

CLARIFYING THE COPYRIGHT BOARD'S MANDATE

**A Consultation on Options for Reform to the Copyright
Board of Canada (Draft, not for circulation)**

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I. INTRODUCTION

1. The Copyright Board (the Board) is an administrative tribunal, empowered to set the royalties payable in certain cases for the use of content that is subject to copyright, and their related terms and conditions. In almost all cases, the jurisdiction of the Board is limited to rights that are collectively managed by collective management organizations (CMOs), or “collective societies”, as they are referred to in the *Copyright Act*.

2. The Board has been an important institution in the Canadian copyright landscape. However, for quite some time there has been growing discontent with its performance and its ability to deal with the cases in front of it in an effective, predictable, timely manner, or with the quality of its decisions.

3. We submit that these are merely symptoms of a deeper underlying problem: the Copyright Board tries to do far too much, and far more than it needs to, or even legally empowered to do. The Board’s lack of a clear sense of its statutory mandate has allowed the scope of its functions to slowly creep beyond reasonable limitations to include the promotion of vague policy goals. At times, this also allowed various actors to take advantage of the Board proceedings and use them to promote interests that have very little to do with the Board’s public policy goals or might even be

antithetical to them. As a result, the efficiency of its core functions has been undermined by unnecessary proceedings and procedural bloat. This can be remedied by reiterating the Board's limited mandate. A clear understanding of what the Board needs to do and why will serve as a razor by which to trim the unnecessary fat and allow it to focus on its core business of ensuring that the public obtains the benefits from collective management of copyrights, where appropriate, while being protected from monopolistic abuses.

4. We submit that although the *Act* does not stipulate an explicit mandate for the Board, the Board's mandate is very clear, specific, and narrow. The legislative history and Supreme Court decisions provides a very clear picture of what was the problem that Parliament sought to remedy in setting the statutory scheme. They indicate that the Board was established to ensure that the public obtains the benefits from collective management of copyrights, where appropriate, while being protected from monopolistic abuses. Accordingly, the Board's powers and operations must be derived from and constrained by this mandate.¹ Specifically, this implies that Board's should only exercise its rate-setting powers when collective management is appropriate, set the royalties and related terms and conditions so that as far as possible, they resemble those that would be set in an open, competitive, market, and ensure that the collective management of copyright does not impair the existence or emergence of competitive market-based licensing alternatives.

5. This mandate also has bearing on various procedural issues, which we will address in more detail below.

6. Existing proceedings or determinations that go beyond this mandate should be excised or directed to the jurisdiction of the courts or other regulatory agencies or tribunals, such as the Competition Bureau (the Bureau), the Competition Tribunal, the CRTC, or dealt with under the Status of the Artist Act, thus freeing the Board to focus on its core function: rate-setting. A clear and limited mandate also serves to limit the scope of evidence and argument at proceedings, and clarifies and simplifies the criteria by which the Board reaches its decisions. Finally, it potentially eliminates the amount and complexity of proceedings before the Board.

¹ *Roncarelli v Duplessis*, [1959] 1959 SCR 121 (available on <http://canlii.ca/t/22wmw>); *Padfield v Minister of Agriculture and Fisheries*, [1968] AC 997 (UKHL) (available on <http://www.bailii.org/uk/cases/UKHL/1968/1.html>).

7. This submission demonstrates how many of the efficiency problems giving rise to this reform consultation process are caused by the lack of a clear and limited mandate. It then proposes and defends the mandate listed above. Finally, it proposes clear procedural reforms that naturally follow from this mandate. These reform suggestions are:

- The Board’s mandate should be clarified to ensure that it performs its rate-setting role in the public interest, i.e., to ensure that the Board’s mandate is limited to attaining the benefits of collective administration of copyright while preventing CMOs from exercising their collective market power and minimizing other anti-competitive outcomes of collective administration.
- In performing its rate-setting function, the Board should seek to set rates corresponding, to the extent possible, to those that exist or would exist in a market place where right holders compete among themselves. In addition the Board should not approve tariffs unless it is satisfied that collective administration is indeed the most efficient to administer the relevant rights and that the proposed scheme does not lessen competition more than is necessary to achieve the benefits.
- All proposed tariffs should be required to include reasons for the necessity of the tariff as well as a rationale for the proposed rate. The Board should refuse to consider or publish any proposed tariff unless the proposal establishes a *prima facie* case for its certification.
- A “competitive impact assessment” by the Competition Bureau should be integrated into all tariffs proceedings.
- The Board should ensure that collective licensing is not the only option available to users, and that approval of the collective scheme does not unduly hinder the emergence of competitive alternatives. For example, when the CMO administer the copyrights on an exclusive basis, or otherwise interferes with the ability of its members to transact directly with users or through other intermediaries, it prevents or erects barriers to the emergence of more competitive alternatives.
- In addition, the Board should also consider whether an all-you-can-eat blanket licence is justified, or whether pay-per-use options could be just as efficient.

- The Board should decline to decide any issues of legal liability for uses of a copyright work. The courts are the proper venue for such determinations, and the Board should proceed to certify any tariff, where such a question arises, on the assumption that liability does not exist until a decision of a competent court decides otherwise.
- The Bureau and the Board should periodically review existing tariffs and collective societies for the same, and should be empowered to sunset such societies and tariffs where appropriate.

II. THE BOARD'S VIEW OF ITS MANDATE HAMPERS ITS EFFICIENCY

8. The Board describes itself "as an economic regulatory body"² or "an independent, quasi-judicial tribunal",³ and it explains that its mandate is to set "fair and equitable royalties".⁴ In the same vein, the Consultation Paper states that "the Board sets tariffs and licences for uses of copyrighted content by which creators and rights holders may receive fair compensation, users pay fair prices and the Canadian public receives broad access."⁵ Moreover, Section 66.91(a) of the *Act* empowers the Governor in Council to make regulations setting "general criteria to be applied by the Board or to which the Board must have regard in establishing fair and equitable royalties to be paid pursuant to this Act".

9. However, besides affirming the trivial point that Parliament could not have intended to empower the Board to set royalties that would be unfair or inequitable, neither the *Act*, nor the Board's own decisions convey a coherent view of what constitutes "fair and equitable" royalties and how to distinguish them from royalties that would be "unfair" or "inequitable".

10. The lack of statutory specification of what constitutes fair and equitable royalties does not mean, however, that the Board's discretion is wide and unfettered, or that the Board can choose to apply any theory of fairness and equity. When legislation confers statutory powers, those powers

² Copyright Board of Canada, Annual Report 2014-15, at 7.

³ Presentation delivered by Mr. Claude Majeau Vice-Chairman and Chief Executive Officer of the Copyright Board of Canada, House of Commons Standing Committee on Industry, Science and Technology, 42nd Parliament, 1st Session (May 5, 2016) at <http://cb-cda.gc.ca/about-apropos/speeches-discours/20160505-en.pdf>

⁴ Copyright Board of Canada, Annual Report *supra* note 2, at 5.

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can only be exercised in accordance with the policy and object of the statutory scheme.⁶ Obviously, different parties might have very different perspectives on what constitute fair and equitable royalties, and when the stakes are high, they might be expected to spend many resources on making compelling arguments in support of their perspective.

