

ALAI Congress 2019 in Prague

Managing Copyright

Questionnaire

CANADA 

by Jean-Arpad FRANÇAIS, lawyer (Sections 1 and 3) and

by ReSound (Section 2)

1. General Overview of the Collective Management (by Jean-Arpad FRANÇAIS, lawyer)

1.1 *Can collective management organizations be described as monopolies (natural monopolies or monopolies set by the law) in your jurisdictions?*

Collective management organizations (CMOs) in Canada are not monopolies set by the law.¹

The economic literature in Canada has described CMOs in terms of monopolies.²

The 1935 Report of the Royal Commission Appointed to Investigate the Activities of the Canadian Performing Rights Society, Limited, and Similar Societies (Parker Report)³ determined that CMOs are an “inevitable monopoly existing for the convenience of the owner and the user; but it should not be exercised arbitrarily and without restraint.”

As explained in *Vigneux v. Canadian Performing Right Society Ltd.*, [1943] S.C.R. 348,⁴ the legislature evidently became aware of the necessity of regulating the exercise of the power acquired by such societies. Legislation was enacted first in 1931, which was subsequently amended in 1936 following the Parker Report, and in 1938.

A Copyright Appeal Board was created whose duty was to consider proposed public performance tariffs and to make such alterations in the statements as may seem just and transmit the statements so altered or revised, or unaltered, as the case may be, to the Minister certified as approved statements. The statements so certified were published in the *Canada Gazette*;⁵ and the fees, charges or royalties so certified were the fees, charges or royalties, which the CMO may collect in

¹ Mario Bouchard, “Collective Management in Commonwealth Jurisdictions: Comparing Canada with Australia”, in Daniel Gervais (ed.), *Collective Management of Copyright and related Rights* (2015) Kluwer Law International BV, The Netherlands.

² For ex., see Marcel Boyer, Michael Trebilcock and David Vaver, eds., *Competition Policy and Intellectual Property* (2009) Irwin Law, Toronto.

³ <http://publications.gc.ca/site/eng/9.828226/publication.html>

⁴ <http://canlii.ca/t/fslvq>

⁵ The *Canada Gazette* is the official newspaper of the Government of Canada.

respect of the issue of licenses during the ensuing calendar year. The *Copyright Act* provided that no CMO shall have any right of action or have any right to enforce any civil or summary remedy for the infringement of the performing rights in any of its works against any person who has tendered or paid to such dealer the fees, charges or royalties that have been approved.

In substance, this regulatory scheme was maintained until April 1st, 2019, when new provisions came into force, somewhat “deregulating” the collective management framework, in the sense that CMOs are no longer required to obtain public performance tariff approval by the Copyright Board of Canada (the Copyright appeal Board’s successor).

CMOs’ “market power” may however, to a certain extent, still be implicitly recognized by the law. Indeed, users and CMOs can apply to the Copyright Board to fix the royalty rates or any related terms and conditions if they are unable to agree⁶.⁷

1.2 Does your system make difference between the voluntary, extended (if any) and mandatory collective management? Which rights are managed under which regime?

The Canadian *Copyright Act* does not provide explicitly for mandatory collective management and extended collective management. This means that a right holder is not required to be a member of a CMO to obtain copyright royalties. However, in a certain number of circumstances, copyright

⁶ S. 71 *Copyright Act* (R.S.C., 1985, c. C-42): (1) If a collective society and a user are unable to agree on royalties to be paid with respect to rights under section 3, 15, 18, 19 or 21, other than royalties referred to in subsection 29.7(2) or (3) or paragraph 31(2)(d), or are unable to agree on any related terms and conditions, the collective society or user may, after giving notice to the other party, apply to the Board to fix the royalty rates or any related terms and conditions, or both.

⁷ The extent to which the Copyright Board can force a collective to issue a licence pursuant to this arbitration scheme remains uncertain. Some are of the view that a CMO is free to deny a licence request. Others argue that once a CMO offers licences for a certain type of use to a certain category of users, it no longer can refuse to issue a licence for that use within that category, and must accept the Copyright Board’s jurisdiction. See Mario Bouchard, “Collective Management in Commonwealth Jurisdictions: Comparing Canada with Australia”, in Daniel Gervais (ed.), *Collective Management of Copyright and related Rights* (2015) Kluwer Law International BV, The Netherlands; Daniel Gervais, “Essai sur le fractionnement du droit d'auteur” (2002) 15 *Cahiers de propriété intellectuelle* 501, available at: <https://www.lescpi.ca/articles/v15/n2/essai-sur-le-fractionnement-du-droit-dauteur/>.

royalties can only be collected and distributed by a CMO. This is the case with respect to remuneration rights⁸ or levies.⁹

⁸ S. 19 *Copyright Act* (R.S.C., 1985, c. C-42): (1) If a sound recording has been published, the performer and maker are entitled, subject to subsection 20(1), to be paid equitable remuneration for its performance in public or its communication to the public by telecommunication, except for a communication in the circumstances referred to in paragraph 15(1.1)(d) or 18(1.1)(a) and any retransmission.

