http://news.cnet.com/Canada-deems-P2P-downloading-legal/2100-1025_3-5121479.html>.
44. Mark Evans, “The music industry conundrum: Copyright Board, CRIA at odds over downloading” *National Post* (December 18, 2003) at p. FP16.

ently wide open to download to your heart's content."⁴⁵ The *National Post* article did not, to its credit, pretend that the issue was clear-cut. It acknowledged ambiguity and controversy, stating:

With so many unanswered questions about what can and can't be done, there are two possible scenarios: the Copyright Board and CPCC [Canadian Private Copying Collective] will have to make regulatory/policy adjustments, or the courts will have to resolve these issues.

If CRIA decides to sue people who upload and download music, the courts will be forced to weigh copyright legislation against the Copyright Board's levy regime. This could be a messy and expensive proposition for all parties.

In the meantime, Canada's rules involving music and copyright protection are in limbo because it is difficult, if not impossible, to interpret the rules.⁴⁶

Other news outlets were not so equivocal in their reporting. *CNet News*, widely-read online, quoted then Secretary General and now Vice-Chairman of the Board, Claude Majeau, as stating: "As far as computer hard drives are concerned, we say that for the time being, it is still legal."⁴⁷ Unfortunately, the quote lacked context, and the pronoun "it" was not defined. *What* was still legal, according to the Board? The article further quoted Mr. Majeau: "Until such time, as a decision is made on hard drives, for the time being, (we are ruling) in favor of consumers."⁴⁸ Again it is difficult to decipher what the article implied by this passage. It is far from clear that these remarks, let alone the Board's decision, support the overall message conveyed in the article.

Regardless, media reports such as this took on a life of their own, and the resulting frenzy of public attention fed many people's misinformed belief that peer-to-peer file sharing is legal under current Canadian law. To truly understand how the Board's mandate is connected to peer-to-peer downloading (and it certainly is, just not quite as characterized by the media), it is helpful to construct a chronology delineating how Canadian copyright law on this issue has unfolded.

45. *Ibid.*

46. *Ibid.*

47. Borland, *supra* note 43.

48. *Ibid.*

In 1996, merely 5 years after the Board was initially created through “Phase I” copyright amendments, legislative reform was again on the government’s agenda. One of several issues advanced during that process was the private copying of music. Then Deputy Prime Minister and Minister of Canadian Heritage Sheila Copps testified to a Parliamentary committee in support of Bill C-32, which included a proposal to deal with the fact that 44 million blank tapes were sold in Canada in a particular year, primarily to copy music, without compensation to copyright owners.⁴⁹ Despite support for a levy from song writing and publishing groups, then vice-president of the Canadian Recording Industry Association Ken Thompson was clear about record labels’ position, and the direction that technology was moving. He presciently foreshadowed “the future availability to consumers of electronic interactive digital delivery of sound recordings, otherwise referred to as the jukebox or record store in the sky,” and argued “owners of those recordings and music could not be adequately compensated by a private copying regime.”⁵⁰ At least in the record industry’s opinion, a private copying system couldn’t compensate for file sharing.

In the next year, 1997, amendments were passed adding among other things Part VIII to the *Copyright Act*. Section 80 is the key provision that would later cause considerable controversy over the legal status of peer-to-peer file sharing.

80. (1) Subject to subsection (2), the act of reproducing all or any substantial part of
- (a) a musical work embodied in a sound recording,
 - (b) a performer’s performance of a musical work embodied in a sound recording, or
 - (c) a sound recording in which a musical work, or a performer’s performance of a musical work, is embodied

49. Standing Committee on Canadian Heritage, House of Commons of Canada, 35th Parliament, 2nd Session, evidence of Sheila Copps (October 3, 1996), online: <http://www.parl.gc.ca/35/archives/committees352/heri/evidence/21_96-10-03/heri21_blk101.html>.

50. Standing Committee on Canadian Heritage, House of Commons of Canada, 35th Parliament, 2nd Session, evidence of Ken Thomspson (October 22, 1996), online: <http://www.parl.gc.ca/35/Archives/committees352/heri/evidence/26_96-10-22/heri26_blk101.html>.

onto an audio recording medium for the private use of the person who makes the copy does not constitute an infringement of the copyright in the musical work, the performer's performance or the sound recording.

(2) Subsection (1) does not apply if the act described in that subsection is done for the purpose of doing any of the following in relation to any of the things referred to in paragraphs (1)(a) to (c):

- (a) selling or renting out, or by way of trade exposing or offering for sale or rental;
- (b) distributing, whether or not for the purpose of trade;
- (c) communicating to the public by telecommunication; or
- (d) performing, or causing to be performed, in public.⁵¹

In essence, the provision means that copying music (a recorded performance of a composition) for a private purpose isn't illegal. But there are a number of crucial caveats to this proposition. The copy must be made *onto* an audio recording medium, which is a statutorily defined term of art. The copy must also be for *personal* use, not for family or friends. And importantly, the copy cannot be traded, distributed, communicated or performed, which in effect not only prohibits further dissemination of the private copy but makes the private copy itself illegal if made for such purposes. Viewed holistically, the statutory license is rather narrow and limited.