11. The Board, however, does not have a magic mirror on the wall, which would tell it what royalties are the fairest of all. Nor is the Board a judge in a debating contest, choosing which party presented a more compelling theory of fairness. Rather, the Board should determine the royalties on the basis of the theory that best fulfills the object of the statutory scheme. Therefore, even though the *Act* does not define what constitute fair and equitable royalties, the nature of the statute and the statutory scheme, its legislative history, and the constitutional capacity of the enacting legislature to confer certain powers, determine the scope of the powers conferred. Likewise, the trivial observation that the Board has regulatory powers, does not mean that it can regulate anyone in the copyright ecosystem and for any or a wide range of purposes.

12. More specifically, when a regulator set prices, those prices most often would be different from the prices that the seller would charge or the buyer would willingly pay in the absence of regulation. In general, governments elect to regulate prices (or establish specific regulators for that purpose) for four different reasons:

13. Monopoly: Concern that without regulatory intervention, a *seller* or *sellers* would exercise market power and charge higher than optimal prices (and impose unfair terms and conditions);

14. Monopsony: Concern that without regulatory intervention, a *buyer* or *buyers* would exercise market power and pay less than would be optimal;

15. Promoting broad policy goals through cross-subsidies: sometimes regulation will allow sellers to charge, and require some buyers to pay, higher-than-otherwise prices, to cross-subsidize the delivery of goods and services at lower-than-otherwise prices to another subset of buyers (or even to guarantee the delivery of goods and services to those that otherwise would not be served at all).

⁶ *Roncarelli v. Duplessis*, *supra* note 1 at 140. *Padfield v Minister of Agriculture and Fisheries*, *supra* note 1 at 1030.

16. The regulation of many utilities, typically natural monopolies, involves price controls, which set maximum prices that the utility providers could charge. To be effective, those regulatory schemes would also typically impose on the seller a duty to deal or sell at prices that do not exceed the regulated ones, but they do not impose on the buyer a duty to deal or prevent the seller from setting lower prices. In other words, such schemes impose constraints and therefore regulate the sellers, not the buyers; the producers, not the consumers.

17. Some of the mechanisms of collective bargaining and labour relations legislation provide an example of the second type of regulation. Such mechanisms might permit workers to exert collective pressure on employers, compel them to pay higher prices for labour. To be effective, they would typically restrict employers' ability to terminate the employment of its employees and replace them with workers who might be willing to work for a lower wage. This regulation regulates the buyers of labour (employers) not the seller of it (employees). Very rarely will an employee be prohibited from quitting their job and accept a higher-paying one.

18. The regulation of some public utilities and other important services might include universal service requirement, which would compel the regulated provider to provide good and services to everyone, even if it would be uneconomical to do so.⁷ This would often be accomplished through regulation of the third kind. To be effective, such regulatory schemes might regulate both sellers and buyers: they regulate sellers by requiring them to provide universal service at regulated prices, and they might regulate some buyers, by limiting their freedom to opt out (e.g., by limiting or prohibiting the entry of other service providers) or by compelling them to buy (e.g., mandatory insurance schemes).

19. By definition, any price regulation will involve detriment to some persons. It might require sellers to sell at lower prices than they otherwise could charge, or it might require buyers to pay higher prices than they otherwise would pay, or it might impose a mandatory charge on parties that would not otherwise choose not to pay at all. At the very least, any regulation will require some persons to do certain things that they wouldn't do otherwise or refrain from doing things that

⁷ For example, the cost of connecting a remote community to an electrical or telephone grid might be too high to be profitable, or to be profitable at a reasonable price for consumers.

they would like to do. The purpose of the regulation determines the identity of the regulatees and the powers and procedures for implementing it.

20. The regulatory scheme in Part VII of the *Act* qualifies the rights of copyright owners when they administer their rights collectively by taking away the power of CMOs unilaterally to set prices as they please and by taking away CMOs power to refuse to license. The scheme permits any interested user to obtain a licence under Board-approved terms, and protects any user who pays or offers to pay the approved royalties from liability for infringement, even if the CMO declines to issue a licence.⁸ To the extent that the scheme acts to the detriment of CMOs or their members, then Parliament must have thought that the public interest justifies it.⁹

21. As noted, while the *Copyright Act* does not contain any specific or explicit statement about the scope or objectives of the Board's regulatory powers, the lack of language does not mean that this is an open question, or that the Board has a wide discretion to regulate CMOs as well as users and for a wide range of unspecified policy objectives. Rather, the legislative history, the jurisprudence, relevant commentary and constitutional and rule of law consideration all indicate a very clear and specific mandate for the regulatory scheme under Part VII of the *Act*.

22. The Copyright Board, the first of its kind in the world, was established following the recommendation of the Parker Commission from 1936. The Parker Commission understood that collective administration of copyrights presents a competition policy problem. It explained that when copyrights are administered collectively “[c]ompetition no longer exists” and “[a] monopoly, or super-monopoly, has arisen.”¹⁰

23. The Parker Commission recognized, however, that collective administration might be the most convenient way to grant licenses, and it described copyright collectives as an “inevitable monopoly”.¹¹ The Commission viewed the regulatory challenge as a familiar one, namely the regulation of natural monopolies, and it was of the opinion that like other natural monopolies

⁸ Ariel Katz, “Spectre: Canadian Copyright and the Mandatory Tariff - Part I” (2015) 27:2 *Intellect Prop J* 151 at 179.

⁹ *Padfield v Minister of Agriculture and Fisheries*, *supra* note 1 at 1030. It should be noted that there is hardly any detriment to copyright owners, because they are not compelled to administer their copyrights collectively. Moreover, the regulatory scheme protects them from liability for some offences under the *Competition Act*.

¹⁰ J Parker, *Report of the Royal Commission Appointed to Investigate the Activities of the Canadian Performing Rights Society, Limited, and Similar Societies* (Ottawa, ON: J.O. Patenaude, 1935) at 19.

¹¹ *Ibid.*

providing important services,¹² copyright collective should be regulated to prevent them from abusing their market power or exercising it arbitrarily.¹³ The Copyright Board¹⁴ was set up to implement this recommendation.¹⁵

24. The Commission's view is also the predominant one in the academic literature,¹⁶ and in the legislative history, including that of the major reforms of the *Copyright Act* in the 1980s and 1990s.¹⁷ This theory of regulation was also fully understood by the Supreme Court, the Privy Council and the lower courts in almost every decision that discussed the matter.¹⁸ In *Vigneux*, Duff CJ, explained that under the plan adopted by Parliament,

the dealer in performing rights [i.e., the CMO] has his sole right to perform any particular musical composition in public qualified by a statutory license vested in everybody who pays or tenders to the dealer a fee, charge or royalty which has been fixed by the Copyright Appeal Board and notified in the *Canada Gazette*. That seems like a revolutionary change, but it is evident that the legislature realized in 1931 that this business in which the dealers were engaged is a business affected with a public interest; and it was felt to be unfair and unjust that these dealers should possess the power so to control such performing rights as to enable them to exact from people purchasing gramophone records and sheets of music and radio receiving sets such tolls as it might please them to exact. It is of the first importance, in my opinion, to take notice of this recognition by the legislature of the fact that these dealers in performing rights, which rights are the creature of statute, are engaged in a trade which is affected with a public interest and may, therefore, conformably to a universally accepted canon, be properly subjected to public regulation.¹⁹

¹² *Ibid* at 49.