(2) For the purpose of providing the remuneration mentioned in this section, a person who performs a published sound recording in public or communicates it to the public by telecommunication is liable to pay royalties

(a) in the case of a sound recording of a musical work, to the collective society authorized under Part VII.1 to collect them; or

(b) in the case of a sound recording of a literary work or dramatic work, to either the maker of the sound recording or the performer.

(3) The royalties, once paid pursuant to paragraph (2)(a) or (b), shall be divided so that

(a) the performer or performers receive in aggregate fifty per cent; and

(b) the maker or makers receive in aggregate fifty per cent.

S. 75 *Copyright Act* (R.S.C., 1985, c. C-42): (1) An owner of copyright who does not authorize a collective society to collect, for that person's benefit, royalties referred to in paragraph 31(2)(d) is, if the work is communicated to the public by telecommunication during a period when an approved tariff that is applicable to that kind of work is effective, entitled to be paid those royalties by the collective society that is designated by the Board, of its own motion or on application, subject to the same conditions as those to which a person who has so authorized that collective society is subject.

(2) An owner of copyright who does not authorize a collective society to collect, for that person's benefit, royalties referred to in subsection 29.7(2) or (3) is, if such royalties are payable during a period when an approved tariff that is applicable to that kind of work or other subject matter is effective, entitled to be paid those royalties by the collective society that is designated by the Board, of its own motion or on application, subject to the same conditions as those to which a person who has so authorized that collective society is subject.

(3) The entitlement referred to in subsections (1) and (2) is the only remedy of the owner of the copyright for the payment of royalties for the communication, making of the copy or sound recording or performance in public, as the case may be.

⁹ S. 83 *Copyright Act* (R.S.C., 1985, c. C-42): (11) An eligible author, eligible performer or eligible maker who does not authorize a collective society to file a proposed tariff under subsection (1) is entitled, in relation to

(a) a musical work,

(b) a performer's performance of a musical work, or

(c) a sound recording in which a musical work, or a performer's performance of a musical work, is embodied,

as the case may be, to be paid by the collective society that is designated by the Board, of the Board's own motion or on application, the remuneration referred to in section 81 if such remuneration is payable during a period when an approved tariff that is applicable to that kind of work, performer's performance or sound recording is effective, subject to the same conditions as those to which a person who has so authorized that collective society is subject.

The *Copyright Act* provides that with respect to certain remuneration rights, non-members may claim their remunerations rights royalties and obtain payment from the relevant CMO.¹⁰ This means that in those circumstances, a CMO can collect royalties or levies on behalf of non-members.

However, a CMO cannot collect royalties on behalf of non-members with respect to equitable remuneration for performers and sound recording makers when published sound recordings of

(12) The entitlement referred to in subsection (11) is the only remedy of the eligible author, eligible performer or eligible maker referred to in that subsection in respect of the reproducing of sound recordings for private use.

¹⁰ *Copyright Act* (R.S.C., 1985, c. C-42):

S. 75 (1) An owner of copyright who does not authorize a collective society to collect, for that person's benefit, royalties referred to in paragraph 31(2)(d) is, if the work is communicated to the public by telecommunication during a period when an approved tariff that is applicable to that kind of work is effective, entitled to be paid those royalties by the collective society that is designated by the Board, of its own motion or on application, subject to the same conditions as those to which a person who has so authorized that collective society is subject.

(2) An owner of copyright who does not authorize a collective society to collect, for that person's benefit, royalties referred to in subsection 29.7(2) or (3) is, if such royalties are payable during a period when an approved tariff that is applicable to that kind of work or other subject matter is effective, entitled to be paid those royalties by the collective society that is designated by the Board, of its own motion or on application, subject to the same conditions as those to which a person who has so authorized that collective society is subject.

(3) The entitlement referred to in subsections (1) and (2) is the only remedy of the owner of the copyright for the payment of royalties for the communication, making of the copy or sound recording or performance in public, as the case may be.

(4) The Board may, for the purposes of this section,

(a) require a collective society to file with the Board information relating to payments of royalties collected by it to the persons who have authorized it to collect those royalties; and

(b) by regulation, establish periods of not less than 12 months within which the entitlements referred to in subsections (1) and (2) must be exercised, beginning on

(i) the making of the copy, in the case of royalties referred to in subsection 29.7(2),

(ii) the performance in public, in the case of royalties referred to in subsection 29.7(3), or

(iii) the communication to the public by telecommunication, in the case of royalties referred to in paragraph 31(2)(d).

S.83 (11) An eligible author, eligible performer or eligible maker who does not authorize a collective society to file a proposed tariff under subsection (1) is entitled, in relation to

(a) a musical work,

(b) a performer's performance of a musical work, or

(c) a sound recording in which a musical work, or a performer's performance of a musical work, is embodied,

as the case may be, to be paid by the collective society that is designated by the Board, of the Board's own motion or on application, the remuneration referred to in section 81 if such remuneration is payable during a period when an approved tariff that is applicable to that kind of work, performer's performance or sound recording is effective, subject to the same conditions as those to which a person who has so authorized that collective society is subject.

musical works are performed in public or communicated to the public by telecommunication.¹¹ This leads to the conclusion that collective management is mandatory with respect to this specific remuneration right.

