

**Speech given by
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Chairman of the
Copyright Board of Canada**

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Bill C-32 – Ten Years Later

I am pleased to be here to speak to you about changes that have occurred at the Copyright Board since the adoption of Bill C-32. Contrary to what was publicized on the website promoting this program, this is not my first public address (I assume the reference was to first since my appointment as Chairman – I actually spend a lot of my time speaking to lawyers and other judges) – I opened the Meredith Lectures at McGill this year. The topic of that seminar was *Approaches to IP in a Transsystemic World*. I managed to get my head around that topic!

I agreed to speak to you during this program to discuss what has happened at the Board in the almost 10 years since Bill C-32 came into force. That second phase represented some dramatic changes and has changed the way the Board functions.

Bill C-32, which became Chapter 24 of the Canadian Statutes of 1997, received royal assent on April 25, 1997 and came progressively into force over the following several months. The legislation constituted the so-called Phase II of copyright revision in Canada. It changed considerably the landscape as far as the Copyright Board is concerned. This is what Michel Héту, then Vice-Chairman of the Board, had to say about the impact of the Bill on collective management generally and the role of the Board in particular:

In 1988, Parliament legitimized collective administration and laid the foundations for its growth; in 1997, Parliament increased its relevance and its importance (and therefore the role of the Board) to a degree that many of us have yet to fully understand. This, in turn, should provide creators with better guarantees of a fair remuneration, and users with both greater access to works and better protection in their dealings with collective societies.

The challenge of the Copyright Board, among others, is therefore to see that the system, in its new, expanded form, will work properly and to the satisfaction of creators and users.

I propose to examine whether that challenge has been met.

THE WORLD BEFORE C-32

The first music collective was set up in Canada in 1925 – The Canadian Performing Rights Society (CPRS), which was a subsidiary of the Performing Rights Society of England.

Following the amendment of the *Copyright Act* in 1931, and a Commission of Inquiry which recommended the creation of a tribunal to protect the public interest, the *Act* was amended to set up the Copyright Appeal Board and the first tariff was approved in 1937.

Thus, contrary to popular belief, the UK Performing Rights Tribunal was not the first tribunal in the common law world to deal with copyright royalties: the Canadian Board predated it by some 20 years.

The Copyright Appeal Board had but one task until 1988: to set royalties for the performance or communication of musical works. All of its members served part time. It had no administrative structure.

In 1988 the institution was renamed the Copyright Board and its organization changed significantly. The Chairman of the Board must by law be a sitting or retired judge. Its members were authorized to serve full time. The Board acquired a permanent support structure. The Board continued to deal with the performance or communication of musical works, but new powers were added. The Board would from that point on set royalties for the retransmission of distant broadcast radio and television signals. It also had the power to arbitrate disputes between collective societies and users concerning the terms and conditions of licences.

Until the provisions of Bill C-32 came into force in 1997, things changed at the Board, but not dramatically in this time frame. Retransmission hearings represented a significant part of the Board's workload. The first two retransmission hearings occupied over ninety hearing days over the course of three years. The arbitration regime, on the other hand, generated little interest.

THE ROLE OF THE COPYRIGHT BOARD

I will probably repeat some things that my colleague Ms. Sylvie Charron said yesterday – so for those who were here yesterday, I apologize. The role of the Board is not just to protect copyright users from potential abuses by collective societies of their monopoly position. Its role is to regulate the balance of market power between copyright owners and users.

The Board is required to set a price for the Canadian market that takes into account Canadian circumstances.

Those rates must be reasonable but they do not “mimic” the market.

Finally, the Board can issue non-exclusive licences for published works and other copyright subject matters if the Board is satisfied that the applicant has made reasonable efforts to locate the copyright owner and the owner cannot be located. I should add that this power has been used many times by the Board.

BILL C-32

From a legal perspective, Bill C-32 conferred on the Board the following additional responsibilities:

- the adoption of tariffs for the new right to remuneration conferred to record makers and performing artists by section 19 of the *Act*, for the performance or communication of sound recordings of musical works (the so-called neighbouring rights);
- the adoption of tariffs, under the general regime which is available, at the option of collective;
- the adoption of tariffs for the reproduction and public performance of radio or television stations’ programs by educational institutions for educational purposes;
- the unlocatable regime was extended to permit the issuance of non-exclusive licences for the use of fixed performances, published sound recordings and fixed communication signals, where the copyright owner cannot be located;
- the adoption of tariffs for private copying of recorded musical works, for the benefit of the rights owners in the works, the performances and the sound recording.