¹³ *Ibid* at 49, 16.

¹⁴ More precisely, its predecessor the Copyright Appeal Tribunal.

¹⁵ *Vigneux v Canadian Performing Right Society Ltd*, [1943] 1943 SCR 348 (available on <http://canlii.ca/t/fslvq>), para 4; aff'd in part and reve'd in part *Vigneux and Others v Canadian Performing Right Society Limited (Canada)*, [1945] UKPC 1 (available on http://www.bailii.org/uk/cases/UKPC/1945/1945_1.html).

¹⁶ See e.g., Ariel Katz, "The Potential Demise Of Another Natural Monopoly: Rethinking The Collective Administration Of Performing Rights" (2005) 1:3 J Compet L Econ 541, at 551–52; Ariel Katz, "Copyright Collectives: Good Solution But for Which Problem?" in Harry First, Rochelle C Dreyfuss & Diane L Zimmerman, eds, *Working Within the Boundaries of Intellectual Property: Innovation Policy For The Knowledge Society* (Oxford: Oxford University Press, 2009).

¹⁷ Ariel Katz, "Spectre: Canadian Copyright and the Mandatory Tariff - Part I" (2015) 27:2 IPJ 151, at 207–10.

¹⁸ E.g., *Vigneux*, *supra* note 6; *Vigneux and Others v Canadian Performing Right Society Limited (Canada)*, [1945] UKPC 1 (available on http://www.bailii.org/uk/cases/UKPC/1945/1945_1.html); *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 SCR 34, para 11; *Canadian Broadcasting Corp v SODRAC 2003 Inc*, [2015] SCC 57 (available on <http://canlii.ca/t/gm8b0>), para 112.

¹⁹ *Vigneux*, *supra* note 15 at 353.

25. To emphasize this point, Duff CJ quoted the statement of Lord Justice Lindley in *Hanfstaengl v Empire Palace*²⁰ that “care must always be taken not to allow” patents and copyrights “to be made instruments of oppression and extortion”, summing up that this “expresses the *raison d'être* of the enactments under consideration”.²¹

26. The phrase “a business affected with a public interest”, which Duff CJ repeated twice in that paragraph, is instructive. The phrase refers to the doctrine, attributed to Lord Hale’s seventeenth century treatise, under which some businesses, even though private property of those who operate them, become “affected with a public interest” and “ceased to be *juris privati* only.” In such cases, the owner would be prohibited from making arbitrary or an excessive charges, and would be required to provide his services to any member of the public who is willing to pay reasonable and moderate charges.²²

27. The statement by Duff CJ thus placed the statutory scheme for the regulation of CMOs within a well-known regulatory framework. It also explains why Parliament never felt it necessary to articulate the Board’s mandate in the statute. The mandate was well understood because it conformed with “a universally accepted canon.”²³

28. In 1997, Parliament added several new functions to the Board’s mandate, however, there is no indication that Parliament contemplated any change in the legislative scheme or its goals when it comes to the Board’s core rate-setting mandate. If Parliament had contemplated such a change, it would have had to communicate it with irresistible clarity.²⁴

29. We note that the Discussion Paper states that “the Board regulates the balance of market power between rights holders and users to ensure that the value of the use of copyrighted content is fair to all parties and end-users. ...”. In our view, a mandate to “regulate the balance of market power between right holders and users” is a radically different mandate than the one contemplated by the Parker Commission, adopted by Parliament, and affirmed by the Supreme Court. The

²⁰ *Hanfstaengl v Empire Palace*, [1894] 3 Ch 109 at 128; Aff’d *Franz Hanfstaengl v H R Baines & Co Limited*, 1895 AC 20 (House of Lords).

²¹ *Vigneux*, *supra* note 15 at 354.

²² *Simpson v Attorney-General*, [1904] 1904 AC 476 (HL) at 482–83.

²³ *Vigneux*, *supra* note 15 at 354.

²⁴ *Goodyear Tire & Rubber Co of Canada Ltd et al v T Eaton Co Ltd et al*, [1956] 1956 SCR 610 (SCC) (available on <http://canlii.ca/t/1nlkc>) at 614. See also *Wilson v Atomic Energy of Canada Ltd*, [2016] 1 SCR 770 (SCC) (available on <http://canlii.ca/t/gsh2f>), para 128.

mandate to regulate CMOs' market power entails a limitation on CMOs power to conduct their business as they see fit. By contrast, a mandate to "regulate the balance of market power between right holders and users" entails something entirely different. To be meaningful, it must contemplate not only the power to regulate CMOs and prevent them from charging unreasonably high prices, but also the power to regulate *users* and compel *users* to pay *higher* fees that they would or could otherwise pay in an unregulated market. Parliament unquestionably intended to limit the exercise of monopolistic powers by CMOs, but Parliament never intended to give the Board the power to regulate *users*, insofar as this means compelling users to pay *higher* fees that they would or could otherwise pay in an unregulated market, forcing users to deal with CMOs, or imposing on users who deal with CMOs more onerous obligations than their general obligations under the *Act*.²⁵

III. WHAT CHANGED?

30. If Parliament ever intended to modify the Board's mandate and grant it regulatory powers over users, it should have communicated its intention with "irresistible clearness".²⁶ Nevertheless, the Board, as reflected in the Discussion Paper, has taken the view that it has the power to regulate users to accomplish such balance of market power. If the change in the Board's mandate cannot be traced to the legislation, what is the source of this view?

31. Apparently, the change can be traced to a statement in a 1986 decision of the Federal Court of Appeal, *PROCAN v CBC*.²⁷ In that case, PROCAN (one of the predecessors of SOCAN) sought to review and set aside the Board's decision of the Board regarding the licence fees payable by CBC. PROCAN proposed a new formula for calculating the payments which would have resulted

²⁵ Contrast Part VII with Part VIII. The private copying levy scheme under Part VIII is clearly designed to regulate manufacturers and importers of blank media, by imposing on them a mandatory levy payable to certain CMOs. Also contrast Part VII of the *Act* with the Federal *Status of the Artist Act* or the Quebec status of artists legislation. Under those schemes, certain producers could be forced to negotiate with certified artists' associations or forced to comply with *minimum* prices and terms set by a tribunal should negotiations fail. To a large extent, these schemes are a mirror image of the scheme under Part VII of the *Copyright Act*, see Ariel Katz, "Spectre: Canadian Copyright and the Mandatory Tariff - Part II" (2015) 28:1 *Intellect Prop J* 39 at 64.

²⁶ *Goodyear Tire & Rubber Co. of Canada Ltd. et al. v. T. Eaton Co. Ltd. et al.*, *supra* note 24; *Wilson v. Atomic Energy of Canada Ltd.*, *supra* note 24.

²⁷ *Performing Rights Organization of Can Ltd v Canadian Broadcasting Corporation*, [1986] 7 CPR (3d) 433 (FCA).

in their substantial increase. Essentially, PROCAN sought to raise the royalties paid by CBC to the level of those paid by commercial broadcasters, but the Board declined to do so.

