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September 29, 2017 (with corrections October 3, 2017) ***BY EMAIL PDF***

To Whom It May Concern

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Re: A Consultation on Options for Reform of the Copyright Board of Canada

Thank you for the opportunity to provide input on the future of Canada's Copyright Board. These submissions are made solely in my personal capacity on not on behalf of my firm or any of its clients. In addition to the submission dated November 1, 2016 that I made to the Standing Senate Committee on Banking, Trade and Commerce last year, which I have attached as Appendix "A" and hereby reiterate, I would make the following additional comments to emphasize and supplement those mentioned directly or indirectly in Appendix "A". These points have since become even more clearly apparent and important.

RENDERING OF JUDGMENTS AFTER THE RETIREMENT OF A BOARD MEMBER

The ***Copyright Act*** provides that:

> *Concluding matters after membership expires*
>
> *66.5 (1) A member of the Board whose term expires may conclude the matters that the member has begun to consider.*

Leaving aside any possible financial implications of this open-ended provision with respect to the remuneration and reimbursement of expenses payable to a retired Board member, the provision does nothing to encourage the timely rendering of a decision after a hearing. In fact, it is not even clear that there had to have been a hearing for a retired member to be "seized" of a matter. The provision is, if anything, a disincentive to the timely rendering of decisions and the record is clear that it can work in precisely this way.

For example, the Board has recently released the following related decisions on August 25, 2017 in which former Chair William Vancise participated, although he had retired from the Board more than three years earlier on May 13, 2014 because his term had then ended:

> ***Online Music Services***
> ***CSI (2011-2013); SOCAN (2011-2013); SODRAC (2010-2013)***
> ***Fact Sheet***
> ***Reasons*** *(August 25, 2017)*
> ***Tariff*** *(August 26, 2017)*
>
> ***Scope of section 2.4(1.1) of the Copyright Act – Making Available***
> ***Reasons*** *(August 25, 2017); (revised – September 22, 2017)*

This tariff actually goes back to 2010. The overall delay is inexplicable and unacceptable, and especially given the period of more than three years since Chairman Vancise has retired. This is inconsistent with the way the Canadian courts function, where judges have typically far greater caseloads than members the Copyright Board.

A retired judge of the Federal Court or Federal Court of Appeal has, at the most, eight weeks to render a judgment in any cause, action or matter previously heard by that judge.

> *Federal Courts Act*
>
> *Giving of judgment after judge ceases to hold office*
>
> *45 (1) A judge of the Federal Court of Appeal or the Federal Court who resigns or is appointed to another court or otherwise ceases to hold office may, at the request of the Chief Justice of that court, at any time within eight weeks after that event, give judgment in any cause, action or matter previously tried by or heard before the judge as if he or she had continued in office.*
>
> *Marginal note: Taking part in giving of judgment after judge of Federal Court of Appeal ceases to hold office*
>
> *(2) If a judge of the Federal Court of Appeal who resigns or is appointed to another court or otherwise ceases to hold office has heard a cause, an action or a matter in the Federal Court of Appeal jointly with other judges of that court, the judge may, at the request of the Chief Justice of the Federal Court of Appeal, at any time within eight weeks after the resignation, appointment or other ceasing to hold office, take part in the giving of judgment by that court as if he or she had continued in office.*

Marginal note: If judge unable to take part in giving of judgment

Even a retired judge of the Supreme Court of Canada has, at the most, six months after retirement to participate in a judgment:

Judges Act

41.1 (1) A judge of the Supreme Court of Canada who has retired may, with the approval of the Chief Justice of Canada, continue to participate in judgments in which he or she participated before retiring, for a period not greater than six months after the date of the retirement.

The Supreme Court of Canada has forced courts to render timely justice in a reasonable length of time in criminal proceedings as a result of the Jordan decision.[1] At a recent "town hall" meeting of the bench and intellectual property bar in Ottawa, it was generally acknowledged that the Jordan decision would put pressure on the civil law justice system to move faster. The delays at the Copyright Board are unsustainable. Dealing with open ended retirement provision would be one small but concrete step in fixing this problem.

Recommendation:

It is recommended that s. *66.5(1) of the of the* ***Copyright Act*** *be amended so as to provide that a member of the Board whose term has expired shall conclude any matter in which the member has participated in an oral hearing within six months*[2] *after the expiration of the member's term and shall not otherwise participate in any unfinished matters before the Copyright Board.*

DETERMINATION OF QUESTIONS OF LAW

The ***Competition Tribunal Act*** provides that:

Questions of law, fact, mixed law and fact

12 (1) In any proceedings before the Tribunal,

(a) questions of law shall be determined only by the judicial members sitting in those proceedings; and

(b) questions of fact or mixed law and fact shall be determined by all the members sitting in those proceedings.

The Copyright Board has never had more than one judicial member at time. The Copyright Board should not be deciding pure questions of law other than those that might be necessarily incidental to determine rate calculation. The Board has does not have a good track record on pure questions of law, as the two Federal Court of Appeal decisions on blank media levies illustrate. It

[1] ***R. v. Jordan***, [2016] 1 SCR 631, 2016 SCC 27 (CanLII), http://canlii.ca/t/gsds3

[2] Or, preferably, eight weeks.

took a second decision[3] to drive home the meaning of the first decision from four years earlier. The Chair of the Board at the time reacted with explicit and unusual criticism of not only of the Federal Court of Appeal but the Supreme Court of Canada.[4] He also had some frank comments directed to Parliament. Needless to say, judicial review by the Federal Court of Appeal and further consideration when appropriate by the Supreme Court of Canada are essential and the Board should welcome the attention it has received from them in recent times. Also needless to say, it is Parliament that determines what the ***Copyright Act*** should say, not the Copyright Board. Presumably, these comments were neither then nor now reflective of the institutional views of the Copyright Board.

The recent decision dated August 25, 2017 on the making available right mentioned above – which was five years in the making and rendered more than three years after the former Chair's retirement – is the subject of determined judicial review from all sides. It was arguably wrongly decided in many important respects. More to the point of the current exercise, it was arguably a serious waste of time and resources for all concerned, when it could have and should have been referred directly to the Federal Court of Appeal pursuant to s. 18.3 of the ***Federal Courts Act***. The Board allowed what should have been, at most, a simple preliminary motion on a point of law to mushroom into an immensely, needlessly and arguably incorrectly handled mega matter that came to involve numerous arguably unnecessary experts and evidence about treaties. The ramifications of this recent making available decision will probably take years more to resolve.

The Board has still to render a decision more than seven years after the proposed tariff for Post-Secondary educational institutions was filed. Prof. Ariel Katz, then an objector, asked in 2013 for a reference to the Federal Court of Appeal on the issue of whether a tariff can be mandatory. This was categorically rejected by the Board and I have chronicled the proceedings involved here. This would have been a very simple question for the Federal Court of Appeal to determine. Several years later, we still have no decision from the Board on the tariff and the question about whether the tariff can be mandatory is now finally before the Federal Court of Appeal in another related context, after a very long and expensive trial, millions of dollars in costs and massive uncertainty in the educational sector – all of which might have been avoided had the Board made the reference as requested in 2013. Once again, the failure of the Board to make a timely and efficient reference to the Federal Court of Appeal may result in many years of expense, delay, and uncertainty for all concerned – which in this case includes the entire educational sector in Canada.

