

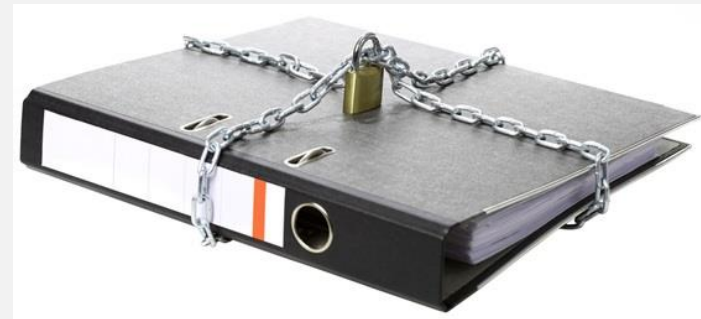
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The Copyright Board of Canada

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The Copyright Board of Canada

- The Copyright Board is the federal economic regulatory body mandated under the *Copyright Act* to, *inter alia*, establish the royalties to be paid for the use of copyright-protected works administered by copyright collectives.
- The Chairman must be a judge, either sitting or retired, who directs the work of the Board and apportions its work among the members.
- The Board has a maximum of five members.
- Matters before the Board are decided by majority vote.

The Filing of Tariffs

- The Copyright Board's royalty-setting process begins with the filing of proposed tariffs by the different collectives.
- Once filed, the *Copyright Act* requires the Board to publish the tariffs in the *Canada Gazette* as soon as practicable after their receipt.
- The Board must give notice to potential users that, within sixty (60) days of the publication of the tariffs in the *Canada Gazette*, they may file written objections to the tariff proposals.
- The Board has the power to grant intervenor status to non-user parties which can demonstrate a legitimate interest in the Board's tariff proceedings.

Agreements

- A collective and an objector may engage in discussions to see if they can resolve their differences with respect to the tariff proposal without the necessity of a hearing before the Copyright Board.
- The Board usually encourages agreements and, if it is satisfied that an agreement would result in reasonable royalties and would otherwise be in the public interest, the Board is likely to give its approval and certify the tariff.
- In such cases, the tariff approval process may be very short and any outstanding issues may be dealt with by written exchanges among the parties and the Board.

Board Hearings

- If there is no basis for agreement among the parties, the Copyright Board's hearing process becomes engaged.
- The period of time required before reaching the oral hearing stage before the Board varies significantly depending on the particular tariff at hand.
- Factors that influence the length of the proceedings include: a) the nature of the tariff; b) the number of parties; c) whether the tariff proceeding is consolidated with a different tariff proposal from either the same collective or a different collective; and d) the complexity of the evidence required.

Interrogatories

- The interrogatory process before the Copyright Board is analogous to the discovery process in civil litigation.
- Interrogatories allow the various participants in the proceeding to seek information from the parties opposite in interest in order to prepare their respective cases for presentation to the Board.
- The interrogatory process is probably the most contentious part of the Board's proceedings.

The Volume of Interrogatories

- There are often complaints from both collectives and objectors that the scope of information required in the interrogatory process is too broad, requiring the expenditure of far too much time and resources for the purpose of providing responses.
- Collectives rarely possess much information that is truly relevant to the issue which is before the Board in any tariff-setting proceeding: the establishment of a fair and equitable tariff rate for the use made – by the objectors – of copyright-protected works.
- It is the objectors that are often subjected to a large quantity of interrogatories from the collectives in terms of overall information-gathering.

The Board's Approach to Interrogatories

- The Copyright Board has adopted a nuanced approach to the interrogatory process.
- In a 2006 ruling, the Board noted as follows:

“Participants are reminded of recent statements of the Board relating to what constitutes an acceptable burden of discovery. Counsel representing the participants in these proceedings have often appeared before the Board. They are asked to help their clients show restraint in the amount of information that they will seek from other participants in these proceedings.”
- In a 2005 ruling, the Board wrote:

“Unless the Board rules otherwise, participants are not required to generate new documents in order to respond to interrogatories; they are required to provide only what already exists, in the form that it exists.”

The Board and Reluctant Participants

- Particular difficulties have arisen when an industry association acts as the official objector before the Copyright Board on behalf of its members.
- Because the interrogatories asked by the various collectives are invariably addressed to the association's underlying members, the association must try to encourage compliance by its members with the Board's interrogatory process.
- These members do not usually have a direct relationship with either the Board or the collectives which have asked the interrogatories.
- The Board has the power to compel the production of evidence from reluctant participants.

The Filing of the Parties' Statements of Case

- The collectives and the objectors must each file “statements of case” with the Copyright Board.
- A statement of case is a short document which sets out a party's:
 - a) arguments; b) an explanation as to how the party intends to establish such arguments at the Board's hearing; c) a list of witnesses the party intends to call at the hearing; d) an estimate of the time needed to present its evidence; e) a written statement from each non-expert witness (a so-called “will say” statement); f) any expert reports filed in support of its case; g) as well as any interrogatory responses from the “other side” upon which the party intends to rely at the hearing.

▼ Cooperation on Evidence Production

- The various parties to Copyright Board proceedings are entitled to go their separate ways and, consequently, need not cooperate with one another.
- The Board has indicated its preference to see more cooperation among the parties with respect to the production of joint evidence, in those circumstances in which such cooperation would be both appropriate and helpful.
- This could include the production of joint survey and database evidence by the collectives and the objectors, as this would obviate the need for the Board to choose between conflicting statistical analyses, expert reports, and witnesses at the eventual hearing.

The Burden of Proof

- The collectives do not bear the burden of proof in defending their respective proposals before the Copyright Board.
- The Board is required to hear the evidence and arguments from both sides and then reach a reasonable and rational decision establishing “fair and equitable” tariff rates.
- Objectors have a role which is equal to that of the collectives whose tariff proposals are being considered by the Board.

The Board's Hearings

- The Copyright Board's hearings are relatively informal.
- While the Board generally follows the rules of court, it provides the parties with considerably more leeway, particularly with respect to the rules of evidence and court procedures.
- The Board's hearings usually involve the presentation of short oral opening statements, witness evidence-in-chief, cross-examination, re-examinations and, at the end of the hearing, final oral argument.

The Timing of Board Decisions

- The parties to Copyright Board hearings often have to wait well in excess of a year from the date of the hearing for the issuance of the Board's decision.
- The Board has had to deal with particularly complex legal and evidentiary issues over the last decade and a half. The Internet has generated a multitude of new uses for copyright-protected content.
- This increased workload has severely hampered the Board's efforts to release decisions in short order, regardless of the nature of the tariff.
- This causes serious difficulties for the collectives and the objectors alike.

The Copyright Board Reform Process

- In August, 2017, the federal government issued a discussion paper entitled “A Consultation on Options for Reform to the Copyright Board of Canada”.
- The government set out 13 options for reforming the procedures of the Copyright Board. The stated purpose of these options was to streamline and render more efficient the Board’s hearing processes.
- These options included the following:
 - Explicitly require or authorize the Board to advance proceedings expeditiously
 - Create new deadlines or shorten existing deadlines
 - Empower the Board to award costs between the parties
 - Require proposed tariffs to be filed earlier in advance
 - Stipulate a mandate for the Board in the *Copyright Act*
 - Specify decision-making criteria that the Board must consider
- This reform process is still ongoing.



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