Note that the Canadian legislation defines CMOs as collective societies (i) operating a licensing scheme and (ii) carrying on the business of collecting and distributing royalties or levies.¹²

1.3 Is the competition between collective management organizations permitted in your jurisdiction? If so, under which circumstances, how often and in which fields (e.g. tariffs, service for users, available repertoire, service for rightholders, amount of deductions) the competition may occur.

Compared to other countries, with over 30 CMOs, Canada appears to have a high number of CMOs.¹³ While competition among collectives is permitted, in practice, these CMOs do not compete against each other: They each typically represent a specific right (reproduction, public performance), category of right holder (author, sound recording maker, performer, broadcaster) or sector group of rights holders (e.g. written material publishers, sport leagues, playwright).¹⁴ When they happen to represent the same right, right holder category or sector, they do not compete with each other because they tend to operate in each official language.¹⁵ Note that several do not have direct

¹¹ S. 19 Copyright Act (R.S.C., 1985, c. C-42) (cited above); *Re:Sound v. Fitness Industry Council of Canada*, 2014 FCA 48 (CanLII), <http://canlii.ca/t/g5f6q>, at para 102-111.

¹² S. 2 Copyright Act (R.S.C., 1985, c. C-42): **collective society** means a society, association or corporation that carries on the business of collective administration of copyright or of remuneration rights for the benefit of those who, by assignment, grant of licence, appointment of it as their agent or otherwise, authorize it to act on their behalf in relation to that collective administration, and

(a) operates a licensing scheme, applicable in relation to a repertoire of works, performer's performances, sound recordings or communication signals of more than one author, performer, sound recording maker or broadcaster, pursuant to which the society, association or corporation sets out classes of uses that it agrees to authorize under this Act, and the royalties and terms and conditions on which it agrees to authorize those classes of uses, or

(b) carries on the business of collecting and distributing royalties or levies payable under this Act in relation to a repertoire of works, performer's performances, sound recordings or communication signals of more than one author, performer, sound recording maker or broadcaster.

¹³ Daniel J. Gervais, "Collective Management of Copyright and Neighboring Rights in Canada: An International Perspective" (2002) 1 *Canadian Journal of Law and Technology* 21. Available at: <https://scholarship.law.vanderbilt.edu/faculty-publications/852>

¹⁴ Daniel J. Gervais, "Collective Management of Copyright and Neighboring Rights in Canada: An International Perspective" (2002) 1 *Canadian Journal of Law and Technology* 21. Available at: <https://scholarship.law.vanderbilt.edu/faculty-publications/852>. see also: Daniel J. Gervais and Alana Maurushat, "Fragmented Copyright, Fragmented Management: Proposals to Defrag Copyright Management" (2003) 2 *Canadian Journal of Law & Technology* 15. Available at: <https://scholarship.law.vanderbilt.edu/faculty-publications/850>

¹⁵ Mario Bouchard, "Collective Management in Commonwealth Jurisdictions: Comparing Canada with Australia", in Daniel Gervais (ed.), *Collective Management of Copyright and related Rights* (2015) Kluwer Law International BV, The Netherlands.

relations with users and only operate as part of umbrella collectives, essentially for distribution purposes.¹⁶

The *Copyright Act* allows limiting the number of CMOs *only* with respect to the collection of private copying levies and equitable remuneration royalties (i.e. the performer's and sound recording maker's equitable remuneration right when published sound recordings of musical works are performed in public or communicated to the public by telecommunication). This Act provides that, for these purposes, the Copyright Board can designate a *single* collecting society.¹⁷

1.4 How is extended (if any) and mandatory collective management regulated and applied where, for the management of a given right, there are more than one organization?

The Canadian *Copyright Act* makes it mandatory that a collective society file a proposed tariff with the Copyright Board for the purpose of establishing royalties referred to in subsection 29.7(2) (copies of a work or other subject-matter made by an educational institution or a person acting under its authority made at the time that it is communicated to the public by telecommunication)¹⁸ or (3)

¹⁶ Daniel J. Gervais, "Collective Management of Copyright and Neighboring Rights in Canada: An International Perspective" (2002) 1 *Canadian Journal of Law and Technology* 21. Available at:

<https://scholarship.law.vanderbilt.edu/faculty-publications/852>

¹⁷ S. 67.1 *Copyright Act* (R.S.C., 1985, c. C-42): On application by a collective society, the Board may designate the collective society as the sole collective society authorized to collect all royalties referred to in paragraph 19(2)(a) with respect to a sound recording of a musical work.

S. 83 *Copyright Act* (R.S.C., 1985, c. C-42): (8) The Board shall, within the period that is established under regulations made under subsection 66.91(2),

[...]

(b) subject to subsection (8.2), designate as the collecting body the collective society or other society, association or corporation that, in the Board's opinion, will best fulfil the objects of sections 82, 84 and 86.

[...]

(8.2) The Board is not obligated to designate a collecting body under paragraph (8)(b) if it has previously done so, and a designation under that paragraph remains in effect until the Board, under a proposed tariff or on a separate application, makes another designation.

