Speech given by
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Copyright Board of Canada

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Introduction

I am pleased to be here to speak to you again this year. Last year, I talked about the changes that had occurred at the Board since the adoption of Bill C-32, the challenges that the expanded legislation placed on the Board, and how the Board has responded to those challenges. In my opinion, the Board has responded remarkably well given its limited resources. (I will expand on that later).

Last year I stated categorically that I was not satisfied with the length of time it took for the Board to render its decisions and indicated that we would resolve that problem.

In large measure, we have, but we are still trying to improve. For example, in CMRRA/SODRAC Inc. (CSI) Online Music Tariff, the hearing began on September 6, 2006 and continued over a period of 10 days. The record of proceedings closed on September 29, 2006 when CSI and the Objectors filed their written arguments. To expedite the decision-making process, the Board's General Counsel met with the parties over a three-month period to settle the form of the tariff (based on a number of assumptions) while I was writing the decision. Thus, the form of the Tariff as opposed to the content had been thoroughly explored by the time the reasons were finished. The decision was issued in both official languages on March 16, 2007, that is within five and one half months. If one compares this to the time it took to render the decisions in Background Music (18 months) and Commercial Radio (15 months), you can readily see the difference.

We heard SOCAN 22, for the communication of musical works over the Internet in April of this year. That hearing began on April 17 and was completed on May 8. I hope that decision will be issued within the same time frame as CSI.

The Board heard a motion on June 5, 2007 brought by RCC and CSMA to prohibit the Board from hearing the request for a tariff filed by CPCC for digital audio recorders. I wrote the decision, rejecting the motion in less than two weeks. The decision was issued in both French and English on July 19, 2007. (The requirement to issue our decisions in both French and English adds appreciably to the time lines.) So you can see that we are making progress. The Board has never been as busy as it was in the last 18 months. In 2006-2007, the Board issued 11 decisions and granted 21 licenses for unlocatable copyright owners.

We currently have two matters in progress. The Board was ordered by the Federal Court of Appeal to rehear and give more complete reasons for the increase in rates for the use of music by commercial radio stations. That hearing commenced on June 25,

2007 and was argued on June 29, 2007. We are currently working on those reasons and will render a decision reasonably quickly.

Finally, we began hearing Access Copyright's request for a tariff for works copied by educational institutions across the country. That hearing was adjourned because of the illness of one of the expert witnesses. We expect to be able to hear the remainder of the evidence in the last quarter of this year.

In November, the Board will hear the request by SOCAN, NRCC and CSI for tariffs with respect to satellite radio. The tariffs that we are establishing for the communication and reproduction rights are all new "tariffs" and that has increased our workload.

So with that brief indication of the work of the Board, I want to discuss a subject that is not well understood, the granting of a license under section 77 of the *Act* to a person who wants to use a protected work whose copyright owner cannot be located.

Unlocatables

The Copyright Board has the power pursuant to section 77 of the *Act* to issue non-exclusive licences for the use of works or other copyright subject-matters when the owner of the copyright cannot be located. This power is not a common one: it exists, in some form or other, in only a few other countries, including Japan and South Korea. In recent years, however, the issue of how to use the works whose copyright owner cannot be located (or, as others would call them, orphan works) has assumed more and more importance, thanks in part to massive efforts on the part of many, including Google, to digitize all of the world's knowledge. The United States Copyright Office issued a major report on the matter in 2006. More recently, a committee of experts advising the European Commission on the creation of a pan-European digital library looked at the issue, as did the Gowers Committee on the reform of intellectual property in the United Kingdom.

Over the last eighteen years, the Copyright Board has dealt with hundreds of licence applications and at least as many informal inquiries. In the last ten years, the Board has received 381 applications for licenses and the number of applications has steadily increased over this period of time. For example, the Board received only five applications in 1990 but that number increased to 43 in 2005. In 2006 we received 37 applications.

The range of works involved is quite remarkable. The Board has been asked to issue licences for the use of architectural plans (a continuing problem), an Emily Carr painting, poems arranged to music by Harry Somers, an adaptation of Tchaikovsky's Swan Lake for use in the children's television series the Care Bears, the re-edition of a biography of the inventor of radio (Fessenden, not Marconi), musical works ranging from the most obscure to hits by Bobby Curtola and the Shirelles, letters to the editor, animated cartoons, one of Cliff Robertson's early movies, photos of prime ministers and premiers, mechanics' training manuals, short stories and the Serenity Prayer (the prayer used by members of AA to open their meetings).

The list of copyright owners who are the subject of these applications reads as a veritable who's who: they include Canadian senators, Joey Smallwood (not a senator), Édouard Montpetit, F.R. Scott, the constitutional expert and poet, the architect of Ottawa's Greek Orthodox Cathedral, the Dubois brothers (one-time members of the Quebec mafia), the scriptwriter for the television series "Horatio Hornblower" and even a Southern belle who wrote children's stories, whose father was a Southern General in the U.S. Civil War and whose sole heir was found living not 25 miles from the plantation where the belle was born in the 1880's.