32. In its application for judicial review, PROCAN argued, consistently with the well-understood mandate of the Board, “that the policy of the *Act* in setting up the Board was to ensure fair and reasonable fees for the use of copyright music, while at the same time prohibiting performing rights societies from using a monopoly power to charge exorbitant fees.”²⁸

33. PROCAN submitted that this policy goal requires the Board to set fees at a market rate, which it asserted, incorrectly, means the same rate for commercial and non-commercial broadcasters. The Court did not take any issue with PROCAN’s characterization of the Board’s mandate, and indeed quoted the earlier jurisprudence explaining that mandate. The Court rejected, however, PROCAN’s submission that the mandate of preventing CMOs from abusing their market power entailed setting the same fees for all broadcasters.²⁹ The Court was correct in rejecting PROCAN’s submission, not because PROCAN mischaracterized the Board’s mandate, but because PROCAN’s argument that in a competitive market CBC would pay the same higher fees that commercial broadcasters pay was economically flawed.³⁰ It was wrong that the Board mandates required it set fees at a market rate, inasmuch as that means rates that would, to the extent possible, correspond to those charged by copyright owners if they had competed with each other rather than setting acting collectively, but because PROCAN was wrong in claiming that in such a market the rates for CBC and commercial broadcasters would be the same.

²⁸ *Ibid*, para 15.

²⁹ The FCA held that “the Board was right to conclude that if it were to accept the amount paid by private broadcasters as conclusive and decisive evidence of the amount to be paid by another type of broadcaster, it would be ignoring the very different circumstances surrounding the operation of a public broadcaster like the respondent.”, *ibid* at para 16.

³⁰ The argument was flawed in two respects: the argument that in a competitive market all buyers will pay the same price is true only in a perfectly competitive market where no seller is able to set a price higher than marginal cost. In such a market, any seller who tried charging a higher price would lose its business to other sellers. But even when copyright owners compete among themselves, such competition is never perfect because one work might be a substitute for another but it is rarely a perfect substitute. And since the copyright prevents other sellers from selling the same work in competition with the owner of the copyright, copyright owners will often have some degree of market power even when they compete among themselves. Therefore, even in markets where copyright owners compete with each other, differential pricing is common. Second, even if in a competitive market copyright owners would not be able to set differential pricing, the implication is that competition would force them to charge lower price, closer to marginal cost. Therefore, if PROCAN’s argument were to be taken seriously, the implication would be that the commercial broadcasters should have paid the lower prices that CBC paid, not the other way round.

34. Nevertheless, even though the Court rejected that submission, it found other defects in the way the Board calculated CBC's fees. Justice Heald found that the Board relied on some considerations that he regarded as "unreasonable and unsuitable". The main problem was that the Board accepted that there was no apparent rationale behind the formula that had been used for many years to calculate CBC's fees, but decided that despite the arbitrariness of that method of calculation, it "enjoyed a long history relatively free of dispute ... [and] has been workable and acceptable to all parties." The Board concluded that under such conditions, "evidence before the Board must be strong and conclusive before the Board will see fit to deviate from the present method of calculation."³¹ Justice Heald, however, held that the fact that "the present tariff has proven to be satisfactory and workable over a significantly long period of time" is, *per se*, irrelevant in the absence of a reasonable and suitable basis for that tariff.³² Justice Mahoney concurred and held that there was no "rational basis" for the fees, as approved.³³

35. In 1993, the Canadian Association of Broadcasters submitted that "the Board's mandate is to set a rate and structure that is 'a fair and reasonable approximation of the market price which would have been set had there been a freely functioning market in performing rights.'"³⁴ The broadcasters also submitted that "the Board's mandate is to protect copyright consumers from the monopolistic powers of performing rights societies."³⁵ The legislative history and the jurisprudence, from the Supreme Court and the lower courts, including the 1986 *PROCAN v CBC* decision, would suggest that this was the correct principle. The Board, however, rejected this submission and held that "[i]ts mandate is to set tariffs on a 'reasonable and suitable' or 'rational' basis. The Board regulates the balance of market power between copyright owners and users."³⁶ The Board correctly relied on the above-mentioned *PROCAN* decision to support the proposition that it is required to set tariffs on a "reasonable and suitable" or "rational" basis, but it provided no authority for the proposition that it "regulates the balance of market power between copyright owners and users."

³¹ *PROCAN v CBC*, *supra* note 27 at 445.

³² *Ibid* at 449.

³³ *Ibid* at 452.

³⁴ *Canadian Assn of Broadcasters v Society of Composers, Authors and Music Publishers of Canada*, [1994] 58 CPR (3d) 190 (FCA) at 194.

³⁵ *Ibid*.

³⁶ *Public Performance of Musical Works 1990 to 1993, Re*, [1993] 52 CPR (3d) 23 (Copyright Board), para 48.

36. In an application for judicial review, the Federal Court of Appeal rejected the broadcasters' view. It held that while "[t]here is no doubt that a fair and reasonable approximation of the market price is a possible rational basis for setting a tariff" it was within the Board's prerogative to reject that standard. The Court's holding seems to be rooted in the notion that determining which standard to use is a question falling within the Board's domain of expertise, as falling within the "home territory", and therefore will not be reviewed by the Court unless patently unreasonable or in excess of jurisdiction.³⁷ The Court agreed with the Board that its mandate was "to set tariffs for the use of musical work which have a reasonable and suitable or rational basis" and "to regulate the balance of market power between copyright owners and users", and added that "it is no more the Board's mandate to protect consumers to the detriment of copyright owners than it is to protect monopolies to the detriment of consumers."³⁸

37. The Court endorsed the Board's reasoning for rejecting the Broadcasters' submission (which would have resulted in lower fees than those SOCAN had previously was permitted to charge). The Board considered that it would be ill-advised to tamper with the balance that currently exists. ... such a change would create distortions during a transition period that could be very long, with no guarantee of tangible longer term benefits."³⁹ Curiously, this reasoning sound very similar to the one that the Court characterized as unsuitable and unreasonable in the *PROCAN* case.

38. Moreover, the Court also endorsed the Board's conclusion that tampering with the status quo "would be too unfavourable to the rights owners in the Canadian market. Furthermore, such a measure could unduly reduce the importance of the collective management of performing rights, and approach to rights management which is certainly legitimized, and probably encouraged, in the Act."⁴⁰ The Court reasoned that "the Board is in a better position than this court to strike a proper balance between the interests of copyright owners and users and this court will not interfere unless the result reached is patently unreasonable."⁴¹

39. With respect, we believe that this holding was ill-considered, as it represented a marked departure from the understanding of the goals of the legislative scheme and the Board's mandate

³⁷ *CAB v SOCAN*, *supra* note 34 at 196.

³⁸ *Ibid.*

³⁹ *Ibid* at 196–7.

⁴⁰ *Ibid* at 197.

⁴¹ *Ibid.*

in furthering it. The view that the Board could require users to pay higher fees in order to maintain a balance of interests of copyright owners and users stands in radical opposition to the problem that Parliament sought to remedy and the scheme it designed for addressing it. The Court clearly failed to realize that the Board's statement with respect to its own mandate evinces such a departure. Nor did the Court acknowledge the inconsistency of this view with earlier case law and the legislative history, and without realizing that this view represents a radical shift in the Board's mission.