The scope of this provision was, however, opened slightly by the Copyright Board's interpretation of it in a series of decisions between 1999 and 2003. The first clue about the Board's view of section 80 came when the Board was asked to certify a levy on blank compact discs, submitted to fall within the definition of "audio recording medium." Section 79 defines an "audio recording medium" as: "a 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."⁵² The Copyright Board adopted a purposive, liberal interpretation of the phrase "ordinarily used" to capture media onto which a "non-negligible" amount of music copying takes place.⁵³ In the late 1990s most consumers copied music onto audiocassettes as opposed to CDs, and most CDs were

51. *Copyright Act*, *supra* note 7, s. 80.

52. *Ibid.*, s. 79.

53. *Private Copying 1999-2000* (Copyright Board of Canada, December 17, 1999) at p. 32, online: <<http://www.cb-cda.gc.ca/decisions/1999/19991217-c-b.pdf>>.

used by businesses for things like data storage. But it was not extraordinary (*i.e.* it could be called ordinary) for some consumers to use CDs, whenever they did, for the purpose of copying music. According to the Board, that made CDs subject to a levy as audio recording media. The Federal Court of Appeal found the Board's interpretation and application of the law to be "not patently unreasonable."⁵⁴

Another key phrase in section 79 is "regardless of its material form." The Board felt, justifiably, that this clause demonstrates Parliament's intention to make the levy as technology neutral as possible. Therefore, in 2003, it agreed to certify a proposed tariff on recordable media embedded in digital audio recorders, such as the Apple iPod and other popular music devices.⁵⁵ This aspect of the Board's statutory interpretation had a significant impact on the peer-to-peer file sharing debate.

The Board did not purport to address the legality or illegality of file sharing. Indeed it expressly disclaimed dealing with the issue: "In these proceedings, the liability of persons uploading, distributing or communicating music through these [file sharing] services is *not at issue*. [...] Peer-to-peer distribution on the Internet is *not addressed* as such in the regime."⁵⁶ That said, it was of course open to others to speculate about the legal implications of the Board's approval of a levy on hard drives in digital devices. And many people did speculate.

One logical (at the time) extension of the Board's reasoning was explained in the present author's previous scholarship on the topic:

The Copyright Board did lay down series of propositions that, if correct, *could have* led to the conclusion that downloading is legal in Canada: a) electronic and hard disk memory is leviable just as 'traditional' media like CDs and cassettes; b) hard disk memory in personal computers is technically identical to other hard disk memory; c) the "legitimacy" of an activity such as private copying depends not on the presence of a tariff on a particular kind or unit of a medium, but on whether the kind of medium is ordinarily used by individual consumers to copy music; and d) personal computers are being widely used by individual consumers to copy music [...] [Therefore,] an inference *could have been* drawn that it is legal to make private copies using personal computers.⁵⁷

54. *AVS Technologies*, *supra* note 20 at paras. 9-13.

55. *Private Copying 2003-2004*, *supra* note 17.

56. *Ibid.* at 20 (emphasis added).

57. Jeremy de Beer, "Locks and Levies" (2006) 84:1 *Denver University Law Review* 1 at 8 (emphasis added, footnotes omitted).

To be clear, I did not argue that file sharing was or should be legal, but merely observed the possible logical basis on which that inference might be drawn. And the legitimacy of the inference depended on the truth of all of the above propositions, most of which were put forward as *obiter dicta* by the administrative tribunal.

But even more to the point, these propositions could only have related to the legality of the end copy made by a consumer strictly for his/her own personal use. Any intention to disseminate the digital copy moves the activity outside the scope of section 80. The term “*downloading*” might be misleading, because in common parlance many people conflate it with file sharing generally, while few people bother to unpack the nuances beyond a headline declaring downloading legal. Functionally, the distinction between downloading and uploading may be irrelevant. File sharing software is usually set to enable uploading and downloading by default, and many (perhaps most) consumers do not manually disable this feature. In fact, if no one uploaded content, peer-to-peer networks would cease to function. A practical, purposive view of file sharing activities could, therefore, lead to the conclusion that they fall outside of the current private copying system altogether.

Federal Court Judge Konrad von Finkenstein, however, took another opinion on the matter before he was appointed Chairperson of the CRTC. Around 2003 the Canadian subsidiaries of the four major record labels sought to sue several alleged file sharers for copyright infringement.⁵⁸ The first step was obtaining the identity of the “John and Jane Doe” defendants from their internet service providers. Procedurally, the plaintiffs sought from the ISPs so-called non-party production and examination of information related to the defendants’ real identities.⁵⁹ For this purpose Justice von Finkenstein required the plaintiffs to show, among other things, a *prima facie* case of copyright infringement. “Downloading a song for personal use,” he wrote, citing the Copyright Board’s private copying decision, “does not amount to infringement.”⁶⁰ That ruling was a key factor in the ruckus surrounding Canada’s lax copyright system. Unfortunately, too few people critically evaluated the basis for that conclusion.

58. *BMG Canada Inc. v. John Doe*, 2004 FC 488, online: <<http://decisions.fct-cf.gc.ca/en/2004/2004fc488/2004fc488.html>>.