¹⁸ S. 29.7 *Copyright Act* (R.S.C., 1985, c. C-42): (1) Subject to subsection (2) and section 29.9, it is not an infringement of copyright for an educational institution or a person acting under its authority to

(a) make a single copy of a work or other subject-matter at the time that it is communicated to the public by telecommunication; and

(b) keep the copy for up to thirty days to decide whether to perform the copy for educational or training purposes.

(2) An educational institution that has not destroyed the copy by the expiration of the thirty days infringes copyright in the work or other subject-matter unless it pays any royalties, and complies with any terms and conditions, fixed under this Act for the making of the copy.

(public performance of such copies)¹⁹ or paragraph 31(2)(d) (retransmission of works carried by distant signals)²⁰.²¹

Regulation is carried out by the Copyright Board who approves the proposed tariff after making any alterations to the royalty rates and the related terms and conditions, or fixing any new related terms and conditions, that it considers appropriate.²²

Note that with respect to the collective management of equitable remuneration for performers and sound recording makers, categorized above as mandatory collectively management, deregulation is the preferred approach, in the sense that the relevant CMO is encouraged to reach agreements with users.²³ If the relevant CMO and a user are unable to reach an agreement, they may apply to the Copyright Board to fix the royalty rates or any related terms and conditions, or both.²⁴

¹⁹ 29.7 *Copyright Act* (R.S.C., 1985, c. C-42): (3) It is not an infringement of copyright for the educational institution or a person acting under its authority to perform the copy in public for educational or training purposes on the premises of the educational institution before an audience consisting primarily of students of the educational institution if the educational institution pays the royalties and complies with any terms and conditions fixed under this Act for the performance in public.

²⁰ S. 31 *Copyright Act* (R.S.C., 1985, c. C-42): (2) It is not an infringement of copyright for a retransmitter to communicate to the public by telecommunication any literary, dramatic, musical or artistic work if

(a) the communication is a retransmission of a local or distant signal;

(b) the retransmission is lawful under the Broadcasting Act;

(c) the signal is retransmitted simultaneously and without alteration, except as otherwise required or permitted by or under the laws of Canada;

(d) in the case of the retransmission of a distant signal, the retransmitter has paid any royalties, and complied with any terms and conditions, fixed under this Act; and

(e) the retransmitter complies with the applicable conditions, if any, referred to in paragraph (3)(b).

²¹ S. 67 *Copyright Act* (R.S.C., 1985, c. C-42): (1) A collective society may file a proposed tariff with the Board for the purpose of establishing royalties with respect to rights the collective society administers under section 3, 15, 18, 19 or 21.

(2) However, a collective society shall file a proposed tariff with the Board for the purpose of establishing royalties referred to in subsection 29.7(2) or (3) or paragraph 31(2)(d).

²² S. 70 *Copyright Act* (R.S.C., 1985, c. C-42): (1) The Board shall — within the period, if any, that is established under regulations made under subsection 66.91(2) — approve the proposed tariff after making any alterations to the royalty rates and the related terms and conditions, or fixing any new related terms and conditions, that the Board considers appropriate.

²³ 67 *Copyright Act* (R.S.C., 1985, c. C-42): (3) A collective society may enter into agreements for the purpose of establishing royalties with respect to rights the collective society administers under section 3, 15, 18, 19 or 21, other than royalties referred to in subsection 29.7(2) or (3) or paragraph 31(2)(d).

²⁴ S. 71 *Copyright Act* (R.S.C., 1985, c. C-42): (1) If a collective society and a user are unable to agree on royalties to be paid with respect to rights under section 3, 15, 18, 19 or 21, other than royalties referred to in subsection 29.7(2) or (3) or paragraph 31(2)(d), or are unable to agree on any related terms and conditions, the collective society or user may, after giving notice to the other party, apply to the Board to fix the royalty rates or any related terms and conditions, or both.

The Copyright Board fixes royalty and levy rates and any related terms and conditions that are *fair and equitable*, in consideration of

- (a) what would have been agreed upon between a willing buyer and a willing seller acting in a competitive market with all relevant information, at arm's length and free of external constraints;
- (b) the public interest;
- (c) any regulation made under subsection 66.91(1); and
- (d) any other criterion that the Board considers appropriate.²⁵

1.5 *Is the collective licensing of rights conducted by non-profit CMOs or a different type of agency or entity (profitable entities such as business corporations), or by the state agency (such as the IP Office)?*

The collective licencing of rights is conducted by private sector entities. The Canadian *Copyright Act* does not require a CMO to have a not-for-profit or for-profit status.²⁶ In practice, most CMOs are not-for-profit corporations while some are for-profit corporations.²⁷ Some have obtained tax status as not-for-profit organizations.

1.6 *Are the collective management organizations obliged to contribute to cultural development of the society? If so, in which areas and how is the cultural support implemented (e.g. management of social or cultural funds)? Is the creation of such funds and their allocation limited by law?*

No. However, some CMOs contribute on a voluntary basis to cultural development through grants, awards and programs.