40. On occasion, the Board went even further and stated that its role is actually to protect collectives from users.⁴² This is probably a classic example of what the literature calls “regulatory capture”—a situation where over time the regulator abandons its original public interest mandate and begins to identify with its *regulatees* and protect their interest.⁴³

41. We also note that the Discussion Paper includes a similar language: “More generally, the Board regulates the balance of market power between rights holders and users to ensure that the value of the use of copyrighted content is fair to all parties and end-users. This function includes limiting market actors' exercise of monopolistic powers, which was a core motivation for the creation of the precursor of the Board in the 1930s.”⁴⁴

42. With respect, we submit that this expansive view of the Board mandate is legally incorrect. First of all, while Parliament unquestionably intended to limit the exercise of monopolistic powers by CMOs, Parliament never intended to give the Board the power to regulate *users*, insofar as this means compelling users to pay *higher* fees that they would or could otherwise pay in an

⁴² Reprographic Reproduction, (Post-Secondary Educational Institutions – 2011-2013), decision from March 16, 2011, para 96, at <http://www.cb-cda.gc.ca/decisions/2011/20110316.pdf>

⁴³ Unfortunately, in 1994 the Federal Court of Appeal accepted this view, but without much discussion, without acknowledging the inconsistency with earlier case law, and without realizing that this view represents a radical shift in the Board's mission, see *Canadian Assn. of Broadcasters v. Society of Composers, Authors & Music Publishers of Canada*, [1994] 58 C.P.R. (3d) 190, para 14.

This view is legally incorrect. Parliament never intended to give the Board the power to regulate users, and when users aren't industries subject to Federal jurisdiction, giving the Board such powers might be *ultra vires*, see Katz, *supra* note 25 at 91–93. But even if this view were correct, the Board has never bothered to develop a theory of how to identify, measure, the respective market power of owners and users, and what it means to “balance” it.

⁴⁴ Discussion Paper, at

unregulated market, forcing users to deal with CMOs, or imposing on users who deal with CMOs more onerous obligations than their general obligations under the *Act*.⁴⁵

43. Second, the power to regulate CMOs and the purpose of the regulation can be easily gleaned from the statutory language and its legislative history. Any determined to CMOs, therefore, rests on explicit statutory mandate. By contrast, there is no such clear statutory basis for the notion that the regulatory scheme could operate to the detriment of users, and no such mandate can be inferred in the absence of clear statutory language.⁴⁶ No matter how desirable the Board deems other policy objectives, to the extent that implementing them causes detriment to users or limits the freedoms they otherwise enjoy, the Board cannot consider them in without clear statutory mandate.⁴⁷

44. Further, there can be little doubt that Parliament's legislative power over copyrights includes the power to regulate copyright owners or those acting on their behalf.⁴⁸ However, to the extent that Parliament intended to so regulate users, not only the power to regulate them requires specific mandate, but if the putative regulates aren't entities that operate in a federally regulated industry then the such regulatory scheme might be *ultra vires* the powers of the federal legislature.⁴⁹

45. It goes without saying that the Board should adopt a 'reasonable and suitable' or 'rational' basis for setting royalties. Obviously, if the Board fails to articulate a rational line of reasoning for its determinations, its decisions would be unreasonable on this basis alone. But it does not follow that it would be sufficient for the Board to advance any policy goal, provided it can articulate a rational line of reasoning for its decision.

⁴⁵ Contrast Part VII with Part VIII. The private copying levy scheme under Part VIII is clearly designed to regulate manufacturers and importers of blank media, by imposing on them a mandatory levy payable to certain CMOs. Also contrast Part VII of the *Act* with the Federal *Status of the Artist Act* or the Quebec status of artists legislation. Under those schemes, certain producers could be forced to negotiate with certified artists' associations or forced to comply with *minimum* prices and terms set by a tribunal should negotiations fail. To a large extent, these schemes are a mirror image of the scheme under Part VII of the *Copyright Act*, see Katz, *supra* note 25 at 64.

⁴⁶ *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, *supra* note 18, para 107.

⁴⁷ *Congreve v Home Office*, [1975] 1976 QB 629 (CA) at 652.

⁴⁸ *Canada (Attorney General) v Sandoz Canada Inc.*, 2015 FCA 249 (available on <http://canlii.ca/t/gm0m4>), para 116.

⁴⁹ Katz, *supra* note 25 at 91–93.

46. But even if the expansive view of the Board's mandate were correct, the Board has never bothered to develop a theory of how to identify, measure, the respective market power of owners and users, and what it means to "balance" it.

47. But if the Board's aims include facilitating the development of copyright markets and ensuring "fair" remuneration for copyright owners,⁵⁰ then it serves to regulate *users* as well by mandating the price they *must* pay in order to be "fair" to the owners and to ensure the growth of the copyright industries. Indeed, in carrying out these functions, it becomes a central planner of copyright markets that intrudes even where markets may work adequately on their own.⁵¹

48. Not only does the *Act* not contain any such mandate, or guidelines or criteria for exercising it, carrying out these functions is neither desirable nor within the special expertise of the Board. Instead, it serves to cause the Board's core rate-setting functions to balloon out in scope and time, leading to the efficiency problems with which this consultation is largely concerned.

49. In any event, the lack of focus and overly broad function trickles down through every aspect of the Board's proceedings. For example, both the interrogatory process and the submission of arguments and evidence can become overly long and drawn out because the universe of information or evidence relevant to a "fair and equitable"⁵² royalty rate is so broad. Similarly, the Board's decision-making is slow and unfocused by the lack of clear criteria on which its decisions should be reached.

50. Further, the Board addresses too many proposed tariffs because there is no screening requirement that ensures that tariffs are approved only when the collective administration of copyrights offers the most efficient way for owners and users to transact and that royalties and related terms and conditions are set to ensure those public benefits and protect users from the exercise of monopoly power, nor any review process that eliminates unnecessary tariffs. This is compounded by the failure to promote market-based alternatives, resulting in blanket licenses becoming *de facto* mandatory for users, and thus constant tariff-setting is demanded by collective

⁵⁰ *Ibid.*

⁵¹ See: Katz, *supra* note 8 at 170–71.

⁵² *Copyright Act*, s 66.91(a).

societies. If the Board adhered to its narrow and well-defined mandate, this would go a long way to cutting down the number of such proceedings, and streamline the remaining ones.

51. Finally, the Board goes well beyond its expertise, and arguably its statutory powers, in performing statutory interpretation and answering questions of legal liability of users. This causes significant inefficiencies as the Board must sometimes bifurcate proceedings to deal with issues of statutory interpretation and legal liability prior to moving forward with respect to tariff certification.⁵³ Despite the Board spending significant time attending to these issues, the Board's decisions are frequently appealed to the higher courts.⁵⁴ It's not clear why the Board should waste its time and resources answering legal questions that are often inevitably answered, and better answered, by the courts.

52. Many of these problems stem from the lack of a clear, limited mandate for the board to follow. As the below sections demonstrate, a clear and limited mandate leads to other reforms that would significantly improve the Board's efficiency and the timeliness of its decisions while ensuring the Board carries out its proper function within the broader goals of copyright policy. Clearly, courts will defer to a tribunal's interpretation of its mandate under its home statute. However, when the legislative history and the case law explain what this mandate is, the tribunal's radically different interpretation cannot be given the same amount of deference, unless the Act defines the mandate in a way that allows the tribunal to choose among several different purposes.