59. *Federal Court Rules*, SOR/98-106, r. 233, 238.

60. *BMG v. Doe*, *supra* note 58 at para. 25. Uploading a song was not illegal either, according to Justice von Finkenstein, but for other reasons unrelated to the Board’s decision.

In fact, as explained above, the Board did not rule that downloading was legal, and expressly avoided any questions about file sharing on peer-to-peer networks more generally. So the Board's decision probably does not support the proposition it was cited for. More importantly, the Board's ruling on the legal interpretation of "audio recording medium" and its application to digital devices including hard drives was overturned on judicial review.⁶¹

Less than nine months after Justice von Finkenstein interpreted the Board's decision to legalize peer-to-peer downloading, the Federal Court of Appeal, in the separate judicial review of the Board's private copying decision, washed away most of the key propositions that led to any potential inference about private copying onto personal computers. According to the Court of Appeal, the Board was wrong to certify a levy on the memory integrated into a digital audio recorder, because there *is* a difference between embedded digital memory and traditional removable media. This aspect of the Court of Appeal's legal reasoning is somewhat difficult to follow and generally unconvincing, but its overarching concern was made clear by the statement that: "it is for Parliament to decide whether digital audio recorders such as MP3 players are to be brought within the class of items that can be levied."⁶² Of course, one could counter that Parliament *did already* decide that memory in "any material form" was subject to a levy. But the bottom line is that the courts have interpreted the statute to require more specificity if it is to apply to embedded memory or digital devices, including memory in music players or personal computers.

Following this judicial review, it seemed improbable that downloading music onto a computer hard drive could constitute private copying under Part VIII of the *Act*. The Federal Court of Appeal eliminated any indication otherwise by vacating all of Justice von Finkenstein's copyright-related findings in 2005.⁶³ Justice Sexton, writing for a unanimous appellate bench, stated in *BMG v. Doe*: "if this case proceeds further, it should be done on the basis that no findings to date on the issue of infringement have been made."⁶⁴ "Copyright infringement *could* result from the use of such devices [as audio

61. *CPCC v. CSMA*, *supra* note 26.

62. *CPCC v. CSMA*, *supra* note 26 at para. 164.

63. *BMG Canada Inc. v. Doe*, 2005 FCA 193, online: <<http://decisions.fca-caf.gc.ca/en/2005/2005fca193/2005fca193.html>>.

64. *BMG Canada Inc. v. Doe*, *supra* note 63 at para. 54.

recorders and personal computers] to private copy.”⁶⁵ Unfortunately, however, once the media had put out the message in 2003 and 2004 that downloading was declared legal in Canada, there was no interest in reporting the less striking story that the cases behind those headlines had been overturned on appeal.

For a brief while, in 2007, the argument that downloading might possibly be legalized by Canada’s private copying system gained some traction again. The Copyright Board issued another decision on an application to certify a tariff related to music devices.⁶⁶ This time rights holders sought to levy devices rather than the memory therein, alleging that the Board and Court of Appeal had previously dealt with only the latter. The Board agreed with this distinction, rejected what it characterized as the Court of Appeal’s *obiter dicta* and decided to proceed with hearings about the proposed levy on devices. Following that, one could at least argue once again that downloading music to personal computers was legal under section 80.

This time, at least some media reports were less sensationalized than they had been several years earlier. A Canadian Press story, for example, noted: “The quasi-judicial tribunal has said in the past that it does not wade into the debate about whether downloading on peer-to-peer networks should be interpreted as legal in Canada.” Mr. Majeau was quoted as saying: “The CD copy that has been made by the end user is a legal copy,” regardless of whether it contains illegally downloaded music, but this was qualified by acknowledging that question of downloading and sharing of music files is technically beyond the Board’s jurisdiction.⁶⁷

However, the legal landscape surrounding peer-to-peer and private copying remained unsettled when the Federal Court of Appeal overturned the Board on judicial review. In Justice Sharlow’s decision mentioned earlier in this paper,⁶⁸ she ruled that the Federal Court of Appeal’s 2004 decision in *CPCC v. CSMA*⁶⁹ covered these issues. Neither devices *nor* the memory therein are subject to the private copying levy. Consequently, copying onto audio recorders,

65. *Ibid.* at para. 147.

66. *Private Copying 2008-2009*, (Copyright Board of Canada, July 7, 2007), online: <<http://www.cb-cda.gc.ca/decisions/2007/20070719-c-b.pdf>>.

67. Michael Oliveira, “Levy allows for legal copies of music goes up” *Brantford Expositor* (December 11, 2008) at p. C4.

68. *Apple v. CPCC*, *supra* note 30.

69. *CPCC v. CSMA*, *supra* note 26.

personal computers and the like is not legalized by section 80 of the *Copyright Act*.