The progressive assumption over the years by the Board of a broader mandate to decide questions of law, as opposed to more focussed rate setting, has been controversial at times and has evolved to a great extent on the implicit and sometimes explicit assumption by the Courts that the Board is an "expert" tribunal. It must, however, be frankly recognized that possession of expertise in copyright law has not necessarily been the case with respect to all of the members of

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[3] ***Apple Canada Inc. v. Canadian Private Copying Collective,*** 2008 FCA 9 (CanLII), <http://canlii.ca/t/1vcx1>

[4] Howard Knopf, ***Chairman Vancise on the Courts and Copyright Policy in Canada***, blog posting November 3, 2009, http://excesscopyright.blogspot.ca/2009/11/justice-vancise-on-courts-and-copyright.html

the Board over the years. In fact, several members of the Board have lacked expertise in copyright law at the time they were appointed and not all have eventually acquired such expertise during their tenure. Nor have all of the appointments to the Chair position, who must be either a sitting or retired judge, had significant prior experience in copyright cases. In this respect, the Copyright Board is very different than the Competition Tribunal, for example, where, as noted above, questions of law must be decided only by judicial members of the tribunal. It is no answer to suggest more expert legal and economic staff to assist the Board members. As explained below, in Appendix "A", there is an old maxim that ""S/He who hears must decide".

Perhaps in light of all of this, the reviewing Courts have recognized that when the Board decides questions of law that can have an effect on civil proceedings, the Board is generally held to the highest standard of review of "correctness".

Recommendation:

The Act should be amended such that the Copyright Board must refer all questions of law to the Federal Court of Appeal pursuant to s. 18.3 of the ***Federal Courts Act*** *where the Board's determination would presumptively be reviewable on the basis of a standard of correctness or in any other case where it would be in the interests of justice to do so.*

MANDATE OF THE BOARD

Policy and legal considerations over the years have been inconclusive as to what the mandate of the Board should be. No doubt, many conflicting options will now be suggested. However, with respect, it is submitted that it should at least be possible to clarify what the Board's mandate should **not** entail. The legislation should be amended to clarify that the Board's mandate is to set rates, terms and conditions of tariffs. The Board should not be permitted, as the result of imprecise or incomplete statutory language, to effectively legislate statutory schemes of protection. This may entail more precise legislation and/or regulation. Two prime examples of how the Board has embarked on law making and gone far beyond rate setting have concerned cable retransmission and blank media levies.

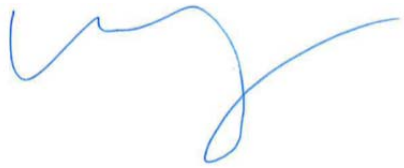
Recommendation

The Act should be amended to fill in as many gaps in detail as possible and to emphasize that the Board's primary role is that of rate setting, along with related terms and conditions.

Conclusion

Once again, I incorporate my submission to the Senate from November 1, 2016 attached hereto as Appendix "A". I also attach at Appendix "B" my curriculum vitae, which indicates my long involvement with and commitment to the copyright cause.

Yours sincerely,



Howard Knopf

APPENDIX "A"

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November 1, 2016 ***BY EMAIL PDF***

Ms. Lynn Gordon
Clerk
Standing Senate Committee on Banking, Trade and Commerce
The Senate of Canada
Ottawa, Ontario
Canada, K1A 0A4

Dear Ms. Gordon:

Re: Hearing to "Study, and Make Recommendations On, the Operation and Practices of the Copyright Board of Canada"

The following is the text of my submission to the Senate Banking, Trade and Commerce Committee for presentation on November 3, 2016. As I would do in the courtroom, I will condense these comments in oral presentations to fit within my allotted time of five minutes. However, I wanted to ensure that the Committee Members have fuller detail and references available to them. The following is a one page summary of my submission. The table of contents and details follow thereafter.

SUMMARY

Immediate improvement that could be undertaken though regulations not requiring 2017 review pursuant to existing authority under ss. 66.6 and 66.91 of the ***Copyright Act*** could include:

1. Procedural steps in Board hearings, e.g. requirement for "pleadings"
2. Threshold criteria for tariff certification having regard to demonstration of sufficient repertoire and membership in the sector and adequacy of remuneration to creator members
3. Timelines applicable to parties and the Board itself for procedural steps, holding of hearing and rendering of decisions
4. Requirement for case management and procedures
5. Interrogatory/discovery procedures, including scope of interrogatories and limitation on number of parties required to submit responses when represented by an association
6. Expert evidence
7. Interventions
8. Interim orders
9. Minimum period of tariff duration
10. Maximum period of tariff retroactivity

Measures that would require legislation and 2017 study could include:

1. Cost awards, including cost recovery for public interest objectors or intervenors
2. "Machinery" issues, such as reconstituting the Board in a manner similar to the Competition Tribunal, with a panel of Federal Court judges and part time lay members with expertise in copyright law and economics
3. The adoption of an ongoing "consent decree" model in appropriate cases based upon the American experience

Contents

Honorable Senators:

I thank you for the invitation to speak to you today about Canada's Copyright Board. This is an important organization that traces its roots back to the 1930's when powerful copyright collectives were emerging and the world was assimilating the astounding and innovative then new high technology of radio and talking pictures. My views are purely personal and do not necessarily reflect those of any current or past clients, or the firm with which I am associated. Although my comments may be somewhat frank at times, I hope that you and all who are listening, including the Copyright Board members and staff for all of whom I have a very high regard, see my comments as constructive, useful and positive.

Why I am Here Today?

I have spent the last 30 years or so involved with copyright law, as a public servant, private practitioner, and occasional academic. I have spent a lot of time at the Copyright Board, at the World Intellectual Property Organization, and had significant initial responsibility for the first

intellectual property case before Canada's Competition Tribunal. I have made successful arguments in several significant court cases involving copyright, including three in the Supreme Court of Canada, and co-authored an amicus brief in an important United States Supreme Court case. Though I have been active in the past at the Copyright Board, I have no pending business there now. I am not a lobbyist.

Most of what I say today has been carefully documented in two lengthy blog postings by me in the last year so, and a PowerPoint presentation by me from the recent ALAI conference[5] about the Copyright Board that took place on May 25, 2016. I trust that you have these documents in your material. I have submitted them to the Clerk, hopefully in time for professional translation.

What I have to say about the Copyright Board is perhaps best described as "tough love". I was active before the board for several years on the controversial "blank media" levy file, in which I helped to work myself out of a job by convincing the Federal Court of Appeal and the responsible ministers from the previous government that levies on iPods and smart phones are not only bad policy but also bad law. We convinced the previous government to reject the music industry attempt to impose what Ministers themselves called a "***really toxic and, frankly, really dumb" …"*** *tax of up to $75 on iPods, Blackberries, cell phones, laptops, computers, memory sticks and automobiles, anything that is capable of playing digital music".*

We succeeded in getting the Government to implement a regulation in 2012 to prevent the Board from imposing what Ministers called a "tax" on the microSDs you and your family have in your smart phones and cameras and which you probably use mainly to take pictures of your grandchildren and your cats.