2. Collective Management Organizations and Authors (Right-holders) (by

²⁵ S. 66.501 *Copyright Act* (R.S.C., 1985, c. C-42).

²⁶ S. 2 *Copyright Act* (R.S.C., 1985, c. C-42): **collective society** means a society, association or corporation that carries on the business of collective administration of copyright or of remuneration rights for the benefit of those who, by assignment, grant of licence, appointment of it as their agent or otherwise, authorize it to act on their behalf in relation to that collective administration, and

(a) operates a licensing scheme, applicable in relation to a repertoire of works, performer's performances, sound recordings or communication signals of more than one author, performer, sound recording maker or broadcaster, pursuant to which the society, association or corporation sets out classes of uses that it agrees to authorize under this Act, and the royalties and terms and conditions on which it agrees to authorize those classes of uses, or

(b) carries on the business of collecting and distributing royalties or levies payable under this Act in relation to a repertoire of works, performer's performances, sound recordings or communication signals of more than one author, performer, sound recording maker or broadcaster.

²⁷ Mario Bouchard, "Collective Management in Commonwealth Jurisdictions: Comparing Canada with Australia", in Daniel Gervais (ed.), *Collective Management of Copyright and related Rights* (2015) Kluwer Law International BV, The Netherlands.

ReSound)

The following questions (section 2) are answered with respect to the rights administered by Re:Sound only, which is the right of performers and makers to receive equitable remuneration for the performance in public and communication to the public by telecommunication of published sound recordings of musical works.

2.1 *Do the authors/rightholders have a legal right to become represented? To become members? If they are rejected, what kind of remedy do they have at their disposal?*

A rightsholder must be represented in order to receive royalties from Re:Sound. They can do so by joining one of Re:Sound's member collectives, an international society with which Re:Sound or its members has a bilateral agreement, or with Re:Sound directly.

2.2 *How does the CMO resolve a conflict between rightholders in case of a "double claim"? Are the rightholders referred to court or is there an ADR at hand?*

Where a conflict arises, royalty payments are suspended until the conflict is resolved. The claimants are notified of the conflict and encouraged to resolve it themselves.

2.3 *How can the authors (rightholders) participate in the activities of the collective management organization? Under which circumstances can they be elected into the management or controlling boards? Are there pre-conditions, such as a minimal amount of remuneration from CMO, to become elected?*

Re:Sound consists of two classes of voting members: the performer class and the maker class, which have equal representation on the board of directors. A rights holder could serve as a director or officer of Re:Sound if nominated by a voting class member and elected by the members. Re:Sound and its member collectives also work directly with rights holders with respect to issues such as repertoire submissions and payment of royalties.

2.4 *How is the remuneration distributed amongst authors? How can the authors intervene in the process of the formulation of distribution schemes? In which phases of the collecting process are the fees taxed and by whom?*

Remuneration is divided equally (50/50) between performers and makers. This is a statutory requirement under the Copyright Act. Applicable taxes are collected from the businesses paying royalties to Re:Sound at the time of licensing.

2.5 *How does the law or legal practice reflect the will of the author ("autonomy of will") to grant licenses individually? Is it allowed for the user to obtain the license directly from the represented author? Are such direct licenses null and void or are they valid, while the user still pays remuneration to the CMO?*

The right of equitable remuneration as administered by Re:Sound, must be licensed collectively pursuant to the Copyright Act.

Please elaborate for each regime of the collective management.

2.6 Do CMOs allow the rightholders to grant a non-commercial license for their work? Are so called “public licences” used in this context? Are there any examples concerning the non-commercial distribution of the protectable subject matter by the CMOs in your country?

Not applicable as the right of equitable remuneration must be licensed collectively.

3. Collective Management Organizations and Users (by Jean-Arpad FRANÇAIS, lawyer)

3.1 How does your jurisdiction prescribe private copying remuneration (“levies”)? Is the general principle of freedom of a contract respected in this area (i.e. is the remuneration a subject of the negotiations between users and collecting societies) or is the size of the private copying levy stipulated by any legislative act (such as governmental decree)?

The private copying regime, as set in sections 79 to 88 of the Canadian *Copyright Act*,²⁸ entitles an individual to make copies (a “private copy”) of sound recordings of musical works for that person’s personal use. In return, those who make or import recording media ordinarily used to make private copies are required to pay a levy on each such medium. The Copyright Board of Canada sets the levy and designates a single collecting body to which all royalties are paid.

The Canadian Private Copying Collective (CPCC) is the collective society for the private copying levy, collecting royalties for the benefit of eligible authors, performers and producers. The member collectives of the CPCC are CMRRA, Re:Sound, SODRAC and SOCAN.

3.2 Nowadays, the major use occurs on the Internet. Has there been any attempts in your country to set a private copying levies collected by CMOs or by different entities or state for the use of protected subject matters on the Internet (e.g. in the form of a so-called “flat fee” or a special tax)?