That does not mean that the Board no longer has a role to play in this area of copyright law. To the contrary, the Copyright Board remains a central body in the debate over peer-to-peer file sharing, and copyright reform more broadly. Bills tabled in 2005, 2008 and 2010,⁷⁰ purportedly to modernize Canadian copyright law, left significant gaps and questions unresolved. For one example, there is no indication in proposed legislation or associated discussion about how to address the important interfaces among technological protection measures and the private copying system.⁷¹ For another, some stakeholders have advocated for a blanket collective licensing system, supervised by the Copyright Board, to remunerate for peer-to-peer file sharing.⁷² There are other issues, too: if the WIPO internet treaties are implemented to explicitly include a making available right in Canadian law, how will this be integrated into the existing tariff structure administered by the Board, and might this apply to peer-to-peer networks or users?

The key message conveyed by this narrative about the Board's dynamic role in the peer-to-peer debate unfolding over the past decade, or even two, is that the relevance and influence of the Copyright Board of Canada cannot be ignored. To further demonstrate this point, it is helpful to provide a separate account of another high-profile public policy issue on which the Board plays a significant but underappreciated role: telecommunications network neutrality.

B. Telecommunications network neutrality

Many technology policy experts as well as casual observers believe that the network neutrality debate is primarily the domain of the Canadian Radio-television and Telecommunications Commission (CRTC). But in fact, issues addressed before the Copyright Board of Canada are closely connected to this as well as other key telecommunications policy matters. The complex relationship between copyright and communications policy has begun to be

70. Bill C-60, Bill C-61 and Bill C-32, *supra* note 6.

71. De Beer, "Locks and Levies," *supra* note 57.

72. Songwriters Association of Canada, "A Proposal for the Monetization of the File Sharing of Music From the Songwriters and Recording Artists of Canada" (March 2009), online: <<http://www.songwriters.ca/proposal/detailed.aspx>>.

explored in the academic literature,⁷³ but it is perhaps most easily explained through a few real-world examples.

In January 1989, Canadian copyright law was amended to include a retransmission right, as recommended by a House of Commons sub-committee and required by the Canada-U.S. Free Trade Agreement.⁷⁴ Until then cable operators could retransmit over-the-air broadcast signals containing copyright-protected programming for free to their own paying cable subscribers. When the former “radio communication” right was replaced with a broader “telecommunication” right, the government also put in place a compulsory licensing system, to be administered within the context of Copyright Board tariff proceedings. In part to avoid exclusive licensing practices and ensure at least some competition in the cable and satellite television industries, the new law allowed anyone who paid the requisite royalties approved by the Board to retransmit distant broadcast signals entirely. One crucial caveat was that the retransmission must be lawful under the *Broadcasting Act*.⁷⁵

Two potentially path-breaking Canadian companies, iCraveTV and JumpTV, sought to test the applicability of the retransmission regime in the context of the internet. Using twentieth-century technologies, the companies took over-the-air television signals of numerous Canadian and American stations, converted and streamed them via the internet. As the pioneer, iCraveTV was almost immediately targeted with legal threats and actions from the who’s who of the entertainment industry.⁷⁶ Even after a preliminary injunction was granted in the United States, legal pressure did not subside, and iCraveTV discontinued its internet streaming. Before JumpTV began similar operations a few months later, the Copyright Board was asked to establish a new tariff so that internet retransmitters might take advantage of the *Copyright Act*’s compulsory licensing system.

73. Tim Wu, “Copyright’s Communications Policy” (2005) 103 *Michigan Law Review* 278; Jeremy de Beer and Christopher D. Clemmer, “Global Trends in Online Enforcement: A Non-neutral Role for Network Intermediaries” (2009) 49 *Jurimetrics* 375.

74. Sub-Committee on the Revision of Copyright of the House of Commons Standing Committee on Communications and Culture, “A Charter of Rights for Creators,” (Ottawa: Supply and Services Canada, 1985); *Canada-U.S. Free Trade Agreement*, art. 2006, online: <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/cusfta-e.pdf>>.

75. 1991, c. 11, online: <<http://laws.justice.gc.ca/en/B-9.01>>.

76. Craig Bicknell, “They Crave Suits v. iCraveTV” *Wired* (December 16, 1999), online: <<http://www.wired.com/techbiz/media/news/1999/12/33093>>.

According to a media interview with the Board's General Counsel, Mario Bouchard, the key question was to be whether or not companies like these were retransmitters under the legal definition in the *Copyright Act*. "iCraveTV may or may not be a retransmitter, we don't know." He continued by explaining who would address the question: "Potentially the Board, ultimately a court of law."⁷⁷ In fact, it was neither, because the Board's hearings were preempted by fast-tracked legislative action.⁷⁸

Had the Board held hearings into this matter, it is conceivable that internet television in Canada and elsewhere would be further advanced, or at least dramatically different, than it is today. As it happened, the government issued a consultation paper, invited responses and within a few months tabled in Parliament legislation to deal with the issue. Amendments as initially proposed would have permitted internet retransmission, but House of Commons committee hearings held in mid 2002 resulted in changes that left so called "new media retransmitters" outside of the compulsory licensing system. A new media retransmitter, under the new definition contained in Bill C-11, was basically a person exempt from the CRTC's ordinary regulations by virtue of the Commission's *Exemption Order for New Media Broadcasting Undertakings*.⁷⁹ With this, a relationship was solidified between the Board's and the Commission's mandates. In effect, the government put the decision-making power over internet retransmission in the hands of the CRTC.

