

A new approach to copyright

On the occasion of the Canadian Association of Broadcasters' 80th anniversary, it is interesting to note that the CAB was originally constituted to provide a meeting place for private broadcasters in Canada to discuss and formulate industry positions on matters of copyright.

That was 1926, and the group of pioneering broadcasters understood the vital importance of a debate on copyright. Though the relationship between broadcasters and rights holders was far simpler at that point, it was also compelling enough to motivate broadcasters to come together in order to build consensus on these issues.

Today, we are rapidly emerging from the analog world towards a new digital age. The implications of this paradigm shift for broadcasters are huge. And this fundamental transformation of the broadcasting industry raises an important question on how we approach the administration of copyright in Canada—when our businesses are being forced to reconsider or reinvent their operating models, how can anyone expect the rest of the environment to stand still?

Can we afford not to explore ways and means to adapt agencies of government to perform economic functions in the digital environment in which content creation and content user businesses operate?

The Copyright Board continues to perform a very important function in Canada, and, by and large, its record is impressive. Since it was established in February of 1989 (succeeding the Copyright Appeal Board), the Board has assumed a proactive view of copyright administration in Canada, and has served rights holders and rights users well.

But given its role and the economic significance of its decisions in Canada—and considering the new environment—it is crucial that we encourage discussion and deliberation on the necessary changes to ensure that it adapts to this evolving landscape.

A good starting point would be to explore the context of today's increasingly complex and multi-layered copyright environment, and ask if there is room within the Board's legislative mandate to allow for a new approach that is more responsive to the evolving realities of creators and users alike.

Broadcasters now face an increasing burden of tariffs on their businesses. Commercial radio, for instance, pays three separate tariffs—the SOCAN tariff to composers, authors and publishers, the NRCC tariff for neighbouring rights to performers and producers of sound recordings, and the CMRRA/SODRAC tariff for reproduction rights to composers, authors and publishers (essentially the same copyright owners as SOCAN represents).

In practical terms, the current condition of collective administration in Canada is characterized by an increasing burden of tariffs, an increasing complexity for rights owners, users and the regulator alike.

In these ever more complex times, it is important that all stakeholders engage in an examination of the Copyright Board's legislative mandate, and seek out a new approach, focussing on *clarity*, *certainty* and a *consistency* to better respond to the evolving realities of creators and users alike. As part of a new approach to guide the Board in exercising its mandate and setting tariffs, I would recommend consideration of a set of basic principles.

The first principle is that Copyright Board should look at the total compensation received by the same rights owners in relation to the same activity when it establishes the value of a right. In Canada, rights owners may receive multiple revenue streams for use of their works, as noted above. Moreover, the same activity—broadcasting—may involve the exercise of several rights: Radio broadcasters cannot broadcast music without paying the SOCAN and NRCC.

The second principle is that the Board should set tariffs on economic factors relating to the value of the right to users. No social or cultural policy consideration should be relevant to setting the tariff rate for the right, particularly where other



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agencies of government are specifically charged with the regulation of social/cultural matters. The Copyright Board should be strictly a rate-setting body, as there are other components of the Canadian government with important and effective roles in ensuring appropriate levels of support for Canadian creators.

The third principle would require the Copyright Board to have a regard to rights payments in the United States for the same or analogous activities. There remains a strong likelihood that given our proximity and our on-going trade relationships, our business models will remain directly influenced by the business models operating in the U.S..

Digitization has caused a paradigm shift in business operations, competition among players in the communications environment, and, fundamentally, in matters of copyright. The Board must adapt to this new environment if it is to continue to effectively serve the best interests of copyright owners and users.