The applicants for licences fall into no particular category. They include school boards, book publishers, the National Film Board, the Department of National Defence, the CBC, the Just for Laughs Festival, Libraries and Archives Canada, authors of scholarly papers and the producers of the television series Riverdale and the producers of a documentary on the Second World War.

The Board is currently conducting a systematic review of its past decisions dealing with unlocatable copyright owners. It is not possible for me in the time I have, to give you precise indications of what that review will yield but we very recently (last week) established a policy to deal with requests for architectural plans which will be posted on our website shortly. Still, in the time available, I want to give you an indication of what the unlocatable regime involves and of the types of issues these applications raise.

Section 77 of the *Act* grants to the Board the power to issue a licence for the use of any kind of copyright subject-matter. Because the Board has dealt almost exclusively with applications for the use of works to date, as opposed to performances, sound recordings or communication signals, my remarks will deal only with works as these are defined in the *Act*.

Section 77 grants the Board the power to issue a non-exclusive licence to do any act mentioned in section 3 of the *Act*, in respect of a work that is published and protected by copyright, if the copyright owner in the work cannot be located after reasonable efforts have been made to do so. The licence is subject to such terms and conditions as the Board may establish. The copyright owner has five years after the expiration of the licence to collect the royalties that the Board sets in the licence. I will deal briefly with these various conditions and provisos.

First, the work must have been published with the consent of the copyright owner. Determining whether a work has been published, or whether the author consented to the publication, is not always easy. If a photo is clipped from a newspaper, the Board will infer that the photographer consented to the publication, especially if the photo is not digital and if it depicts a recent newsworthy event: after all, it was the photographer who provided the photo to the paper. A photo in a book, however, may or may not have been published with the consent of the photographer: authors often use photos they find in various archives without seeking the necessary consent to use them. Paintings are deemed published if they are in a catalogue released by the gallery that is presumed to be the author's agent; if they are in a catalogue for an exhibition in a museum, however proof of consent will probably be required.

What about audio-visual works? In the past the Board has ruled that distribution of copies of an animated Popeye cartoon to cinemas constituted publication of the cartoon, at least if the distribution took place at a time, such as the 1940's, when there was no market for home movies.

Second, the works must be protected by copyright. Put another way, if the work is in the public domain the Board has no power to issue a licence because a licence is not necessary.

Third, the licence must pertain to a use mentioned in section 3 of the *Act*. Let me refresh your memory. The operative part of that section states:

> 3. (1) For the purposes of this Act, "copyright", in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof.

and then lists a number of rights as well as the right to authorize those acts.

This means that if the *Act* allows the use without a licence, then the licence in principle will not be issued. Thus, no licence will be issued if the contemplated use constitutes fair dealing, if it involves less than a substantial part of the work or if it triggers anyone of the exceptions set out in the *Act* (for a more detailed explanation, see the Board's decision in Breakthrough Films and Television, File No. 2004-UO/TI-33). This aspect of the Board's power is the one that raises the most complex issues.

Determining what constitutes fair dealing, for example, is difficult at the best of times and the Board is conscious that any ruling it might release on this issue does not bind courts of law, which in effect leaves the user vulnerable to prosecution for copyright infringement.

Fourth, the owner of the copyright must be unlocatable after reasonable efforts have been made to find her. The person one should be looking for is the copyright owner, who is not always the author. Sometimes, legal fictions create situations that may be difficult to handle. Thus, copyright in older commissioned photographs used on LP sleeves is probably owned by the record label, while copyright in a commissioned photograph circulated to a singer's fan club is probably owned by the artist's manager.

As the *Act* states, the efforts made to find the copyright owner must be reasonable. In this respect, the Board has always applied a sliding scale approach. The nature of the contemplated use, the sophistication of the applicant, the notoriety of the potential copyright owner all will influence the extent to which additional efforts will be requested. The Board does its own research to determine just how unlocatable the copyright owner is. In 21% of the applications our research results in the copyright owner being found with the result that there is no need to issue a formal licence. That number is only for files that are opened. In many cases, we help find the owner before a file is opened.

I note in passing that the Board distinguishes between a copyright owner that is unlocatable and one that is unreachable. It sometimes happens that the Board or the applicant knows precisely who the copyright owner is and where to find her or him. If the person simply refuses to return phone calls or emails, there is nothing the Board can do. A good example of this is J.D. Salinger, who may be reclusive and unreachable, but is not unlocatable; or Robert Campeau who is well known to be in Ottawa, but unreachable.