Relatively more recently, the CRTC has been weighing in on copyright policy generally and even on issues internal to the Board. When the government conducted a broad public consultation on copyright reforms in 2009,⁸⁰ the CRTC took the unusual step of making submissions about several live substantive and procedural issues pending before another federal administrative body, the Copyright

77. "iCrave TV Controversy," *The Canadian Encyclopedia*, online: <<http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=M1ARTM0012073>>.

78. *An Act to Amend the Copyright Act*, S.C. 2002, c. 26, online: <http://laws.justice.gc.ca/PDF/Annual/2/2002_26.pdf>; Legislative History, online: <http://www2.parl.gc.ca/Sites/LOP/LegislativeSummaries/Bills_ls.asp?Parl=37&Ses=2&ls=c11>.

79. Canadian Radio-television and Telecommunications Commission, *Public Notice CRTC 1999-197*, "Exemption order for new media broadcasting undertakings" (December 17, 1999), online: <<http://www.crtc.gc.ca/eng/archive/1999/PB99-197.htm>>.

80. Online: <<http://copyright.econsultation.ca>>.

Board.⁸¹ Specifically, the CRTC opined that the Board should issue a single tariff covering different rights and/or rights holders in the context of radio broadcasting. It also suggested that “obligations and powers” should be imposed on the Board to streamline its proceedings, stating that the Board was unsatisfactorily taking too much time to issue decisions. The Commission’s third submission dealt with Canada’s fair dealing provisions and possible consequences thereof, again an issue relevant to several different disputes before the Copyright Board. Conspicuously and curiously absent from the CRTC submissions was any mention of the obvious issues where the Board’s and Commission’s jurisdiction *do* overlap – internet retransmission of copyright-protected programming and telecommunications network neutrality are examples.

Having already explained above how webcasting and copyright intersect, it is worthwhile spending some time exploring the more subtle connections between copyright and network neutrality. The CRTC is certainly the primary battleground where network neutrality debates have played out in Canada, although important developments have also occurred in the legislative and judicial branches of government, with proposed statutory provisions and class action litigation on point.⁸² In October of 2009, following a widely publicized and broadly participatory hearing, the CRTC released its Telecom Regulatory Policy 2009-657 concerning the “Review of the Internet traffic management practices of Internet service providers.”⁸³ The decision established a fairly detailed set of rules regarding network neutrality.

But the CRTC is not the only relevant regulatory body impacting the issue, and telecommunications law is not the only relevant regulatory framework for governing it. About a decade earlier, the Copyright Board had already begun to deal with questions about service providers’ role in effecting internet telecommunications.⁸⁴ The

81. Canadian Radio-television and Telecommunications Commission, “Submission to Public Consultations on Copyright Reform” (September 11, 2009), online: <<http://www.crtc.gc.ca/eng/publications/reports/pcr.htm>>.

82. Jeremy de Beer, “Network Neutrality in the Great White North (And Its Impact on Canadian Culture)” (2009) 59:2 *Telecommunications Journal of Australia* 24.

83. Canadian Radio-television and Telecommunications Commission, *Telecom Regulatory Policy 2009-657*, “Review of the Internet traffic management practices of Internet service providers” (October 21, 2009), online: <<http://www.crtc.gc.ca/eng/archive/2009/2009-657.htm>>.

84. Portions of the discussion in this section of the paper are drawn from Jeremy de Beer, “Network Neutrality,” *supra* note 82 at p. 24.9-24.10.

Board's purpose was not to establish regulatory rules for such behaviour, but to establish a factual basis for the application of copyright legal principles. Its hearings and subsequent decision dealt heavily with the neutrality or lack thereof of Canada's internet service providers connecting end users to, among many other things, copyright protected music online. The case eventually went all the way to the Supreme Court of Canada.⁸⁵

Indeed, the highest-level judicial consideration of principles related to network neutrality in Canada occurred in this judicial review of the Copyright Board's decision. In proposing Tariff 22, SOCAN had argued that ISPs were active, not neutral, parties in the online telecommunication of music. ISPs argued they were merely passive providers. Canada's *Copyright Act* contains a safe harbour provision, 2.4(1)(b), which in effect exempts passive carriers from copyright liability for the content they transmit:

a person whose only act in respect of the communication of a work or other subject-matter to the public consists of providing the means of telecommunication necessary for another person to so communicate the work or other subject-matter does not communicate that work or other subject-matter to the public.

One of several questions for the Board was whether ISPs do anything more than merely provide the means of telecommunications for others to communicate via the internet. It ruled that, in their role as connectivity providers, they do not. The Supreme Court eventually upheld that ruling.

The Supreme Court judgment contained numerous (seven, to be precise) references to neutrality as a requirement for immunity under the Copyright Act. For example, at paragraph 92 the court explained that an intermediary is immune from liability if it "does not itself engage in acts that relate to the content of the communication, *i.e.*, whose participation is content neutral, but confines itself to providing 'a conduit' for information communicated by others." The factual basis for this conclusion was in part "the impracticality (both technical and economic) of monitoring the vast amount of material moving through the Internet".⁸⁶

85. *SOCAN v. CAIP*, *supra* note 11.