53. We note that the Federal Court of Appeal's recent decision in *Access Copyright v Alberta*⁵⁵ might indicate that the Court's holding in *CAB v SOCAN* is ripe for consideration. In that case, the Court, the Court held that, in light of the recent Supreme Court decision in *Guérin*

administrative decision-makers are still kept within what some might call "jurisdictional fences." The majority's approach still respects what some call "jurisdiction." There comes a point where an administrative decision-maker adopts a view of its statutory powers and the statutory scope of its authority that is neither acceptable nor defensible. When that happens, reviewing courts acting

⁵³ Jeremy de Beer, "Canada's Copyright Tariff-Setting Process: An Empirical Review" (2016) 63:3 Journal of the Copyright Society of the USA 471, pp. 492-493.

⁵⁴ *Ibid*, p. 243. Indeed, every issue raised in the five Supreme Court of Canada cases, known sometimes as the 'copyright pentology', originated at the Copyright Board: see Michael Geist, ed, *How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: Ottawa University Press, 2013).

⁵⁵ *Canadian Copyright Licensing Agency (Access Copyright) v Alberta*, 2018 FCA 58 (available on <http://canlii.ca/t/hr6rg>).

under the reasonableness standard will quash the administrative decision, thereby keeping the administrative decision-maker within its authority.⁵⁶

54. Be that as it may, our goal in this submission is not to arguing that the characterization of the Board's mandate in *CAB v SOCAN* has to be reversed. Rather, we discuss that decision in our attempt to identify the moment in time where the Board began adopting a vague and unfocused mandate, and one that encompasses potentially markedly different regulatory goals. We wish to emphasize that the shift from a well understood mandate (regulating a monopolists market power within an well-known regulatory framework dealing with the regulation of public utilities, common carriers, and other businesses "affected with a public interest"), to a different one, in which the Board can also regulate users and require them to pay higher fees, represents a very radical change, that occurred without much attention. We believe that this shift has created the present situation where the Board is a regulator without a clear theory of its regulation, and a clear sense of whom does it regulate and for what purpose. We believe that this confusion has impacted every aspect of the Board's operation and has contributed to the present dissatisfaction with its operations.

55. In any event, even the Court of Appeal's holding in *CAB v SOCAN* does not preclude the Board from reorienting itself to its original mandate and recognize the problems arising from the "balancing of market power" approach. Nor does that holding prevent the Governor in Council from "issuing policy directions to the Board and establishing general criteria to be applied by the Board or to which the Board must have regard in ... establishing fair and equitable royalties to be paid pursuant to this Act", pursuant to section 66.91. And of course, Parliament can always amend the Act and articulate a more specific mandate for the Board along the lines of our recommended proposals.

IV. DEFER DETERMINATIONS OF LIABILITY AND STATUTORY INTERPRETATION TO THE COURTS

56. The Discussion Paper notes that the Board has become "an adjudicator often of first instance, which requires it to interpret and apply many provisions of the Act. As a matter of course, the Board hears and rules upon complex disputes of fact and law relating to copyright and related

⁵⁶ *Ibid*, para 75.

rights between rights holders and users based on evidence and a highly specialized understanding of relevant legal and economic principles.”

57. While the Board indeed has taken upon itself to serve as adjudicator as described, we submit that the Board’s jurisdiction to perform this function is questionable. In fact, the Board’s tendency to immerse itself in deciding many legal question, often on novel and contentious issues in copyright law, has been an additional important contributor to many of the problems that prompted this consultation, as well as others that we address below. This causes significant inefficiencies, delay and complexity. Sometimes the Board bifurcates proceedings to deal with issues of statutory interpretation and legal liability prior to moving forward with respect to tariff certification.⁵⁷ Bifurcation, if done properly, could improve the efficiency of decision-making, but more than once the Board and parties spend considerable time and resources on arguing and deciding a myriad of legal issues only to discover that the legal determination was not necessary for setting the fee or only had a negligible impact on it. Despite the Board spending significant time attending to these issues, the Board’s decisions are frequently reviewed by the courts.⁵⁸ It’s not clear why the Board should waste its time and resources answering legal questions that are often inevitably answered, and better answered, by the courts. In fact, the more the Board ventures into answering complex and novel legal questions, the more likely will parties seek judicial review of its decisions.

58. Disputes between CMOs and users have long contributed to the development of Canadian copyright law, but until relatively recently, when CMOs and users disagreed on whether a particular act required the copyright owner’s consent, they would resolve the question directly in an action for copyright infringement. Many landmark decisions reached the Supreme Court that way. The practice of seeking to resolve substantive questions of copyright law before the Board, with almost automatic judicial review before the Federal Court of Appeal, and frequent appeals to the Supreme Court, is of a recent vintage. This shift did not result from any direct change in the

⁵⁷ Jeremy de Beer, “Canada’s Copyright Tariff-Setting Process: An Empirical Review” (2016) 63:3 *Journal of the Copyright Society of the USA* 471, pp. 492-493.

⁵⁸ *Ibid*, p. 243. Indeed, every issue raised in the five Supreme Court of Canada cases, known sometimes as the ‘copyright pentalogy’, originated at the Copyright Board: see Michael Geist, ed, *How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: Ottawa University Press, 2013).

law favouring one form of adjudication over another.⁵⁹ Rather, it was an unintended jurisdictional creep.

59. Indeed, in 1979 the Federal Court of Appeal held that “the sole function of the Board is to fix the rates which the performing rights societies can charge. ...”⁶⁰ While “[t]he societies must still establish their legal right to collect the tariff ... if a user contests that right, then the Courts are the proper forum for a determination of the rights of the respective parties, not the Board.”⁶¹

60. While later the FCA stated that the Board does have jurisdiction to hear incidental questions of law necessary to carry out its core rate rate-setting function,⁶² the FCA also emphasizes that this power ought to be exercise must be “necessary and inexorably linked to the exercise of its [rate setting] function”.⁶³ The FCA also emphasized the ad hoc nature of such determinations, and they may not bind everyone for all time.”⁶⁴

61. In practice, the Board has not paid heed to the limitations of these decisions. It has routinely heard arguments and made rulings on important legal questions even when such determinations are not necessary to carry out its core rate-setting function. Moreover, the Board has frequently decided to hear arguments and decide legal issues even when deciding the legal issue was not required for fulfilling the rate-setting mandate in the particular case. More than once, the Board decided to make such unnecessary legal determination for the purpose of establishing a precedent that could and would be relied on as a precedent in subsequent proceedings.⁶⁵

⁵⁹ Katz, *supra* note 8 at 176.

⁶⁰ *Curly Posen and Motion Picture Theatres Association of Canada v Minister of Consumer and Corporate Affairs Canada*, [1980] 2 FC 259, at para 6.

⁶¹ *Ibid*, para 7.

⁶² *CTV Television Network Ltd v Canada (Copyright Board)*, [1993] 2 FCR 115.

⁶³ *Id.*, at para 16.

⁶⁴ *Id.* citing *FWS Joint Sports Claimants v Canada (Copyright Board)*, [1991] 1 FCR 487 (C) (available on <http://canlii.ca/t/g9w17>). Notably, in these two later decisions the FCA emphasized that they were consistent with *Posen*.