Fifth, the licence is subject to the terms and conditions that the Board sets. Board licences, like any copyright licence, generally contain terms that describe the use that is allowed, the price to be paid for the use, the credits to be offered and the date of expiration of the licence. For example, a typical licence will authorize the reproduction of a specified number of copies, will provide that it is non-exclusive and valid only in Canada.

Sixth, the *Act* provides that the Board *may* issue a licence if all the conditions set out in section 77 are satisfied. In other words, the Board is not under a strict obligation to issue a licence even if all the conditions have been met. Generally speaking, when this stage is reached in an application, the Board sees itself as stepping into the shoes of the absent copyright owner. Is this a use that the owner of the copyright would have licensed as a matter of course? Would a copyright owner have balked at issuing a licence for reasons having to do with the commercial nature of the use, because the requested licence is retroactive or indeed for considerations involving moral rights issues? Put another way, should the Board issue a licence to the Alberta Cattlemen's Association for the use of a song that was composed by a die-hard vegetarian. When time comes to make those judgment calls, the Board relies largely on industry practices.

How does the Board set the price for a licence? The current market rate for the intended use is the rate normally used. That market rate can readily be ascertained from a recognized market (e.g., publication of a novel) or a price that is generally applied to a collective society (e.g., SODRAC and CMRRA for mechanical licences).

Some issues the Board has had to address in issuing licences have raised a certain amount of controversy. One concerns the involvement of collective societies in the process, and especially the payment of royalties to those collectives.

From the outset, the Board sought to involve collectives in determining whether efforts made by the applicant to locate the copyright owner are reasonable. The assumption was and remains that collectives probably are in the best position to help determine where the copyright owner might be contacted. This has proven to be true in a number of cases. For example, Access Copyright is often able to help a potential applicant find a copyright owner even before a formal application is filed. The Board has signed two memoranda of understanding, one with Access Copyright and one with COPIBEC, which set out the role of the collectives in helping the Board do its work. Of course, the Board retains its discretion to follow or ignore the recommendations the collectives make.

The most controversial aspect of the Board's involvement with collectives concerns the payment of royalties as set out in the licence. Licences deal with the payment of royalties in one of two ways. In some cases, the applicant is required to pay royalties only if the copyright owner claims them. If not, then the licence is, in effect, for free. Most of those cases involve benign uses, or situations where the work may well already be in the public domain.

In other cases, the Board requires as a condition of licence, that the royalties established by the Board be paid to a collective (usually one that manages the type of use involved in the licence). The collective can use those royalties as it sees fit, as long as it undertakes to pay that amount to the copyright owner if he shows up within five years after the licence expires.

Between 1990 and 2006 the total value of all licences issued by the Board is $50,000 (Can.) more or less. This does not account for licences used which required a rate of a number of cents per copy.

Not everyone agrees with this approach. Some, including David Vaver, have argued that the Board has no business requiring royalties to be paid to anyone who is not clearly entitled to them. If the copyright owner does not show up, no royalty should be required. The Board has, however, chosen to approach the matter differently. In our opinion, applicants should not be able to enjoy the benefits of a licence without paying for it. The assumption we make is that, given the choice, the average copyright owner would rather have the licence fee paid to similarly situated authors rather than be retained by the person using the work. In addition, users, just as copyright owners, can become unlocatable. Collective societies rarely do.

In passing, I should say that unlocatable copyright owners do sometimes show up once a licence has been issued. Collectives regularly issue all points bulletins requesting information about owners who could not be found. Recently, the daughter and sole heir of an author asked for the payment of the royalties set by the Board when she happened to find out that a licence had been issued for the use of one of "her" works.

Is the section 77 regime truly helpful? It is hard to say. Dealing with applications involving modest uses is certainly time consuming. As noted, the total potential royalties payable pursuant to licences the Board has issued over the years is well below $75,000. On the other hand, the section 77 regime has proven to be especially efficient in dealing with applications involving large amounts of works. In one case, the Board

issued a series of licences dealing with thousands of titles over a period of years. The licences allowed an institute linked to the National Library to microfiche all known Canadiana from the years 1900 to 1920 without risk of infringing copyright. These types of applications may become more commonplace; Board staff has already had discussions with personnel at Library and Archives Canada about the possibility of issuing licences to assist in the process of creating the ultimate Canadian digital library.

There are also those who would argue that any mechanism that allows a potential user to comply with copyright law when it proves otherwise impossible to contact the copyright owner has the inherent merit of increasing respect for copyright.

I leave that to you to discuss and decide.

Before I leave you, I would be remiss in not mentioning that the Board is able to do its work only because of the dedicated work of our hard-working professional and support staff. We do not have enough staff. We need more lawyers, more economists and more staff at the Secretariat/Registry of the Board. I have made my views known on this subject, but to date to no avail.

As always, it is a pleasure to be with you and I hope that this brief aperçu has been helpful.