These efforts to stop the "iPod tax" in the Courts apparently did not sit well with the former Chair of the Copyright Board, Justice William Vancise. In a speech on August 11, 2009 to the Intellectual Property Institute of Canada's summer course on copyright held at McGill University online here,[6] he said:

> *In 2004, the Court ruled the Board was wrong to conclude that the permanently embedded or non-removable memory, incorporated into a digital audio recorder or the*

[5] http://alaiottawa2016.alai.ca/
[6] http://cb-cda.gc.ca/about-apropos/speeches-discours/20090811.pdf

> *device itself, was "an audio recording medium ordinarily used by individuals to copy music".*
>
> *In 2007, CPCC tried again and the Board was asked to determine whether the recorder itself was a recording medium as defined in the Act. It said yes in a long and well-reasoned decision. The Federal Court of Appeal, once again on judicial review, overturned the Board. This time, the Court in six turgid paragraphs found its decision of 2004 dealt with the matter and was binding on the Board. I still wonder how the Federal Court of Appeal came to that conclusion when the question of whether the device itself was subject to a levy had not even been an issue in the previous decision and the comments of Noel J.A. were obiter and contained in what can only be called a "throw away line." A throw away line that has had extreme consequences, not the least of which is at least 10's of millions of dollars in royalties that have not been paid to authors, composers and performers and threatens to destroy the private copy regime.*
>
> (highlight added)

I have also further succeeded[7] in potentially working not only myself but also many of those you have heard from in these two days out of a job by convincing the Supreme Court of Canada that Copyright Board tariffs are not mandatory. For example, according to the Board, a university or a school that makes one unauthorized copy of one work in the repertoire of one collective with even an interim tariff from Board could be liable for millions of dollars to that collective. This issue was dealt with the case of ***Canadian Broadcasting Corp. v. SODRAC,*** 2003 Inc., [2015] 3 SCR 615, 2015 SCC 57 (CanLII), <http://canlii.ca/t/gm8b0>, which I have asked the Clerk to distribute to you. The operative paragraphs are 101-113. We do not have time to go into this in detail today. However, suffice it to say that when the implications of this decision are a fully assimilated by those who stand to benefit from them, Copyright Board tariffs will be regarded as "optional" on users and mandatory only for collectives – much like the old plane and train fare tariffs. Those old tariffs set maximum rates but consumers were always free to get from one point to another by different and more competitive means, whether by bus, bicycle, car or canoe. Nobody forced anyone to take the plane or train if they did not need to do so, much less to buy an expensive pass for more travel over a longer timer period than they need. For example, dozens

[7] Along with Prof. Ariel Katz and Prof. David Lametti, as he then was.

of Canadian universities have shown that they can comply with copyright law and clear their copyright needs far more efficiently for all concerned – including creators – through direct and transactional licensing, reliance on fair dealing rights, use of open access material and other means than the controversial interim Copyright Board tariff. We may get some indication of how the lower courts will apply the ***CBC v. SORDRAC*** ruling in the context of a university in the coming weeks or months in the Access Copyright v. York University case.

The 80th Anniversary

The predecessor to today's Canadian Copyright Board was established 80 years ago in 1936 as the Copyright Appeal Board ("CAB"). This resulted from the landmark Parker Commission report, to which I commend you. It was concerned with the "super-monopoly" power of the then single music collective, which was the predecessor of SOCAN, and its effect on the innovative new high tech sectors of radio and sound pictures. Here is a searchable link for your convenience in English[8], and in French[9]. I have asked the Clerk to distribute copies for you. If you think of TV and Internet, rather than radio and "sound pictures", the document is, in many respects, still as fresh and relevant as it was 81 years ago.

The CAB worked very well for more than 50 years without a single full time employee or member. It was well regarded internationally. During that time, there was only one and later two competing collectives operating in Canada. Until 1988, the only collective copyright activity explicitly permitted in Canada was in the performing rights field for composers and authors. The competition between CAPAC and PROCAN, as they were known, was good for both composers and authors on the one hand and the public on the other. Today, CAPAC and PROCAN have merged to become SOCAN. Moreover, we now have three dozen or so other collectives in Canada. Together, they are generating about $500 million per annum operating in various sectors ranging from media monitoring to marching bands to blank media levies. While technology and the market place are evolving in a way that may eliminate the need for a specialized copyright tribunal someday, that day is still far away. We now probably have more collectives in Canada than in any other country and we certainly have the largest copyright tribunal staff by a factor of 500% than any other country. These facts and figures are by no means necessarily a source of

[8] https://www.scribd.com/document/329030738/1935-Parker-Report-pdf
[9] http://epe.lac-bac.gc.ca/003/008/099/003008-disclaimer.html?orig=/100/200/301/pco-bcp/commissions-ef/parker1935-fra/parker1935-fra.pdf

pride. They may be symptomatic and perhaps even causal factors in the present milieu that has brought us together today. At this time, there is widespread consensus amongst a strange mix of bedfellows that the current regime needs improvement. Almost all stakeholders seem to agree that Board proceedings take far too long and cost far too much.

The Role of the Courts

The Courts – namely the Federal Court of Appeal ("FCA") and the Supreme Court of Canada ("SCC") have done a very good job and have, indeed, played an indispensable role in correcting some of the errors that have come to light in Copyright Board decisions. The Courts have invariably moved much faster than the Board. The Courts have focused a lot of attention on the Copyright Board. In 2011, the Supreme Court of Canada took the unprecedented step of hearing five copyright cases – often called the "Pentalogy" – from the Copyright Board in two days. The ***CBC v. SODRAC*** case was heard in 2015. The Federal Court of Appeal has been very active in reviewing Copyright Board cases. It seems that virtually all the Board's contested decisions in recent years have been taken upstairs by one party or another.

However, the Board has not always reacted well to the comments from the FCA and the SCC. Indeed, it seems to have shown more or less explicit resentment at times. I mentioned earlier the comments of the former Chair about Justice Sharlow's "six turgid paragraphs". Another example is a statement by the Board in a ruling of September 19, 2012 that the SCC engaged in "findings of fact". Any experienced appellate lawyer knows that this is absolutely not what the SCC does and the comment rightly raised a lot of eyebrows.

I have every faith that the Courts will continue their good work and correct many of the problems that arise from Copyright Board cases, some of which result from choices made by the parties themselves. Nonetheless, although the courts move much more quickly than the Copyright Board, we cannot afford to wait and take our chances on how all of the problems with the Copyright Board may someday be resolved by the courts. There are things we can do almost immediately by way of regulations and in the 2017 review by way of legislation that will solve most or all of the problems that are now so apparent with the Board. That said, there are some issues that I would prefer to see left to the Courts rather than to Parliament or the bureaucrats – because the Courts are truly independent and immune from lobbying.

The Retroactivity Problem

The problem of retroactivity of the Board's decisions is a very serious one. It has issued tariffs – for example on background music – that go back six years or so from the date of issue. These tariffs can be very substantial and frequently catch small and even medium size businesses and institutions by surprise. Believe or not, most Canadians do no lay awake at night reading the Canada Gazette in order to see get advance warning of the next big Copyright Board tariff that may affect them. Fortunately, as the result of the intervention we made in the ***CBC v. SODRAC***, the issue is now on the radar of the SCC, at least by way of a footnote. We had reminded the SCC that it had said back in 1954 in the case of ***Maple Leaf Broadcasting v. CAPAC*** [1954] SCR 624[10] where the issue arose and the retroactive period was only a few weeks that "I think the better view is that it is an implied duty of the Board to proceed with all possible expedition …" That was when the retroactive issue only involved a few weeks or month at the beginning of a calendar year.

The Current State of the Board

There is much of which the Board can be proud. It staff are very dedicated, polite, courteous, competent and knowledgeable. Some of them have served for a long time. There is considerable institutional memory at the Board concerning its activities since 1989.

However, there are a number of clearly problematic aspects of what it happening – or not happening – at the Copyright Board:

For example, the Board:

- Takes often more than four years to hold a hearing after a proposed tariff is filed
- Takes often more than two years after a hearing to render a decision
- Issues decisions that are retroactive even by six years or so
- Has allowed a small cadre of the same counsel and the perennial experts (some of which "experts" have insufficient independence from their clients), to make simple cases very lengthy and protracted

[10] http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7547/index.do

- Has gone from one extreme of arguably very excessive tariffs and expensive hearings that banks were happy to finance to lower than expected tariffs that clearly cannot even cover the legal costs of obtaining them
- Has been frequently overruled by the FCA and SCC
- Has, for whatever reasons, reached the point where one of its most important cases ever - the Access Copyright Post-Secondary Tariff, which is worth potentially tens of millions of dollars and could profoundly and negatively affect education and innovation and education in Canada - is proceeding virtually by default. This may be in large part because the Board has had apparently failed to prevent the interrogatory process from getting completely out of hand and allowing the main institutional objectors to spend at least $3,000,000 that we know about[11] before their unexplained and inexplicable withdrawal and surrender mid-way through the process. We still do not know the actual reason why these organizations withdrew and what the fallout from this withdrawal may be.
- Is still deliberating whether the 2012 legislation and a 2012 Supreme Court case do or do not result in a new "making available" right, a threshold legal point in a much larger proceeding that could have and arguably should have been referred straight to the Federal Court of Appeal, where it will invariably end up anyway years later than necessary.