The increased legal obligations alone do not give a full description of the practical impact of the legislation on the work of the Board. Here are a few statistics:

- Of the more than 30 final decisions issued since C-32 came into force, half dealt in whole or in part with matters flowing from C-32.
- Ten of the 17 final decisions that were issued after the holding of a hearing dealt with matters that were “created” by Bill C-32.

- The variety of tariffs has grown exponentially. Before C-32 there were SOCAN tariffs and retransmission tariffs and that was it. We now have compulsory tariffs for the so-called neighbouring rights, for private copying and for the use of radio and television programs by educational institutions. Collectives have voluntarily filed for, and obtained, tariffs for the copying of musical works onto video-copies, for media monitoring of private television broadcasts, and for the reproduction of musical works by commercial and non-commercial radio stations.
- Other voluntarily filed tariffs currently are under consideration for photocopying by primary and secondary schools and for the reproduction of musical works by satellite radio, among others.
- Of the four matters currently scheduled for hearings, three are C-32 matters.
- One matter, for which the Board just recently set the timetable, will involve the examination of three proposed tariffs for the use of music on satellite radio; two of those tariffs could not have been filed before C-32 came into force.
- Of the eight applications for judicial review of decisions of the Board since C-32 came into force, six concerned tariffs that the Board could not have adopted before 1997, and five dealt with matters that could not have arisen under the *Act* prior to the adoption of Bill C-32.

C-32 IS NOT THE ONLY REASON THINGS HAVE CHANGED

The Internet has modified the way in which users deal with works and now forms a large part of the Board' business. The private copying tariff is a case in point, as are some of the SOCAN and CSI tariffs.

Other new uses for pre-existing rights emerge: in hotel rooms and satellite. The tariff the Board certified just this weekend, SOCAN 24, which concerns ringtones, the annoying sound that you heard (or maybe I just imagined it) earlier during my presentation because someone forgot to switch off their cell phone. That business which did not exist prior to 2001 is expected to generate some six billion dollars world wide by 2008. We will shortly have to consider a tariff for "ringbacks".

Then, there are my colleagues on the Federal Court of Appeal and the Supreme Court of Canada, who sometimes help make the Board's life more complicated. Let me give you two examples.

In *CCH Canadian Ltd. v. Law Society of Upper Canada*, the Court's discussion of what constitutes fair dealing does not favour an objective test, but a series of somewhat vague, sometimes circular criteria, such as examining the intentions of individual users or of the agents through whom they act to determine that question.

In *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers*, the Court ruled that in order to determine whether a communication by telecommunication involving participants from more than one jurisdiction occurs in Canada, there should be a "real and substantial connection" with Canada.

Both of these tests appear to favour a highly individualized and context-dependent analysis of transactions involving works protected by copyright. Both tests fit neatly within the context of civil litigation, which by its nature focuses on the *ex post facto* analysis of a single event or sets of events. The usefulness of these tests is questionable in a rate setting context. The determination of a tariff is an *ex ante* exercise meant to apply to a whole class of events involving persons most of whom may not know that they will be users during the life of the tariff. A more generic approach would be more useful.

Let me return to the original question. Has the Board met the challenge of Bill C-32? The answer, as in most endeavours involving human beings, is yes and no.

On the one hand, the Board has succeeded in certifying, generally within a reasonable period of time, the new tariffs proposed by a variety of collectives. Its decisions in general have withstood the test of the market and of judicial review; all but one of the applications for judicial review filed since 1997 were dismissed.

There have recently been a mounting number of complaints about the manner in which the Board examines and sets tariffs. Some argue that appearing before the Board costs too much, that proceedings are far too complicated, that the obligations of disclosure are too onerous and, that it takes too long for the Board to render its decisions. Many of these problems are real. It is difficult however for the Board to address them directly unless someone raises the issue or issues.