The *Copyright Act* provides for levies on *blank audio recording media* used to privately copy recorded musical works, performances and sound recordings. Currently, in practice, only recordable compact discs (CD-R, CD-RW, CD-R Audio, CD-RW Audio) are subject to a private copying levy.²⁹

Tariffs on computer memories are not on the agenda under the current legislative framework. The reason is probably the result of a decision of the Federal Court of Appeal concluding that a permanently embedded or non-removable memory, incorporated into a digital audio recorder does

²⁸ <https://laws-lois.justice.gc.ca/eng/acts/C-42/index.html>

²⁹ See: <https://cb-cda.gc.ca/tariffs-tarifs/certified-homologues/2017/2017-12-02.pdf>

not retain its identity as an “audio recording medium”: *Canadian Private Copying Collective v. Canadian Storage Media Alliance*, [2005] 2 FCR 654, 2004 FCA 424 (CanLII).³⁰

A Parliamentary Committee recently recommended that the Government of Canada study the private copying regimes in place in other countries with a view to identifying the digital environment, the distribution of royalties flowing from the private copying levy, and the impact on consumers on which a private copying levy applies, including the impact of the private copying regime on the retail prices of the different types of digital device to which they apply.³¹

3.3 How are the tariffs set (by decision of the CMO, by negotiation with users, consumers or others?)? What are the statutory criteria for the tariffs (e.g. assessing the value of the rights by experts, proportionality etc.)? Do they require approval of a regulatory authority (such as an IP Office, Ministry of Culture etc.)? How can they be contested by the users? By general courts, by special ADR procedure or specialized tribunals?

“Tariffs” are set by decision of the CMO or by negotiation with users.³² However, in Canada the notion of “tariff” is distinguishable from a “licence”.

Licence

A CMO can negotiate with a user a copyright licence on an individual basis.

If a CMO and a user are unable to agree on royalties or on any related terms and conditions, the CMO or user may, after giving notice to the other party, apply to the Board to fix the royalty rates or any related terms and conditions, or both.³³

Tariff

A CMO may choose to file with the Copyright Board a proposed tariff for the benefit of those eligible authors, eligible performers and eligible makers who, by assignment, grant of licence, appointment of the CMO as their agent or otherwise, authorize it to act on their behalf for that purpose.³⁴

A CMO may find this option advantageous as it avoids carrying out negotiations with multiple users or allows it to negotiate with trade associations or user groups.³⁵

³⁰ <http://canlii.ca/t/1jgv9>

³¹ <https://www.ourcommons.ca/Content/Committee/421/INDU/Reports/RP10537003/indurp16/indurp16-e.pdf> at p. 117.

³² S. 67 *Copyright Act* (R.S.C., 1985, c. C-42): (3) A collective society may enter into agreements for the purpose of establishing royalties with respect to rights the collective society administers under section 3, 15, 18, 19 or 21, other than royalties referred to in subsection 29.7(2) or (3) or paragraph 31(2)(d).

³³ S. 71(1) *Copyright Act* (R.S.C., 1985, c. C-42).

³⁴ S. 67, 83(1) *Copyright Act* (R.S.C., 1985, c. C-42).

³⁵ A licence between a CMO and a trade association will not legally bind members of the association without further ratification by members. Non-members of the association would require additional negotiations and yield transaction costs. Approved tariffs overcome these hurdles.

A proposed tariff must be filed no later than October 15 of the second calendar year before the calendar year in which the proposed tariff is to take effect or, if a day is established under regulations made under subsection 66.91(2), no later than that day.³⁶

A proposed tariff must be filed in both official languages and include (a) the acts to which the tariff is to apply; (b) the proposed royalty rates and any related terms and conditions; and (c) the effective period of the proposed tariff.³⁷ A proposed tariff's effective period must be at least three calendar years or, if a minimum period is established under regulations made under subsection 66.91(2), at least that minimum period.³⁸

The Copyright Board, in the manner that it sees fit, publishes the proposed tariff and a notice that an educational institution, a *retransmitter* or any user who files an objection must do so no later than the 30th day after the day on which the Board made the proposed tariff public or, if a day is established under regulations made under subsection 66.91(2), no later than that day.³⁹

The Board must, within the period that is established under regulations made under subsection 66.91(2),⁴⁰ approve a proposed tariff, after making any alterations to the levy rates and the related terms and conditions, or fixing any new related terms and conditions, that the Board considers appropriate.⁴¹

Effect of Approved Tariff or Fixed Royalties

A tariff approved by the Copyright Board is of general application. Once approved, the concerned CMO may collect the royalties specified in an approved tariff for the applicable period and, in default of their payment, recover them in a court of competent jurisdiction.⁴²

Licence terms fixed by the Copyright Board are only binding on the individual user. The effect of a licence fixed by the Copyright Board is the same as approved tariffs.⁴³

Note that the Supreme Court of Canada held that "licences fixed by the Board do not have mandatory binding force over a user; the Board has the statutory authority to fix the terms of licences pursuant to s. 70.2, but a user retains the ability to decide whether to become a licensee and operate pursuant to that licence, or to decline."⁴⁴ The nuance here is that such a licence "is not *de jure* binding against users, even if the particulars of a specific proceeding, and a user's decision to

³⁶ S. 68 *Copyright Act* (R.S.C., 1985, c. C-42).