Basic Board Numbers

You will hear a lot about the apparently sophisticated statistical analysis in a commissioned study by Prof. Jeremy de Beer published in 2015 concerning "Canada's Copyright Tariff-Setting Process".[12] I have shown in detail on my blog,[13] copies of which I have provided for you, how Prof. de Beer's methodology of "dissection" of tariffs into component parts and into separate years "unfortunately obfuscates the actual numbers that really matter and exaggerates the ones that do not". His study is disappointing and, in my view, not only contributes nothing useful to this discussion but actually serves to create the impression that the Board is much more productive than it really is. His study calls for still more data and more statistical analysis. However, this is clearly not needed. Two or three events per year do not require, or even justify,

[11] http://excesscopyright.blogspot.ca/2016/02/access-copyright-and-absent.html
[12] http://jeremydebeer.ca/canadas-copyright-tariff-setting-process/
[13] http://excesscopyright.blogspot.ca/2015/06/the-copyright-board-can-we-move-on-with.html

expensive statistical analysis. The situation just requires a little common sense and the willingness to frankly evaluate the obvious results.

Here are the numbers that really matter, which I have spelled out, and which have not been and indeed cannot be, refuted. The Board:

- Issues only two or three significant substantive decisions a year.
- Holds only two or three hearings per year
- Certifies only 4.9 actual "tariffs" per year according its own pre-de Beer taxonomy – notwithstanding the frankly absurd suggestion that dissection of these tariffs into parts and years would suggest 70 tariffs per year, as Prof. de Beer and now the Board maintain
- Takes typically four years or more to hold a contested hearing after a tariff is filed
- Takes typically two years or more to render a decision after the hearing is over.

How Does The Copyright Board Compare to other Tribunals and Courts?

The Board is unusual if not unique in many respects. For example:

- Virtually all Courts and tribunals normally mange to hold a first instance hearing with all the evidence within two years a after a case is started.
- Virtually all other courts and tribunals in Canada render decisions within six months or sooner after a hearing. As I have pointed out before, the Canadian Judicial Council has recently stated that "judges should render decisions within six months of hearing a case, except in very complex matters or where there are special circumstances."[14] It is difficult to find, if not impossible, to find any examples of cases at the Board that would warrant an exception to this benchmark. Two years or more of pendency is now the norm at the Board. The delay is actually getting worse rather than better. *Even the recently retired Chairman stated almost 10 years ago that the delay in decision rendering was excessive. This was at a time when parties were grumbling about mere 18 month delays. In a published speech from 2006, the now retired Chairman of the Copyright Board (William Vancise) stated*[15] *shortly after his appointment:*

[14] https://www.cjc-ccm.gc.ca/english/news_en.asp?selMenu=news_2014_1021_en.asp
[15] http://www.cb-cda.gc.ca/about-apropos/speeches-discours/20060823.pdf

> *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.* (emphasis added)

- This makes Board decisions typically retroactive by six years or so, which is unfair and untenable to those who are liable to pay for these tariffs. As I have noted, this was a problem raised at the Supreme Court of Canada in 1954 and is back on that Court's radar screen.

The Regulatory Capture Issue

Specialized tribunals and even specialized courts are potentially vulnerable to "regulatory capture". They tend to see the same executives, lawyers and experts repeatedly. They go to conferences either as speakers or to learn, and this is not necessary a bad thing. This is less of a problem with generalist courts, because superior court judges have great independence and they are tenured until age 75. They do not need to become specialized in any particular field and they do not see the same faces over and over again.

In one inappropriate, shocking and indeed blatantly disgraceful occurrence last year, Music Canada apparently felt that it was entitled to lobby the new Chairman[16] and organized an "astroturf" email campaign to him concerning a decision that Music Canada did not like. As I said on my blog:

> *"The Copyright Board is an independent quasi-judicial tribunal. Parties make their case. If they don't like the result, they can seek judicial review. It is NEVER acceptable to "lobby" such a tribunal in any way, and especially reprehensible to write lobbying letters to its Chair. This is an insult to the Board and its distinguished new Chair, Justice Robert A. Blair."*

The Board's recently retired Chair has publicly and rightly condemned this action as "completely unacceptable and totally inappropriate".[17] This action was all the more remarkable because Music Canada, which is hardly devoid of smart and experienced lawyers on its staff, somehow

[16] http://excesscopyright.blogspot.ca/2015/06/shameful-behaviour-of-music-canada.html
[17] http://cb-cda.gc.ca/about-apropos/speeches-discours/30052016-en2.pdf

actually felt that it was entitled to do what it did in the case of the Board. However, I am sure that even Music Canada would not organize a letter writing campaign to a newly appointed justice of the FCA or the SCC about how they should deal with copyright issues. Hopefully, we will never see another effort such as that of Music Canada. However, we may perhaps need to find a way to make sure that all stakeholders at the Copyright Board, even Music Canada, will always treat it with the same respect and give it the same independent status, which obviously includes the immunity from lobbying and improper communication to which any judicial or quasi-judicial body is entitled in Canada. I will make some suggestions below.

The Copyright Board of Canada may, however, have succumbed to some extent to a much more subtle form of regulatory capture. I am absolutely not suggesting that there is any aspect of the "revolving door" or other obvious type of problem that we see too often in the USA, for example. The Board has been apparently become convinced by a small and skilful group of very experienced parties, their counsel and sometimes less than sufficiently independent expert witnesses that there is something uniquely erudite, complicated, and extraordinarily important and quasi-mystical about copyright law that requires hearings of sometimes great length, complexity, and long pendency of decision-making. Frankly, that is simply not the case.

The Competition Tribunal regularly hears cases that are far more complicated both factually and legally and involve much more money than anything that the Copyright Board is ever dealt with. In recent times, the Competition Tribunal has disposed of immensely important cases involving billions of dollars with respect to credit card transactions and real estate listings in less than three years and five years respectively from start to finish. The Federal Court of Canada hears dozens of cases a year involving the Patented Medicines Notice of Compliance ("PMNOC") regime. These are worth sometimes hundreds of millions of dollars, involve numerous experts and invariably complex science in which few if any judges are educated, and are dealt with from beginning to end in less than 24 months because the law says that they must be. Nothing focuses the mind like a law or regulation that sets a firm deadline.

Despite what you may hear, the Board rarely deals with complicated legal issues. When these issues arise, the invariably find their way to the Federal Court of Appeal. Sometimes the Board is

upheld, for example with respect to provincial crown immunity.[18] Other times, it is not, for example with respect whether levies can apply to devices in contrast to media and, this case, had to be told so twice.[19] Sometimes, it dodges and delays a question that might best be referred to the Federal Court of Appeal – such Prof. Katz's attempt to trigger a reference as to whether a reprography tariff can be mandatory in the case of universities. Perhaps the current never-ending deliberation on whether there is now a "making available" right should have been referred directly to the Federal Court of Appeal, who would have disposed of it in a year or so in all likelihood.