⁶⁵ For example, in *Satellite Radio*,⁶⁵ one of the contentious issues was whether the making “buffer copies”, whereby 4 to 6 seconds of a sound recording were copied temporarily implicated the reproduction right. The Board decided that the 4 to 6 second buffer copy was not a substantial part of the protected work. This finding should have been enough for not approving the proposed tariff on those buffer copies. The Board, however, chose, unnecessarily, to decide two additional legal questions, namely whether these copies were “reproductions” within the meaning of the *Act*, and whether they were in “material form.” The Board noted that it was not strictly necessary to deal with these issues, but decided to do so nonetheless “to provide guidance in future cases.”⁶⁵

62. The Board's recent decision from August 25, 2017 on the scope of the making available right provides the clearest example of how astray did the Board go in conducting unnecessary hearing and making unnecessary and highly questionable determination of a wide array on complex legal questions. In 2012, the Board was initially of the view that the scope of subsection 2.4(1.1) of the *Act* "was properly before it as a necessary incident to the exercise of its core competence" and that it would have been impossible to certify SOCAN's proposed Tariff 22.A without deciding the scope of that subsection. The Board, on the view that its determination of the question would set a precedent applicable in many other cases, decided, however, to conduct a separate proceeding for determining the scope of this subsection and invite anyone who might be affected by the ruling to make submissions. The Board also believed that "the interpretation of the making available right essentially raises purely legal issues that require little (or preferably, no) discovery or presentation of new evidence", that it could examine the issue without altering the timetables of other proceedings, and that it would be possible to decide the issue quickly through written submissions.

63. Nearly five years later, when the Board handed down an 81-pages long decision, these assumptions proved wrong. First of all, even though the Board accepted that SOCAN would be entitled to collect royalties under subsection 2.4(1.1), it declined to certify its proposed tariff because there was insufficient usable economic evidence on how to price the act of making available.⁶⁶ This means that contrary to the Board's initial view, it was not necessary at all to decide the scope of subsection 2.4(1.1). The determination of the legal issue, perhaps one of the longest and most complicated *obiter dictum* in Canadian copyright law, did not matter for that specific case.

64. The problems with this self-expansion of the Board's mandate are numerous. It over complicates the rate-setting proceedings before the Board, and makes them more costly and lengthy. It shifts the Board's focus from developing and applying special expertise in the specific function of rate-setting, to becoming a copyright adjudicator and a major interpreter of the *Act*.

⁶⁶ <http://www.cb-cda.gc.ca/decisions/2017/DEC-2017-SAT-25082017.pdf>, para 154

65. Not only does the Board lack any special expertise in statutory interpretation or determinations of copyright liability when compared with the courts,⁶⁷ it also has some significant disadvantages. As Justice Binnie noted in *SOCAN v CAIP*, “the Chair of the Board must be a current or retired judge, [but] the Board may hold a hearing without any legally trained member present”⁶⁸ and in contrast to tribunals such as the Competition Tribunal, there is no limitation on the ability of non-judicial members of the Copyright Board to decided legal questions.⁶⁹

66. This, combined with the fact that many of such legal questions before the Board are normally dealt with by the courts, and are far beyond the Board’s core mandate of working out of the details of an appropriate royalty tariff, was one of the reasons why the Supreme Court decided that those legal determination should be reviewed under a standard of correctness.⁷⁰

67. Reviewing the Board’s decisions on legal questions on a correctness might mitigate some of the problems with allowing the Board to make them in the first place, but it does not remedy all problems and in fact creates others. One problem is that the Board, not bound by the same evidentiary and procedural rules as the courts, can decide legal issues on the basis of evidentiary record that would not be admissible in a court. Since finding of facts are generally not reviewable, legal rules might be established on the basis of evidentiary record that would be insufficient or even non-admissible if the same question came before a court. In the same vein, the rules about standing in proceedings before the courts are stricter than those before the Board. This might encourage forum shopping, where CMOs (and potentially objectors too) realize the possibility of obtaining a favourable interpretation of the Act if they raise the issue before the Board as opposed to litigating it in a court. As a result, the Board hears and decides more questions than it needs to, the parties spend more time and resources than is necessary in litigating them, and the decisions, based on very different evidentiary, procedural and standing rules, might distort the development

⁶⁷ *CTV Television Network Ltd v Canada* (Copyright Board), [1993] 2 FCR 115 (“the Board has not expressly been given the power to interpret law and as it does not claim a special expertise”). *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 SCR 283 (SCC), mlzsync1:0051 {"type":"case","extrafields":{"jurisdiction":"ca"}} (available on <http://canlii.ca/t/fs0v9>), para 15.

⁶⁸ *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, [2004] 2 SCR 427 (SCC) (available on <http://www.canlii.org/en/ca/scc/doc/2004/2004scc45/2004scc45.html>), para 49.

⁶⁹ *Competition Tribunal Act, RSC 1985, c 19 (2nd Supp)* [*Competition Tribunal Act, RSC 1985, c 19 (2nd Supp)*], s 12(1).

⁷⁰ *SOCAN v CAIP*, *supra* note 68, paras 49–50. *Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada*, *supra* note 67, paras 10–15.

of the law. This, in turn leads to more applications for judicial review, which in turn undermine the rationale for establishing a specialized administrative tribunal in the first place.

68. There is no reason for the Board to involve itself in the determination of substantive questions regarding the scope of copyright and what activities might result in liability. The Board's workload and efficiency could be significantly improved if the Board refused, or did not have the jurisdiction, to hear and decide such matters.

69. The courts, especially the Federal Court, have significant expertise and competencies in intellectual property disputes, and there is no reason to prefer Board decisions to those of the courts. The appointment requirement to the Board do not provide any basis to suggest that its members possess better expertise in deciding such substantive question, and the frequency of the Board's decisions that are reviewed by the courts would not support such an assumption either.⁷¹ In any event, as we document earlier, Parliament never intended that the Board would become an adjudicator of substantive copyright question and the fact that the Board has assumed this function was a result of mission creep rather than design.

70. Thus, we propose that in any case where a novel issue of whether a particular activity would require a licence from a CMO (or a duty to pay equitable remuneration) arises, legal liability is raised by a collective society in proposing a tariff, or where a *prima facie* case is shown by any other party that liability does not exist for the use in question, the Board should do one of the following:

- Move forward with the approval process as though the legal liability did not exist;
- If the issue involves a purely question of law, refer it to the Federal Court of Appeal, under ss 18.3(1) and 28(2) of the *Federal Courts Act*;
- Stay the proceedings until the CMO obtains a court decision demonstrating that the sought liability exists or the other party obtains an opposite decision.

71. That said, the Board should be able to decide incidental matters so long as they are necessary, involve minor questions of law or mixed fact and law that do not require bifurcation

⁷¹ See *supra* note 54.

nor significant submissions from the parties, and do not affect the decision whether to approve the tariff or the level of the approved royalties.

72. This system has the advantage of significantly improving the efficiency of the tariff approval process, while ensuring that users are protected from overzealous applications of copyright law. It also ensures that the collectives, who are typically most able to afford to bring judicial proceedings, are the ones required to seek a judicial determination, rather than putting the onus on objectors to demonstrate that legal liability does not exist. This proposal also minimizes the strategic use of the Board's proceedings that we discuss in greater detail below.

