

## 53. Refining and Remaking the Copyright Board of Canada

The Copyright Board plays an important role for both rights holders and users of copyright-protected works. In its role, the Board attempts to set tariff rates that are reflective of the value of the protected use(s) under its mandate, and create marketplace certainty for all stakeholders.

The Board is a government-mandated economic regulatory body empowered to establish the amount of royalties to be paid for the use of copyrighted works in those cases where the licensing of such works is entrusted by the owner of the copyright to a collective society appointed to administer the collection of royalties on those works. The Board also is empowered to supervise agreements between users and certain collectives and issues licenses for the use of works when the owners of copyright in a work cannot be located.

Many Canadian businesses are impacted by the work of the Board, and those businesses need consistent, timely, transparent and market-driven rates to operate successfully and sustainably in Canada. As active participants in the digital economy, these businesses can't suffer from a process that is unpredictable, unstable and slow. The Board must create an environment that supports the development of new and existing businesses.

The Board has attempted to address some of its strategic priorities in recent years, such as ensuring timely and fair processes and decisions. For instance, in 2012, the Board established a Working Committee on the operations, procedures and processes of the Board. The goal of this Committee was to make the tariff-setting process more efficient and productive. However, apart from collecting stakeholder feedback on a limited number of specific procedural issues, little has been done to effectively or meaningfully improve the regime. While a more thorough review of the Board's processes in general and of its Model Directive on Procedure has been promised, no real efficiencies have been achieved, and none appear forthcoming.

As a result, those dependent on the rulings of the Board continue to face significant challenges that are caused, in large part, by the Board's own practices and procedures. For example, long delays in publishing tariff rates have caused disruptions for business users, and Board decisions have been perceived as being inconsistent and unpredictable – adding costs and uncertainty to users and rights holders. In addition, vacancies and delays in Board and staff appointments have delayed hearings, while the legal and economic complexities of matters coming before the Board have increased, and little has been done by the Board or government to respond effectively to the increasing demands on the Board.

### Recommendations

That the federal government:

1. Undertake a structural review of the Copyright Board as part of the upcoming five-year review of the Copyright Act (in 2017), examine the current Copyright Board model (in comparison to other similar tribunals in Canada and abroad) and, in particular, the role of the Board in the context of the collective administration of copyright and how it should respond to (and keep pace with) the needs of the many industries that rely on its tariff-setting function.
2. Encourage the Board to consider and implement regulatory measures (including amendments to the Model Directive on Procedure) and other non-legislative tools that could streamline the tariff-setting process.
3. Promote efficiency by
  - a. Ensuring that a full complement of qualified Board members is in place.
  - b. Ensuring that the Board member vacancies are filled in a timely fashion.
  - c. Promulgating procedures which encourage collective societies and users or their representatives to negotiate licenses.

4. Encourage the Board to minimize the delay between the filing of proposed tariffs and the certification of those tariffs, and in particular the delay between the filing of settlement tariffs and the certification of those tariffs, thereby minimizing the extent of retroactivity of the tariffs.
5. To promote transparency, encourage the Board to:
  - a. Encourage and foster means of enhancing stakeholder review of the Board's procedures and practices and other Board related information, including the recommendations of any stakeholder review working groups and stakeholder surveys.
  - b. Ensure that rules governing dispute resolution processes and tribunal hearings, and, if those rules are departed from, the grounds for such departure, are fully disclosed.
  - c. Establish and publish a database of the Board's rulings.
  - d. Create a clear and easily-accessible list of guidelines and principles that are used to influence Board decisions, and build upon them regularly to take into account how businesses are operating in the fast-changing digital economy. For instance, the Board should consider adopting guidelines that require the Board to consider and adhere closely to negotiated market-based rates (using willing buyer-willing seller principle) when deciding tariff rates.