Mostly, the Board crunches numbers and, whether in spite of or because of its sometimes complex arithmetic, use of proxies, and other supposedly sound economic techniques, comes up with a figure somewhere close to the middle of the extremes suggested by the parties. This usually takes six years of more. The actual number or the method of getting to it will rarely, if ever, be reviewable because the FCA will usually defer to this as "fact finding" within the Board's presumed expertise. However, the FCA and the SCC can and will reverse where there is a "misapplication" of legal principles to what would normally be a matter of fact-finding.[20]

The Board has recently conducted its own internal review exercise[21] to which it invited "the usual suspects" consisting of a select group of some the counsel who have regularly appeared before it. I and some others who might have been able to help were not invited. Most of these very experienced and capable people reached conclusions that would have made proceedings even longer and more expensive at the Board. As I replied to the Board in that process, "The status quo may be working very well for some of them and/or their clients. However, it is not working very well for many stakeholders or the general public." Indeed, a strange group of bedfellows was unhappy about the result of this consultation. That is very likely a major reason why we are here today.

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[18] ***Manitoba v. Canadian Copyright Licensing Agency (Access Copyright***), 2013 FCA 91 (CanLII), <http://canlii.ca/t/fwvf5>

[19] ***Apple Canada Inc. v. Canadian Private Copying Collective,*** 2008 FCA 9 (CanLII), <http://canlii.ca/t/1vcx1>

[20] ***Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright),*** [2012] 2 SCR 345, 2012 SCC 37 (CanLII), <http://canlii.ca/t/fs0v5> para. 37

[21] http://cb-cda.gc.ca/about-apropos/pdf/discussion-paper.pdf

What do We Need?

We need a system that will set timelines, deadlines, and rules of procedure just like virtually all other courts and tribunals in this country. There is absolutely nothing special about the Copyright Board or copyright law to justify the absence of regulations explicitly establishing efficient procedures, deadlines, and the other basis norms that govern virtually all other courts and tribunals in Canada. The simple norm is that cases should be heard within one or two years at the most from the time of filing and decided no later than six months after the hearing. Likewise, it is the norm that a party seeking a judicial or quasi-judicial remedy should state at the very outset the basic factual and legal basis of its case, rather than forcing a usually unwilling objector into extremely expensive and intrusive interrogatory "fishing expeditions" to figure out whether the collective even has a case, let alone what the case is all about. Speaking of fishing expeditions, we need a board that will know when to say no when collectives go fishing for clearly and obviously irrelevant and intrusive financial data about how much and objector might be able to pay. That will rarely if ever be relevant from a legal or economic standpoint and has more than once driven well-intentioned objectors to simply walk away, which may have been the intended result all the way along. Courts generally do not allow discovery to become an endless fishing expedition. So-called expert tribunals should be even more vigilant about such excess tactics.

We need a Copyright Board that follows certain minimum standards when it comes to the admissibility of evidence. It should not hear any evidence from so-called experts who are economically dependent time after time on the party that hires them and who, in some cases, serve more as advocates than experts. In some cases, the Board has even treated testimony from someone effectively in a management position of a collective as expert testimony. Much, if not most, of the so-called expert testimony that the Board spends so much time on hearing and deliberating upon would never see the light of day in a normal court of law. The Board is also extremely tolerant of hearsay evidence, as well as other unreliable and untested evidence. The Board has allowed evidence in the form of industry reports that it treats as confidential and which are not presented by anyone who could be cross-examined. This cannot be justified by a need for informality and efficiency. Rather, it is conducive to a waste of time, lack of transparency and unpredictability in terms of reliable results. Even allowing for the fact that

tribunals are not as strictly bound by the rules of evidence as superior courts, the Board should not be permitted to depart too far from the normal rules of gravity.

We need a Board that knows when to say "no" to unwarranted claims of confidentiality. We have a presumption of openness in our judicial system. Tariffs are by definition matters that affect the public. The Board issued a refreshing ruling[22] recently in this respect, but it has all too often done otherwise in the past.

We need a Board that knows when to say "no" more firmly to a collective that has not presented an adequate case to warrant the imposition of a tariff. To its credit, the Board has done so on at least one occasion in which I successfully argued to support the Board's decision in the case of ***SOCAN V Bell***[23], where SOCAN presented virtually no evidence to justify a particularly vague tariff on "other sites" on the Internet. However, where a collective cannot demonstrate that it has a sufficient share of the necessary repertoire in his chain of title or the collective administration makes insufficient economic sense other than for the lawyers and managers of the collectives, the Board should be able to refuse to certify a tariff that would be a deadweight economic loss to all concerned other than a handful of lawyers and executives.

We need a Board that is willing and able to look out for the interests of actual creators, in contrast to those of the managers and lawyers who act for collectives. I am not suggesting that this is what the Board has intended to do. However, the Board has almost invariably refused to get involved in the internal workings or affairs of collectives and has resisted any attempts to expose average or median royalties paid to members. It did come to the rescue on one occasion. In 1994, it told SOCAN that its proposed concert tariff was too low to be in the interests of its members:

> *The Board hopes, however, that SOCAN will give due consideration to filing its proposed concert tariff for 1995 at a rate higher than that in the SOCAN/CAMP agreement. The*

[22] Access Copyright, Post-Secondary Educational Institutions Tariff, 2011-2017 / Access Copyright, Tarif pour les établissements d'enseignement postsecondaires, 2011-2017 [CB-CDA 2016-087] http://cb-cda.gc.ca/avis-notice/2016/CB-CDA-2016-087.pdf

[23] Society of Composers, Authors and Music Publishers of Canada v. Bell Canada, 2010 FCA 139 (CanLII), <http://canlii.ca/t/29z9n>

> *Board is of the view that unless this course is followed, the interests of SOCAN's members will not be properly served.*[24]

To the extent that I am anecdotally or actually aware of such data, I can tell you that many if not most creator members of the best-known collectives in Canada are lucky to see $200 a year from their collective. That is about the same as or even less than the average hourly rate of the most junior lawyers at the law firms that work for collectives. Even if this figure could magically be doubled, it would not enable anyone to quit their day job. At some point, hard questions need to be asked about whether collective activity should give rise to tariffs and tariff hearings, if the only tangible reward is for the executives, lawyers and experts for the collectives and a handful of outlier successful creators members at the extreme of the bell curve – who are already likely quite rich anyway from non-collective copyright related returns.

We need a Board that, if it wishes to be regarded by the reviewing courts and its stakeholders as an "expert" Tribunal, must consist of expert members. This is clearly a sensitive and delicate issue in a small country such as Canada where there are very few real experts in copyright law, much less with related expertise in administrative or competition law or economics, and who might be reasonably regarded as independent in their views. The notion of presumed expertise is fundamental to the usual doctrine of deference with respect to fact-finding and even many legal conclusions reached by so-called expert tribunals. However, when the expertise may be lacking, the reviewing courts may find polite ways to avoid what would normally be reflexive deference.

We need to Board that encourages efficient participation and representation of the public interest. This would presumably require collectives to pay the reasonable costs of public interest objectors. That is hardly a radical suggestion. It has been in place for years at CRTC.

We need a board that does not allow retired members to continue to deliberate potentially for years on pending decisions. Even the Supreme Court of Canada requires retired judges to finish up their work within six months of leaving. I do not know whether or how retired Board members are paid for these post-retirement deliberations. However, the real issue is that there is no need for such deliberations to last beyond six months.

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[24] 1991-13, 1992-PM/EM-1 and 1994 p. 418. http://cb-cda.gc.ca/decisions/m12081 994-b.pdf.

How Do We Address These Needs?