86. *Ibid.* at para. 101.

It is easy to imagine how the Board's decision and subsequent Supreme Court ruling in this case could be applied to indirectly encourage ISPs to behave in a neutral fashion. ISPs whose participation in telecommunications is not content neutral are exposed to the risk of significant copyright liability. If it is now technically and economically feasible to monitor and shape particular types of traffic, like experts report it is,⁸⁷ then the factual basis for decisions to absolve ISPs from liability would no longer exist.

There is, however, a paradox that is closely connected to the peer-to-peer file sharing issues discussed earlier in this paper. Traffic shaping practices are currently being used to delay access to transmissions using peer-to-peer applications. Copyright holders are highly likely to support ISPs shaping of this traffic on the belief that much of it is infringing content. It would be strange if slowing down potentially infringing transmissions could increase ISPs' risk of liability, especially considering that copyrights holders worldwide are working to encourage or even require this kind of network management.⁸⁸ Perhaps such a counterintuitive result would be used to justify the adoption of alternative policies regarding copyright liability and network neutrality.

The Copyright Board's and Supreme Court's discussions of potential liability for ISPs' caching activities are relevant to this discussion. The Federal Court of Appeal had overturned the Board's decision that caching was necessary for the efficient transmission of content and therefore did not take ISPs outside the ambit of the safe harbour, but the Supreme Court reinstated the Board's ruling. The Supreme Court cited the Board's finding that the early utility of the Internet had been limited by the lack of bandwidth necessary to transmit audio files.⁸⁹ It also approved of the Board's legal and factual characterization of caching as "necessary" in order to "maximize the economy and cost-effectiveness of the internet 'conduit,'" which should therefore not attract copyright liability.⁹⁰ It is possible that a court (or the Board) dealing with a similar copyright issue might find that traffic shaping, like caching, is necessary for efficient and effective Internet transmissions.

87. Graham Finnie, "ISP Traffic Management Technologies: The State of the Art" (Heavy Reading, 2009), online: <<http://www.crtc.gc.ca/PartVII/eng/2008/8646/isp-fsi.htm>>.

88. De Beer and Clemmer, *supra* note 73.

89. *SOCAN v. CAIP*, *supra* note 11 at para. 114.

90. *Ibid.* at para. 115-6.

Like the first narrative offered in this paper, this story about the Board's involvement with the field of telecommunications demonstrates the significant impact that its interpretation and application of legal principles has on important public policy matters. As significant as that role has been in the past, there is reason to believe that its role is only going to expand over time.

IV. AREAS OF CURRENT AND FUTURE ENGAGEMENT

There are at least two noteworthy issues that the Board has grappled with very recently, which in the future are likely to become even more prominent features of Canadian copyright law, policy and practice. One relates to the fair dealing provisions of the *Copyright Act*, and the other addresses the growing problem of orphan works. The purpose of the following discussion is not to present an exhaustive, nor even a particularly detailed, discussion of these topics. Rather, the more modest aim of this concluding section is to offer a general introduction to what I believe are two key issues that the Board will heavily influence in the *next* two decades of its existence.

A. Fair dealing and other exceptions

Canada's *Copyright Act* contains a number of provisions under the title, "Exceptions," which reference circumscribed classes of activities that do not infringe copyright.⁹¹ The most notable group of sections governs "fair dealing," including separate sections that address fair dealing for the purposes of research or private study; criticism or review; or news reporting.⁹² Related sections deal more specifically with matters such as educational institutions; libraries, archives and museums; computer program backups; ephemeral recordings; incidental inclusion; persons with perceptual disabilities; *et cetera*. Also within this Part of the *Act* are the provisions pertaining to retransmission of broadcast signals. None of these sections are, *prima facie*, as inclusive as the United States' general provision governing "fair use," which sets out an illustrative but non-exhaustive list of exceptions to exclusive rights.⁹³

That said, neither the Canadian nor the American statute interprets itself. The courts and, in Canada at least, the Copyright Board,

91. *Supra*, note 7, ss. 29-32.3.

92. *Ibid.*, ss. 29-29.2.

93. 17 U.S.C. § 107, online: <http://www4.law.cornell.edu/uscode/17/uscode_sup_01_17.html>.

play significant roles in shaping the contours of the legitimate, non-infringing activities encompassed in these legislative provisions. I stress this point because fair dealing is right now squarely on Canada's copyright reform agenda. And there is extensive academic and public debate in Canada over precisely what fair dealing reform ought to look like.⁹⁴

One of several relevant questions in this context is whether a more open-ended provision would be any less predictable or contentious than the status quo. While some commentators argue that an amended fair use style section "would lead to uncertainty, expensive litigation and important public policy decisions made by courts instead of Parliament,"⁹⁵ I have a different perspective. First, what little empirical research has been done on this topic suggests that an open-ended provision can work reasonably well in practice,⁹⁶ especially if coupled with co-operative initiatives to develop best practices.⁹⁷ Second, and more importantly in the context of my argument here, uncertainty, litigation and judicial interpretation are inevitable under any system. In other words, litigation over the interpretation of Canada's current laws is already taking place before the courts and, indeed, the Copyright Board. There is no evidence to conclude, and little reason to speculate, that this would change substantially regardless of the kinds of reforms eventually enacted. No matter which if any route Parliament takes, the Board will be dealing with fair dealing issues well into the foreseeable future.