³⁷ S. 68.1 (1) *Copyright Act* (R.S.C., 1985, c. C-42).

³⁸ S. 68.1 (2) *Copyright Act* (R.S.C., 1985, c. C-42).

³⁹ S. 68.2, 68.3 *Copyright Act* (R.S.C., 1985, c. C-42).

⁴⁰ At the time of writing this report, *Regulations Establishing Time Limits in Relation to Matters Before the Copyright Board* had not yet come into force. The proposed regulations are available here: <http://www.gazette.gc.ca/rp-pr/p1/2019/2019-04-27/html/reg2-eng.html>

⁴¹ S. 70 (1) *Copyright Act* (R.S.C., 1985, c. C-42).

⁴² S. 73 *Copyright Act* (R.S.C., 1985, c. C-42). This holds also true in case of an interim tariff: *Canadian Copyright Licensing Agency v. York University*, [2018] 2 FCR 43, 2017 FC 669 (CanLII), <http://canlii.ca/t/h4s07>

⁴³ S. 73 *Copyright Act* (R.S.C., 1985, c. C-42).

⁴⁴ *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, [2015] 3 SCR 615, 2015 SCC 57 (CanLII), <http://canlii.ca/t/gm8b0> at para 113.

engage in covered activity during an interim period, may mean that the user does not *de facto* have a realistic choice to decline the licence.”⁴⁵

Furthermore, the CMO concerned may apply to a court of competent jurisdiction for an order directing a person to comply with any terms and conditions that are set out in an approved tariff or that are licence terms fixed by the Board.⁴⁶

Criteria

The Copyright Board fixes royalty and levy rates and any related terms and conditions that are *fair* and *equitable*, in consideration of

- (a) what would have been agreed upon between a willing buyer and a willing seller acting in a competitive market with all relevant information, at arm’s length and free of external constraints;
- (b) the public interest;
- (c) any regulation made under subsection 66.91(1); and
- (d) any other criterion that the Board considers appropriate.⁴⁷

Contested tariffs or royalties

Decisions of the Copyright Board approving tariffs and royalties can be subject to judicial review by the Federal Court of Appeal.⁴⁸ As Pr. Paul Daly explains, “[j]udicial review is concerned with the legality, reasonableness and procedural fairness of administrative decision-making. The principles of legality and reasonableness apply to the substantive matters addressed by the Copyright Board, such as the scope of copyright protection and the calculation of tariffs, whereas the principle of procedural fairness applies to its decision-making processes. On substantive matters, Canadian judges generally defer to expert agencies. In the case of the Copyright Board Canadian courts have in recent years exercised close control over strictly legal questions addressed by the Copyright Board whilst according it a greater margin of appreciation on matters of mixed fact and law, policy and discretion.”⁴⁹

3.4 Does the competition law in your country recognize abuse of dominant position of a CMO? Are there any examples (cases) that the CMO has been held responsible for the distortion of the competition?

⁴⁵ *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, [2015] 3 SCR 615, 2015 SCC 57 (CanLII), <http://canlii.ca/t/gm8b0> at para 111.

⁴⁶ S. 73.1 *Copyright Act* (R.S.C., 1985, c. C-42).

⁴⁷ S. 66.501 *Copyright Act* (R.S.C., 1985, c. C-42).

⁴⁸ S. 28 *Federal Courts Act* (R.S.C., 1985, c. F-7): (1) The Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of any of the following federal boards, commissions or other tribunals: [...]

(j) the Copyright Board established by the *Copyright Act*;

⁴⁹ Daly, Paul, *Best Practices in Administrative Decision-Making: Viewing the Copyright Board of Canada in a Comparative Light* (May 20, 2016). A Report Prepared for Canadian Heritage and Innovation, Science and Economic Development Canada, 2016. Available at SSRN: <https://ssrn.com/abstract=2782487>

The *Competition Act* (R.S.C., 1985, c. C-34),⁵⁰ contains provisions on abuse of a dominant position. However, section 79(5) of this Act provides that the *mere* exercise of an Intellectual Property right is not an anti-competitive act for the purposes of the abuse of dominance provision.⁵¹ The Competition Bureau acknowledges the possibility that under the very rare circumstances set out in section 32 of the *Competition Act*, the *mere* exercise of an IP right might raise a competition issue.⁵²

Section 32 of the *Competition Act* gives the Federal Court the power, on application by the Attorney General, to make remedial orders if it finds that an entity has used the exclusive rights and privileges conferred by a patent, trademark, copyright or registered integrated circuit topography to unduly restrain trade or lessen competition.⁵³

The Competition Bureau explains that “[w]hen the Federal Court determines that a special remedy is warranted under section 32, it may issue a remedial order declaring any agreement or licence relating to the anti-competitive use void, requiring the licensing of the IP right (except in the case of trademarks), revoking the IP right or directing that other things be done to prevent anti-competitive use. This provision provides the Attorney General with the statutory authority to intervene in a broad range of circumstances to remedy an undue lessening or prevention of competition involving the exercise of statutory IP rights. In practice, the Attorney General likely would seek a remedial order under the Act only on the recommendation of the Commissioner [of competition].”⁵⁴

⁵⁰ <https://laws-lois.justice.gc.ca/eng/acts/c-34/index.html>

⁵¹ Subsection 79(5) *Competition Act* (R.S.C., 1985, c. C-34): “For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the Copyright Act, Industrial Design Act, Integrated Circuit Topography Act, Patent Act, Trade-marks Act or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.” See *Toronto Real Estate Board v. Commissioner of Competition*, 2017 FCA 236, <https://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/301595/index.do>, where the Federal Court of Appeal confirmed the lower court conclusion that “[t]he purpose, therefore, of any asserted copyright was not “only” to exercise a copyright interest.”