For some problems, the central responsibility lies squarely with the Board. I have been dissatisfied with the time it takes for a hearing to be scheduled. That is a matter which is largely in the control of the parties but I believe the Board could speed up the process by tightly supervising the pre-hearing process.

I am not at all happy with the time it takes to render a final decision. I have tried to address the issue and I can assure you it will be resolved. If the Supreme Court of Canada can render a decision within six months of a hearing, there is no reason why this Board cannot do the same. My goal is to see that this occurs.

In other areas, the responsibility must be shared. Take, for example, the recent complaints about the interrogatory process. Recently, one objector complained that the amount of information requested of it was excessive. It so happens that this same objector had requested more information from the collectives than anyone else in that proceeding. One is reminded of kettles and pots.

Another example has to do with the fact that some users face separate proceedings for separate rights. The Board is very conscious that users are now sometimes confronted, due to Bill C-32 or the mingling of uses that used to be quite separate (on radio or over the Internet for example), with multiple demands in respect of what they perceive as a single use. In response to this, the Board has merged the examinations of tariffs filed by different collectives and even merged tariffs themselves. Still, it is not always possible to prevent collective societies from choosing how they divide up the licensing of their repertoire, even more so if a collective chooses, for strategic reasons, to withdraw a proposed tariff. By the way, it is far from settled that a collective under the general regime can withdraw a proposed tariff after having filed it. We intend to look at the issue at some point in time.

More importantly, those who complain about how the Board proceeds forget that the Board is quite capable of adapting its procedures to the circumstances at hand. Non-lawyers who appear before it have found that both staff and members try to accommodate their needs. Panels generally attempt to proceed as informally as circumstances will allow. The Board applies rules of evidence very loosely so as to allow the expeditious gathering of enough relevant information, subject to then assessing the weight evidence should receive under the circumstances.

On the issues of length of proceedings, I think that the Board is doing a pretty good job overall. The Board's secretariat works hard at shortening hearings by forcing participants to focus on the real issues. We have resorted to pre-hearing conferences to identify the important issues so as to better manage the hearing. A good example is in the file involving Access Copyright and the school boards, where the parties have agreed to allow their experts to jointly "clean up" the raw data so that we will not have long debates about the validity of the data itself. Still, participants insist on providing

“atmospheric” or “soft” evidence which is not helpful in solving the real issue. Even with this, we manage to keep our hearings relatively short.

A current proceeding before the U.S. Copyright Royalty Board dealing with the streaming of recorded music over the Internet is scheduled to last 25 days; the 2001 hearings into the same matter extended over 51 days. The President of the British Copyright Tribunal tells me that the first matter he will hear this Fall, which also concerns music over the Internet, is scheduled for two *months*. By contrast, the longest hearing to be held since the adoption of Bill C-32 (the first private copying hearings) extended over 17 days. We don't expect the CSI music online hearings to last two weeks.

Before ending, I would not mind sharing with you some thoughts about recent discussions concerning the possibility that the government issue a directive or directives to the Board. I raise these issues simply as a cautionary matter. Given that the Board may eventually be asked to rule on the legality and meaning of such a directive or directives, I will limit my comments to the following. First, directives should not be so vague as to be meaningless. Nor should they be so precise as to dictate conduct in specific instances. Second, directives are regulations and as such, cannot change what individuals or the government think is wrong with the law: that requires nothing short of a change in the law. Third, one should keep in mind the lessons of the past. Only once, in 1991, did the government issue such a directive, only to be told fourteen months later that the directive was redundant, since the Board had always done what the directive asked it to do: redundant regulations are bad regulations at any time, even more so when they are issued by a government whose platform includes getting rid of unnecessary regulations. Fourth, one wonders why directives of this nature are now being discussed when some of the issues are before the Federal Court of Appeal.

I am of the view that the Board has done a good job overall in dealing with the challenges of Bill C-32 considering the permanent state of under funding in which it is maintained. Having said that, all I can say is that we will continue to try and deliver the best possible service under the circumstances.

I would be remiss in not mentioning that we are indeed fortunate to have extremely talented and dedicated support staff to assist us. These people make the work of the Board possible.

Thank you.