Just about everything I have mentioned so far could be dealt with by regulations implemented pursuant to the existing statute, as authorized in Section 66.91 of the ***Copyright Act***.[25] As the Honourable Senators know very well, regulations are much easier to implement than legislation. The process requires consultation, but above all requires decisiveness on the part of Ministers and officials. We have seen the regulatory process used wisely by the previous government in 2012 to exclude microSD's and other similar devices that were never intended to be part of the music industry's levy scheme. Regulations need not await the 2017 review. The process could, in principle, begin next week. If there is a will, there is certainly a way.

In this respect, I must say frankly that in my opinion the recent study commissioned by the Government from Prof. Paul Daly[26] is not sufficiently helpful. His recommendations are essentially these:

> *1. Proposes that the Board should be able to award costs. This suggestion was dismissed by retired Chairman, William Vancise, who noted that, during his tenure, he had not observed any egregious behavior on the part of parties or their counsel and that he could see no reason for a cost award regime. It would seem obvious that collectives never get what they ask for – and this alone would hardly seem to be the basis of awarding costs. Prof. Daly provides nothing specific on this inherently controversial suggestion.*
>
> *2. Proposes a number of fairly obvious recommendations about case management, to be dealt with through regulations proposed by the Board itself and approved by the Governor in Council including the early exchange of Statements of Case. The report stops short of suggesting or even considering regulations directly from the Governor in Council that could be far more potent and effective.*
>
> *3. Recommends that the current Directive on Procedure be retained.*
>
> *4. Recommends that "the Copyright Board should continue to attempt to effect culture change through informal changes – including a 'Best Practices' manual for (a)*

[25] See Appendix "A"
[26] https://www.scribd.com/doc/316992594/Daly-Paper-SSRN-id2782487

conducting discovery, (b) introducing expert evidence and (c) conducting a hearing – and persuasion"

5. Recommends further study "with a view to developing a metric which would propose benchmarks for the time periods within which regulatory decisions ought to be rendered"

It is obvious that the current Directive on Procedure is inadequate and would likely be inconsistent with the kind of regulations that would be required. So, why should it be retained? It is not clear why Prof. Daly stops short of suggesting Governor in Council regulations imposed by the Minister under the existing authority of s. 66.91. Moreover, the last thing we need is another consultant's study that would tell us what we already know. We know what the benchmarks are. They are there in plain sight from the Courts and comparable tribunals, such as the Competition Tribunal. It is time to get specific – and not to pitch for another study.

Do We Need Some "Creative Destruction"?

However, there are even more fundamental issues that may require legislative attention and perhaps even some "creative destruction". This may be the case, if one believes that the culture of the Copyright Board is beyond repair from a regulatory capture standpoint and if one concludes that the Board lacks either the will or the jurisdictional basis to fix what appears to be broken.

We should look carefully at the legislation and rules governing Canada's Competition Tribunal and ask whether that body could serve as a model or provide useful lessons for a reconstituted Copyright Board. The Competition Tribunal has a smaller budget and staff than the Copyright Board. However, it deals with the most complicated factual and legal issues one can readily imagine including credit card charges[27] and real estate listings[28], in less than three years and five years respectively from start to finish. The real estate listings case even had a substantial copyright component. The Competition Tribunal has a much busier docket than the Copyright Board. With its output of only two or three substantial substantive decisions and hearings a year, the Copyright Board can hardly be said to be busy.

[27] http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=333
[28] http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=347

It is worth looking at some hard data comparing the Copyright Board and the Competition Tribunal:

First is a brief comparison of key numbers as of 2014.

Tribunal/ Applicable Regulations or Rules re Procedure	Mandate/# of Significant & Substantive Decisions per year	# of Members	# of Staff FTE	Budget (i.e. net cost of operations)
Copyright Board/No procedural regulations in place other than Board's informal and very general "Directive on Procedure"	Setting Copyright Tariffs and Levies pursuant to Copyright Act/ app. 3 per year. (S. 77 "Unlocatable" decisions cannot be considered as "significant" and have never involved an actual hearing)	Up to 5 full time. Currently 1 full time + 1 part time. Chair who must be a sitting or retired judge.	16	3,514,185 (2013-2014)
Competition Tribunal/ Competition Tribunal Rules (SOR/2008-141)	Dealing with wide range of applications arising from *Competition Act*/ app. 10 per year since 2000.	Up to six judicial members from Federal Court and not more than eight lay members	9	3,184,043 (2014)

There is a long-standing symbiotic relationship between competition (or antitrust as the Americans call it) law and copyright collectives. They are cognate cousins, as it were. In the USA, collectives have essentially been regulated by ongoing judicial oversight pursuant to "consent decrees" for more than eight decades.

However, I am nothing if not realistic. As much as it might make sense to merge the Copyright Tribunal and the Competition Tribunal, there would be endless and excruciating protest from Canada's cultural sector. In the USA, the entertainment industry is regarded simply as that – an

industry. In Canada, it is all about telling our stories and our national identity and nobody wants to hear the words antirust and culture in the same sentence, or even the same paragraph or book, much less in the same hearing room.

The most compelling model for a reconstituted free standing Copyright Board would be one that is modelled after Canada`s Competition Tribunal. That body has its own ***Competition Tribunal Act***[29] and ***Competition Tribunal Rules***[30] dealing with procedures, evidence, costs and other basis matters. This model is attractive because:

- It is based upon a panel of available judges from Canada`s Federal Court
- These judges have all the independence of Federal Court judges
- The lay member must have appropriate expertise
- The cognate nature of competition and copyright law suggest that a model that works for the former would work for the latter.
- This would ensure a higher degree of immunity from regulatory capture, not to mention the kind of efficiency and productivity that we see from the Competition Tribunal.

Moreover, there are lessons to be learned from studying considering the American model of "consent decrees" oversight by truly independent and expert federal judges, which date back to 1934. Since the Canadian Copyright Board was born out of concern about "super monopolies" expressed by the late great Judge Parker at around the same time in 1935, the possible adaptation of a "consent decree" model in Canada under the aegis of the Federal Court is something that merits serious exploration.

The USA also has a small and apparently very effective Copyright Royalty Board ("CRB") with a specialized jurisdiction and statutorily imposed deadlines, which it meets because it must do so. This three person expert tribunal has a staff of only three persons.

Here are its main aspects:

- Copyright Royalty Board ("CRB") has very specific jurisdiction and mandated procedures

[29] http://laws-lois.justice.gc.ca/eng/acts/C-36.4/
[30] http://laws.justice.gc.ca/eng/regulations/SOR-2008-141/index.html

- Consists of three (3) full time Copyright Royalty Judges (limited terms) 17 USC § 801& 802
- Mandated expertise in economics and copyright law
- Members must be lawyers
- Staff of three (3) to support (17 USC § 802)
- "Hortatory" specification of pendency limit of 11 months 17 USC §803(c)(1) & 15 days from expiration of a current statutory rate & terms
- Appeal to United States Court of Appeals for the District of Columbia Circuit 17 USC §803(d)(1)

Perhaps we can learn some lessons from the CRB, one who whose members made an excellent contribution to the recent ALAI conference on May 25, 2016.

Does the Board Need More Resources?

As the great architect Ludwig Mies van der Rohe said, "Less is more". As Benjamin Franklin said, "if you want something done, ask a busy person".[31]

Clichés aside, the simple answer is "no". Moreover, the complicated answer is the same. "No".