Two still-ongoing cases demonstrate concretely the kinds of fair dealing/use issues that the Board is likely to continue dealing with

94. See, for example, Carys Craig, "The Changing Face of Fair Dealing in Canadian Copyright Law: A Proposal for Legislative Reform" in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005); Giuseppina D'Agostino, "Healing Fair Dealing" (2008) 53:2 *McGill Law Review* 309; Howard Knopf, "Why Canada Needs Parody Parity and Comedy Comity: Copyright Control of Canadian Humour" (2008) 20:3 *Les Cahiers de propriété intellectuelle* 717; Barry Sookman and Dan Glover, "Why Canada Should Not Adopt Fair Use" (2009) 2 *Osgoode Hall Review of Law and Policy* 139.

95. Sookman and Glover, *ibid.* at 141-2.

96. Barton Beebe, "An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005" (2008) 156:3 *University of Pennsylvania Law Review* 549, online: <<http://www.pennumbra.com/issues/pdfs/156-3/Beebe.pdf>>.

97. For example, the Centre for Social Media at American University has helped to facilitate stakeholder-generated statements of best practices for the fair use of copyrighted materials for documentary filmmaking, user generated video, education and several other activities. See <http://www.centerforsocialmedia.org/resources/fair_use>.

over time. One involves the use of music clips as previews by online music retailers,⁹⁸ and the other concerns the photocopying of books and other materials in elementary and secondary schools.⁹⁹

In the first of these cases, the Board applied the Supreme Court of Canada's landmark ruling in *CCH v. LSUC*,¹⁰⁰ requiring a "large and liberal" interpretation of allowable purposes of fair dealing,¹⁰¹ to include previews of songs streamed to consumers conducting "research" into a potential music purchase. The differences between legal research in *CCH v. LSUC* and consumer research in the case before the Board were, in the Board's words, "differences in degree, not differences in nature."¹⁰² Given that consumers' use of previews for research is usually "fair," no royalties are payable by the services facilitating their behaviour.¹⁰³

In the even more recent case concerning photocopying in schools, the Board included 20 pages (exclusive of references and tables) of description, analysis and application of the law related to fair dealing.¹⁰⁴ All parties to the dispute agreed that students and educators are engaged in some activities that constitute fair dealing, but there was considerable disagreement over precisely how much photocopying is non-infringing, and how much requires a license. The Board was called upon to resolve some controversial legal nuances and apply complex survey and other evidence to answer these questions.

Both Board decisions have worked their way through the Federal Court of Appeal's judicial review process and are about to be dealt with by the Supreme Court of Canada. Whether the court will eventually uphold, vary or reject the Board's reasoning, the result will probably be more legal work on the fair dealing issues in these and other files. Looking at the Board's mandate more broadly, it seems that these recent cases are only the tip of the iceberg. The issue has been alluded to in the context of tariffs on media monitoring and

98. *Tariff No. 22.A (Internet – Online Music Services) 1996-2006*, (Copyright Board of Canada, October 18, 2007), online: <<http://www.cb-cda.gc.ca/decisions/2007/20071018-m-e.pdf>>.

99. *Reprography by Educational Institutions*, *supra* note 15.

100. *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, online: <<http://csc.lexum.org/en/2004/2004scc13/2004scc13.html>>.

101. *Ibid.* at para. 51.

102. *Tariff No. 22.A*, *supra* note 98 at p. 34.

103. *Ibid.* at p. 36.

104. *Reprography by Educational Institutions*, *supra* note 15 at p. 16-36.

clipping services,¹⁰⁵ as well as private copying,¹⁰⁶ and could be relevant to many more of the disputes arising regularly before the Board.

B. Orphan works and unlocatable copyright owners

The issue of orphan works has burst into the worldwide copyright policy spotlight in the past several years. A potential problem has been lurking for many years, but only began receiving significant attention with the recent publication of important reports in the United States,¹⁰⁷ Britain¹⁰⁸ and the European Union.¹⁰⁹ Perhaps the most significant catalyst for public attention and commentary, however, has been the Google Books project, which is an attempt to digitize and upload the world's entire repertoire of books. Many of those books are in the public domain, but many are not. Of the tens of millions of books protected by copyright, many are so-called orphan works; their copyright owners are unlocatable.

In 2006 authors and publishers filed a class action lawsuit in the United States against Google, the settlement of which had received preliminary court approval in late 2009, but was more recently rejected.¹¹⁰ If and when a final settlement will be concluded are anyone's guess. Legal proceedings in the case are far from over, and one of the outstanding (and perhaps continually ongoing) issues is what to do about licenses in respect of orphan works. In Canada, however, a solution to this orphan works problem might lie with the Copyright Board.