⁵² Competition Bureau, *Intellectual Property Enforcement Guidelines* (2019) at para 35:

<https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04421.html#sec03>

⁵³ S. 32 *Competition Act* (R.S.C., 1985, c. C-34): (1) In any case where use has been made of the exclusive rights and privileges conferred by one or more patents for invention, by one or more certificates of supplementary protection issued under the Patent Act, by one or more trade-marks, by a copyright or by a registered integrated circuit topography, so as to

(a) limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity that may be a subject of trade or commerce,

(b) restrain or injure, unduly, trade or commerce in relation to any such article or commodity,

(c) prevent, limit or lessen, unduly, the manufacture or production of any such article or commodity or unreasonably enhance the price thereof, or

(d) prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity,

the Federal Court may make one or more of the orders referred to in subsection (2) in the circumstances described in that subsection.

⁵⁴ Competition Bureau, *Intellectual Property Enforcement Guidelines* (2019) at para 25:

<https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04421.html#sec03>

Note that if a CMO and a user are unable to agree on copyright royalties or on any related terms and conditions, the CMO or user may, after giving notice to the other party, apply to the Board to fix the royalty rates or any related terms and conditions, or both.⁵⁵ CMOs can also opt to file a tariff proposal to be eventually approved by the Copyright Board.

Royalties set by the Copyright Board – as prescribed under the framework set out in Part VII.1 and VIII of the *Copyright Act* – are unlikely to meet the conditions that would trigger the application of the *Competition Act*. For example, in the case of *Society of Composers, Authors & Music Publishers of Canada v. Landmark Cinemas of Canada Ltd*,⁵⁶ the defendant argued that the quantum of royalties to be collected by the Society of Composers, Authors & Music Publishers of Canada (then a performance right CMO), as certified by the Copyright Board, constituted a restraint of trade and was used to enhance price, with the result that it is contrary to the *Competition Act*, R.S. 1985, c. C-34 (as amended). The defendant alleged that the establishment of royalties by the Copyright Board constituted illegal price fixing and an unfair and monopolistic trade practice, which was injurious to the Canadian public.

The court dismissed these arguments, noting that “the activities of plaintiff and the Copyright Board within the framework of s. 67 of the *Copyright Act* are expressly sanctioned by federal legislation and therefore exempt from the operation of s. 32 of the *Competition Act* under the “Regulated Industry Defence”.^[57] The Board’s fee-setting activities fall within its explicit legislative mandate and its activities are deemed to be in the public interest”.

In some jurisdictions the problem may be the non-transparency of tariffs. Are there any rules on the statutory level or as the outcome of the self-regulatory activities which concern the transparency of the tariffs? Has there been any development in this area in recent years?

The Canadian framework entrusts the Copyright Board with setting fair and equitable royalties, when CMOs seek the approval of their tariffs or when parties are unable to agree on a copyright licence terms. While the Copyright Board oversees the relationship between CMOs and users, in terms of royalties and related terms and conditions, it does not have authority over the actual collection of royalties from users and distribution of royalties to rights holders or over the relationship between rights holders and CMOs in general. (e.g. CMO governance, internal management, etc.)

In terms of transparency of CMOs’ collective rights’ management, the House of Commons entrusted in December 2017 its Standing Committee on Industry, Science and Technology with the statutory review of the *Copyright Act*. The Committee issued its Report in June 2019. It recommended that the Copyright Board of Canada review whether provisions of the *Copyright Act* empower the Board to increase the transparency of collective rights management to the benefit of rights-holders and users through the tariff-setting process, and report to the House of Commons Standing Committee on Industry, Science and Technology within two years. It also recommended that given the important

⁵⁵ S. 71(1) *Copyright Act* (R.S.C., 1985, c. C-42).

⁵⁶ [1992] F.C.J. No. 1034, 37 A.C.W.S. (3d) 20, 45 C.P.R. (3d) 346, 60 F.T.R. 161.

⁵⁷ See Competition Bureau, *Technical Bulletin on "Regulated" Conduct*, Septembre 27, 2010. Available at: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03273.html>

role of collective societies in the copyright framework and in the collective administration of rights, that the Government of Canada consider the benefits and mechanisms for increasing the transparency of collective societies, particularly with regards to their operations and the disclosure of their repertoire.⁵⁸

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⁵⁸ <https://www.ourcommons.ca/Content/Committee/421/INDU/Reports/RP10537003/indurp16/indurp16-e.pdf> at p. 120.