I have no doubt that you will hear from the Board and from some of its supporters that all that is needed is more resources and that, if so provided, happy days will be here again. However, that defies logic and experience. Even one of the music industry regular experts at the Board, Prof. George Barker from Australia, suggested at the recent ALAI conference rather frankly that calls for greater resources should be viewed in light of the inherent self-interest of every government institution and those who manage it to call for more resources

The Board already has more than 10% of the budget of Supreme Court of Canada, which adjudicates 80 or so of the most complex and important cases by definition in Canada each year, and hears about 600 or so leave applications. As I said, the Board has a bigger budget and more FTEs than the Competition Tribunal, or its counterpart Copyright Royalty Board in the United

[31] http://izquotes.com/quote/328251

States. It spends a lot of money on outside contracts, for example "to obtain legal advice regarding an access to information request" and for "temporary help for a legal advisor specialized in copyright for the office of the Copyright Board's Vice-Chairman and Chief Executive Officer"[32], to "rent quality art work"[33] and temporary help and outside management consulting for "maintenance and updates of the Copyright Board's website"[34].

What it needs above all is prescribed deadlines to get its job done. That is how other efficient tribunals and courts function. This is not radical and is not rocket science. What is truly radical and unsupportable is that there is something mystical about copyright law that puts the Copyright Board above and beyond the basic principles of sound administrative law practice and procedure.

By the way, the Board's insatiable desire for new resources raises legal in additional to financial questions. There is a fundamental axiom of administrative law that "S/He who hears must decide". The Board cannot go on hiring economists and lawyers to do the work that members should be doing without this maxim eventually being tested. The members are hired and paid to hear and decide cases. The staff is there to help. With the best copyright lawyers in Canada presenting cases to the Board, one wonders why the Board needs more and more staff to understand what the cases are all about and to do research behind the scenes.

In the Federal Court, judges are expected to hear and rule on dozens of matters a year. These may include major intellectual property, admiralty, land claims, or other federal court matters involving trials or hearings, not to mention various motions and many immigration matters. Naturally, there is immigration matter are very important to those involved. The judges are expected to issue their judgments – which are often long and learned – in three months or so and no less than six months. They have only one clerk – usually fresh out of law school. The Board has four full time experienced lawyers on staff and has apparently recently engaged a part time counsel from April 1. 2016 to March 31, 017 "for temporary help for a legal advisor specialized in copyright for the office of the Copyright Board's Vice-Chairman and Chief Executive Officer"[35], not to mention another prominent outside counsel to deal with ATIP issues.

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[32] http://cb-cda.gc.ca/about-apropos/disclosure-divulgation/contracts-contrats/2016-2017-1-e.html
[33] http://cb-cda.gc.ca/about-apropos/disclosure-divulgation/contracts-contrats/2015-2016-1-e.html
[34] http://cb-cda.gc.ca/about-apropos/disclosure-divulgation/contracts-contrats/2014-2015-3-e.html
[35] http://cb-cda.gc.ca/about-apropos/disclosure-divulgation/contracts-contrats/2016-2017-1-e.html

The Board members need to render their decisions promptly and to take ownership of writing these decisions. That is their job – not that of their staff.

Reasons for Optimism?

There are some signs for cause for optimism at the Board. The quality of its decisions from a legal standpoint seems to be getting better. The pendulum has swung from sometimes excessively generous tariffs beyond anyone's expectations that were usually bankable assets from their very conception to more realistic recent tariffs that may not always pay for the costs of the high-priced lawyers and experts that the collective retains. If these recent decisions are upheld, some of the problems we are concerned about may solve themselves, since collectives may refrain from filing essentially speculative tariffs that take up too much of the Board's time and the objectors' resources. If nothing else, this pendulum swing has created a very strange mix of bedfellows that are united in the belief that the Board, as we know it, requires attention.

The Board's new Chairman, Justice Robert Blair from the Ontario Court of Appeal, has impressive credentials and was instrumental in the widely praised reform of the Ontario court system in the 1990s that served as a model for reform of the Federal Court system. I would like to think – though I have no basis for knowledge – that this was a factor in his appointment.

However, overcoming the inertia and resistance to change on the part of certain copyright collectives and their counsel not to mention the existing culture of the Board may prove to be a more formidable task in some respects than he faced before. I obviously do not speak for him and indeed have never met him. However, if he wants to make some positive changes, he may welcome and maybe even need your help.

Tribunal Machinery

An attempt to deal with the "machinery" aspect of the Copyright Board, as the Privy Council Office would call it, was included in Bill C-93, a budget implementation bill that suffered an historical defeat in the Senate in 1993 for reasons not related to the circumstances concerning the proposed new Intellectual Property Tribunal.[36] Bill C-93 would have created an Intellectual Property Tribunal that would have merged the Copyright Board with the Trade-marks

[36] http://www.albertasenator.ca/flashblocks/data/BT%20Govt%20Agencies/Debates%20Bill%20C-93.pdf and http://www.albertasenator.ca/flashblocks/data/BT%20Govt%20Agencies/GlobeandMail18June1993.pdf

Opposition board, as a first attempt to implement an Intellectual Property Tribunal as suggested in the Henderson Report of 1991. I was closely involved with the late Gordon F. Henderson, C.C., Q.C. in the preparation of that report and the progress of that bill. This was his last major project. He died shortly after the Bill was defeated.

The first CAB lasted for 53 years. The present Copyright Board has survived for about 27 years. It may be time re-examine and reimagine the "machinery" aspect. In addition to making a better board, it may be possible to save a lot of taxpayers' money.

What Can be Done by Regulation and What May Require Legislation?

A great deal can be done by Governor in Council Regulations pursuant to s. 66.91 of the legislation that does not require the attention of Parliament. The Board itself can propose potentially useful regulations that could be approved by the Governor in Council pursuant to s. 66. 6(1) of the ***Copyright Act.*** However, the Board has shown no interest in this procedure, though it has been available for many years. The more likely path to success would be the implementation of regulations by the Governor in Council pursuant to s. 66.91 of the ***Copyright Act.*** I have provided both these sections in Appendix "A" of this submission.

In the longer term, legislation may be required for costs awards, "machinery" issues such as constituting the Board in a manner similar to the Competition Tribunal, and possible adoption of a "consent decree" mechanism such as we have seen in the USA for 80 years or so.

Here is summary of these possibilities:

Immediate improvement that could be undertaken though regulations not requiring 2017 review pursuant to existing authority under ss. 66.6 and 66.91 of the ***Copyright Act*** could include:

1. Procedural steps in Board hearings, e.g. requirement for "pleadings"
2. Threshold criteria for tariff certification having regard to demonstration of sufficient repertoire and membership in the sector and adequacy of remuneration to creator members
3. Timelines applicable to parties and the Board itself for procedural steps, holding of hearing and rendering of decisions
4. Requirement for case management and procedures

5. Interrogatory/discovery procedures, including scope of interrogatories and limitation on number of parties required to submit responses when represented by an association
6. Expert evidence
7. Interventions
8. Interim orders
9. Minimum period of tariff duration
10. Maximum period of tariff retroactivity

Measures that would require legislation and 2017 study could include:

1. Cost awards, including cost recovery for public interest objectors or intervenors
2. "Machinery" issues, such as reconstituting the Board in a manner similar to the Competition Tribunal, with a panel of Federal Court judges and part time lay members with expertise in copyright law and economics
3. The adoption of an ongoing "consent decree" model in appropriate cases based upon the American experience

The Solution is Very Simple

- Less resources and more regulation
- Use existing regulation making power now to fix now what is already broken.
- Use the 2017 review to look at longer range "machinery" and other aspects that require legislation

The Role for This Committee?