Pursuant to section 77 of the *Copyright Act*,¹¹¹ the Board may upon application grant non-exclusive licenses to use in Canada works whose copyright owners are unlocatable. Despite being one of the most advanced legislative responses to the issue of orphan works

105. *Media Monitoring 2000-2005*, (Copyright Board of Canada, March 29, 2005), p. 9-10, online: <<http://www.cb-cda.gc.ca/decisions/2005/20050329-mv-b.pdf>>.

106. *Private Copying 2003-2004*, *supra* note 17 at p. 21-22.

107. Registrar of Copyrights, *Report on Orphan Works* (Washington: United States Copyright Office, 2006).

108. British Screen Advisory Council, *Copyright and Orphan Works: A Paper Prepared for the Gowers Review by the British Screen Advisory Council* (2006).

109. i2010: Digital Libraries High Level Expert Group – Copyright Subgroup, and *Final Report on Digital Preservation, Orphan Works, and Out-of-Print Works* (2008); Bernt Hugenholtz *et. al.*, *The Recasting of Copyright & Related Rights for the Knowledge Economy* (Amsterdam: Institute for Information Law, 2006), ch. 5.

110. *The Authors Guild, Inc., Association of American Publishers, Inc., et al. v. Google, Inc.*, Case No. CV 8139 (United States District Court, SDNY).

111. *Supra* note 7.

anywhere in the world, this regime has received relatively little attention. However, the Board's General Counsel, Mario Bouchard, and I have together done a thorough legal and empirical study of the way in which this system has worked since its enactment in 1989, the same time that the Copyright Board itself was created.¹¹² Legal issues pertain to matters such as the types of works and other subject matter that may be licensed; the criteria for license eligibility including the status of the orphan work and the efforts undertaken by an applicant to locate its copyright owner; the residual discretion retained by the Board to grant or deny applications; and the particular terms and conditions of licenses that may be granted. Our analysis revealed interesting statistics about the nature and results of the license applications made to the Board, the processing of those applications, and the value of the royalties generated as a result of licenses granted.

Perhaps most relevantly for this paper, however, our study analyzed data about the increasing rate at which the section 77 licensing system is being used. Evidence demonstrates that the Board is becoming steadily busier with more applications year after year. Issues are becoming increasingly complex. There is no indication that the trend will decline. To the contrary, there are reasons to predict that demand for this licensing process will dramatically increase in coming years, the nature of applications and corresponding issues will become more complex and the Board will play a more prominent role in the licensing of orphan works.

Aside from the statistical increase in the raw number of applications to the Board, single applications to use multiple works might be expected more frequently in the future than in the past. Over a period of four years in the mid 1990s, the Board issued to one applicant eleven licences authorizing the reproduction of 6,675 Canadian works published between 1900 and 1920.¹¹³ The procedures for doing so were not, initially, clear-cut. Challenging issues arose, many of which are still unsettled. Developing a workable protocol to deal with different but similarly situated applicants will require significant reflection, planning and coordination in implementation.

112. Jeremy de Beer and Mario Bouchard, "Canada's 'Orphan Works' Regime: Unlocatable Copyright Owners and the Copyright Board" volume 10, Number 2 (winter 2010) *Oxford University Commonwealth Law Journal*, pp. 215-254.

113. *Re Canadian Institute for Historical Microreproduction*, 1993-UO/TI-5 (18 September 1996), online: <<http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/27-b.pdf>> and subsequent decisions dealing with the same applicant.

The opportunity to do mass licensing on behalf of unlocatable owners may come as class action litigation related to copyright infringement proliferates. One recent case may provide a template for the future involvement of the Board in such matters. In 2008 a lawsuit was filed on behalf of heirs of the famous jazz musician Chet Baker against the Canadian subsidiaries of the four major record labels.¹¹⁴ The representative plaintiffs claimed that the record labels are engaged in widespread, systematic copyright infringement by regularly failing to obtain licenses and/or pay royalties before reproducing musical works on CDs. One of several reasons for the labels' failure to clear rights prior to producing records is that copyright owners are sometimes unlocatable. While the likelihood of legally issuing retroactive licenses in respect of past infringements is remote, it would be unsurprising to see the Board play a role in the future administration of matters such as this. Combined with the possibilities raised by other cases, such as the Google Books litigation that is still unsettled in the United States and yet to spread to Canada, one might image the Board playing a central role not only on high profile public policy issue but also in a growing number of private party disputes.

V. CONCLUSION

The Copyright Board issues relatively few decisions compared to some other administrative tribunals, and those that it issues are, ostensibly, of an economic regulatory nature. Reflecting more deeply on its role during the past twenty years, however, it becomes clear that the Board has played a significant role shaping Canadian copyright law, policy and practice. It has had and will continue to have considerable impact on high profile public policy issues. Two examples are peer-to-peer file sharing via the internet and telecommunications network neutrality and related policies. The Board is likely to become even more influential over the next twenty years of its existence. Two issues where its impact is just beginning to be felt are fair dealing and orphan works. The preceding discussion of all four of these areas demonstrates that it is appropriate not to reflect on the Board's work as legal history but as legal history making, which has a deservedly more noteworthy connotation.

114. *Craig Northey v. Sony BMG Music (Canada) et al.*, (Ontario Superior Court of Justice, CV 0800360651 00CP).