This is where Honourable Senators can play a key role. The bad news is that you have heard a lot about problems with the Copyright Board of Canada. The positive opportunity is that you will send a message to the House of Commons and the Ministers, that reform of the Copyright Board should be **the** top priority for the 2017 review. That is not to say that the implementation of regulations should be delayed. Rather, it should be loud and clear that some regulations are needed immediately and legislative reform may be advisable to complete the task. You are going to be lobbied long and hard with a lot of disingenuous and even misleading suggestions that the current *Copyright Act* and jurisprudence from the Supreme Court of Canada are somehow ill-conceived and even out of sync with international law. That is absolutely false. This highly

orchestrated lobbying campaign that has already begun to unfold should not serve as a distraction from the main issue that faces all stakeholders in the Canadian copyright milieu

Indeed, at the present time, Canada's copyright legislation, though far from perfect, is probably the best and most balanced copyright legislation in the world. It is the product of three waves of legislation that took place in 1988, 1997 and 2012 under governments led by both major parties. To everyone's credit, the copyright issue has remained non-partisan. This is a tremendous opportunity for this illustrious Committee to continue its interest in the copyright file and to remain seized of it in a constructive way – as we have seen with Senate Committees in the USA that have played a key and ongoing role in copyright law and have developed much expertise.

I hope that you will agree with me that Canada's Copyright Board could benefit from some tough love and send the appropriate message to the House of Commons and the Ministers so that they can do their part to make this once admired and emulated institution fully functional, efficient and exemplary again.

I thank you for your attention and I will be glad to take any questions.

Howard Knopf

APPENDIX "A"

Regulations 66.6 (1) The Board may, with the approval of the Governor in Council, make regulations governing (a) the practice and procedure in respect of the Board's hearings, including the number of members of the Board that constitutes a quorum; (b) the time and manner in which applications and notices must be made or given; (c) the establishment of forms for the making or giving of applications and notices; and (d) the carrying out of the work of the Board, the management of its internal affairs and the duties of its officers and employees. Marginal note:Publication of proposed regulations (2) A copy of each regulation that the Board proposes to make under subsection (1) shall be published in the Canada Gazette at least sixty days before the proposed effective date thereof and a reasonable opportunity shall be given to interested persons to make representations with respect thereto. Marginal note:Exception (3) No proposed regulation that has been published pursuant to subsection (2) need again be published under that subsection, whether or not it has been altered as a result of representations made with respect thereto. R.S., 1985, c. 10 (4th Supp.), s. 12.	Règlement 66.6 (1) La Commission peut, avec l'approbation du gouverneur en conseil, prendre des règlements régissant : a) la pratique et la procédure des audiences, ainsi que le quorum; b) les modalités, y compris les délais, d'établissement des demandes et les avis à donner; c) l'établissement de formules pour les demandes et les avis; d) de façon générale, l'exercice de ses activités, la gestion de ses affaires et les fonctions de son personnel. Note marginale :Publication des projets de règlement (2) Les projets de règlements d'application du paragraphe (1) sont publiés dans la Gazette du Canada au moins soixante jours avant la date prévue pour leur entrée en vigueur, les intéressés se voyant accorder la possibilité de présenter à la Commission leurs observations à cet égard. Note marginale :Exception (3) Ne sont pas visés les projets de règlement déjà publiés dans les conditions prévues au paragraphe (2), même s'ils ont été modifiés à la suite des observations. L.R. (1985), ch. 10 (4e suppl.), art. 12.
Regulations **66.91** The Governor in Council may make regulations issuing policy directions to the Board and establishing general criteria to be applied by the Board or to which the Board	**Règlements** **66.91** Le gouverneur en conseil peut, par règlement, donner des instructions sur des questions d'orientation à la Commission et établir les critères de nature générale à suivre

must have regard • **(a)** in establishing fair and equitable royalties to be paid pursuant to this Act; and • **(b)** in rendering its decisions in any matter within its jurisdiction. • 1997, c. 24, s. 44.	par celle-ci, ou à prendre en compte par celle-ci, dans les domaines suivants : • **a)** la fixation des redevances justes et équitables à verser aux termes de la présente loi; • **b)** le prononcé des décisions de la Commission dans les cas qui relèvent de la compétence de celle-ci. • 1997, ch. 24, art. 44.

APPENDIX "B"

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Howard P. Knopf is Counsel with Macera & Jarzyna, LLP in Ottawa, Canada. He has worked in government and the private sector mainly in the areas of copyright, trademarks, cyberlaw, competition and related issues. He has been the Chairman of the Copyright Policy Committee of the Canadian Bar Association and was advisor to the Law Commission of Canada on security interests in intellectual property. He edited the resulting book entitled Security Interests in Intellectual Property. He spent over a decade in the Canadian federal government, with senior responsibility for:

- major copyright revision
- serving as Head of Delegation to several World Intellectual Property Organization ("WIPO") meetings in Geneva
- launching Canada's first and most important abuse of dominance case involving intellectual property law.

He has frequently lectured at the invitation of the judiciary, government, law schools, continuing legal education fora, the Law Society of Upper Canada, WIPO and various NGO's including at The Bellagio Series on Development and Intellectual Property Policy at the Rockefeller Foundation's Bellagio Study and Conference Center on Lake Como in Northern Italy, 24 - 28 October 2005, and the Couchiching Institute on Public Affairs. He has published extensively, both as author and editor. Since 2000, he has been a member of the faculty of the annual Fordham International Intellectual Property Law and Policy Conference in New York. He has been an adjunct law lecturer at Queen's University and was cited by Canadian Lawyer magazine as being one of Queen's law faculty's "best and brightest."

He has appeared as counsel before the Copyright Board, the Canadian Artists and Producers Professional Relations Tribunal, the Federal Court, the Federal Court of Appeal and the Supreme Court of Canada. He has served as a panelist in cases involving the WIPO Uniform Domain Name Dispute Resolution Policy (UDRP). He has been an advisor on policy issues to the Government of Canada and WIPO.

His litigation successes include important decisions in the Federal Court, the Federal Court of Appeal and the Supreme Court of Canada on issues involving file sharing, privacy, private

copying levies, parallel importation, fair dealing and whether Copyright Board tariffs are mandatory. He was co-author of an amicus brief in the United States Supreme Court in the Grokster case. He has appeared several times on various issues before Parliamentary and Senate committees in Canada.

His arts background includes a Master's degree from the Juilliard School of Music in New York, and a career before becoming a lawyer as a professional clarinetist (solo, chamber and orchestral musician) in Canada, the USA, and Europe from 1969 to 1975. He was a frequent recording artist for the CBC as a soloist, chamber musician and in studio sessions. He was co-founder of the York Winds. He was a Teaching Assistant at the Juilliard School of Music, New York, 1970-1971 and a part time instructor in music at the University of Toronto and York University, 1972-1975.

His community and civic activities include:

- Member of the Board of Directors of the Couchiching Institute on Public Affairs 2010 – 2013 Organizer of Couchiching Ottawa Round Table evenings 2010 – 2013, which have featured current and retired senior members of the public service, academia, the judiciary, non-governmental organizations, the Senate, and the President of the CBC.
- Member of the Board of Directors of Canadian Music Centre, 2000 - 2003
- Member of Board of Director of the Canadian Musical Heritage Society 1998 - 2000
- Advisory Panel member of Planning Committee for National Arts Centre Human Rights Festival/Symposium, 1997 - 1998
- Member of the jury for the SOCAN Foundation Gordon F. Henderson Copyright Competition, 1993 to 1996
- Member of the Board of Directors of Espace Musique, Ottawa, 1991 - 1993
- Member of the Board of Directors of Comus Music Theatre, Toronto, 1982 - 1983
- Member of the Council of the Faculty of Music, University of Toronto, 1982- 1983

He has written numerous op-eds for national media and appeared many times on national media on issues related to intellectual property law. He maintains the most widely read Canadian copyright law blog at *www.excesscopyright.blogspot.com* and is often quoted in Canadian and foreign print and digital media.

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