V. AGGRAVATING FACTORS

A. Incentives to over-fragmentize rights

73. Three related issues further aggravate the problem. One, the Board has also taken the view that once a CMO establishes that a user's activity implicates a copyright administered by the CMO, the user must as a matter of law pay royalties, the CMO is entitled to have its proposed tariff approved, and the Board is required as a general matter to set higher-than-nominal royalty.⁷² This view is flawed, both legally and economically,⁷³ but it encourages CMOs to identify as many acts as possible as falling within the scope of the rights under their administration and propose additional tariffs or additional payments.

74. When copyright owners compete with each other, the price that each of them might be able to charge from a user will not depend on counting how many separate legal rights will be implicated in the user's activity. Rather, the price will depend on the marginal utility (or value) that the user can derive from choosing the work or works of one copyright owner over those of another or other alternatives. So long as the user needs a licence, the price it would be willing to pay would not change whether as a matter of law, the licence should cover one right, two separate

⁷² CMRRA/SODRAC Inc. (Commercial Radio Stations) for the Years 2001 to 2004, <http://www.cb-cda.gc.ca/decisions/2003/20030328-rm-b.pdf>, at 13

⁷³ Legally, at least as 3 rights are concerned, copyright in a work only entails a duty to seek permission, not a duty to pay. The copyright owner might demand payment in exchange to the grant of permission, but the right itself is not a right to be paid, and the amount of payment if demanded and accepted, reflects the competitive position of the work, relative to its alternatives.

rights, or more. If the user needs more than one work, the total price paid will be the sum of those marginal values.

75. Similarly, when copyright owners compete with each other, dividing their copyright bundle among different entities will only make their works less attractive for users to the extent that users will need to negotiate with different entities to obtain all the necessary licences. A copyright owner who can offer a bundle of all the necessary rights will be more competitive than those who cannot.⁷⁴

76. By contrast, when copyright owners administer their rights collectively and offer an all-or-nothing blanket licence, they can charge a price that exceeds the sum of marginal values but corresponds to the entire value of their works. This is one of the main attraction of collective administration for copyright owners, but even then, the ability to extract monopolistic rents will depend on how much the user needs the works relative to not using any of them, not on whether, as a matter of law, the use implicates this number or distinct legal rights or another.

77. The attractiveness of collective administration and blanket licensing as an effective rent-extraction tool is, of course, precisely the reasons why Parliament decided to regulate them in the first place. However, if the regulator can be persuaded that, because as a matter of law one activity implicates more than one right the price that the CMO would be allowed to charge should be higher, then naturally CMOs will be expected to identify as many licence-requiring acts as possible.

78. And if the Board endorses a principle that as a matter of law, a CMO is *entitled* to have its tariffs approved, then copyright owners might take advantage of the regulatory scheme and unbundle their separate rights and divide them among separate CMOs. Even though such unbundling may be economically inefficient overall, it could be profitable for CMOs if the regulatory environment makes it so.

B. The Spectre of Mandatory Tariffs

79. A second contributing factor is the fear that Board-approved tariffs could be imposed on users. This “spectre” of mandatory tariffs, which the Board itself endorsed, is based, in our opinion,

⁷⁴ Katz, *supra* note 16.

on a faulty interpretation of the *Act*. Among its many flaws, this theory entails an anomalous situation where an act of infringement, if occurs after a tariff has been approved, might expose the user to much greater liability than the user might be exposed to if the same act were litigated before the courts. It also encourages copyright owners to form more collective administration scheme than is efficient, to artificially unbundle the bundle copyright in a work and let each strand to be administered separately by a different CMO for the purposes of exercising greater market power, not improving efficiency.⁷⁵

C. Unnecessary Setting of Legal Precedent

80. Thirdly, users might feel compelled to object to any proposed tariff, oppose to any theory of liability advanced by CMO, and apply for judicial review of any adverse legal determination, lest the Board's interpretation of the *Act* become a legal precedent. Moreover, the Board's eagerness to answer many legal questions presents a potential dilemma for users. If they participate as objectors, then the Board's determination might create an issue estoppel and preclude them from challenging its correctness in any future proceeding between them and the CMO. To prevent that, they must insist that the Board decides the legal issue correctly. If they don't participate as objectors, they might not face the risk of issue estoppel, but they might still run the risk that a future challenge of the Board's decision before a court will be regarded as impermissible "collateral attack" on the Board's decision.⁷⁶ Either way, they might feel compelled to spend many resources on proceedings before the Board.

81. All of these dynamics might explain why, instead of functioning as a nimble and agile specialized tribunal, the Board has become the opposite.

VI. PLAYING BOARD GAMES TO GAIN MARKET POWER

A. The problem

82. The problems do not end here, unfortunately. By straying away from its mandate and embracing vague theories of regulation, Board's proceedings tend to become a methodological and evidentiary playground. If the Board is free to consider prices in more competitive setting as

⁷⁵ Katz, *supra* note 25 at 44–50.

⁷⁶ See comment by Justice Phelan in *AC v York*.

a valid benchmark but is also free not to do that and choose one or more any other unspecified criteria, then almost any evidence, argument, or “expert” opinion might be relevant, at least potentially. And if it can regulate CMOs as well as users, and if it ought to ensure the CMOs don’t charge too much but can also require that users don’t pay too little, then it only makes sense that it should have powers to compel users to produce evidence, be subject to intrusive interrogatories, or even generate survey evidence at their own, just as it may or may not require CMOs to do. Add to that the Board’s eagerness to decide many legal issues, necessary or not, and it’s easy to see how the cost of participating in Board could easily become beyond the reach of many users.

83. As a result, the mere ability to file proposed tariffs and impose on users significant costs in merely objecting to them allows CMOs to exact supra-competitive rates without any effective regulatory oversight. The following simple numerical example illustrates that.

84. Suppose that playing music generates a radio station profit of \$10 million, and suppose that a CMO’s repertoire includes all the music that the station might be interested in, and that the CMO is the only source for obtaining licences (either because it owns the copyright or holds an exclusive licence or because the transaction costs involved in negotiating with the copyright owner are indeed prohibitive). The CMO presents the radio station with a binary choice: either it obtains a licence from the CMO, plays music, and earns up to \$10 million, or it cannot play any music and earns nothing or significantly less. This means that an unregulated CMO could offer the station a licence for slightly less than \$10 million, siphon all of the station’s profit, and the station would have no choice but to accept the offer.

85. The Board, of course, is supposed to prevent that from happening, but this would require the radio station to participate in the Board proceedings and incur the costs of such participation. Now, suppose that the radio station and the CMO each know that the Board will set the rate at only \$3 million, but they also estimate that the Board proceedings would cost the parties \$2 million each. In this case, the station and the CMO would be happy to settle for a fee of \$5 million—not as high as \$10 million, but still considerably higher than \$3 million. If the cost of the proceeding rises to \$3 million, they would settle for \$6 million. If the cost of convincing the Board that the fee should be no higher than \$3 million were \$7 million, the radio station would be indifferent between paying \$10 million or exiting the market altogether.

86. Now, suppose that the CMO files a tariff proposing a tariff of \$15 million, and the radio station estimates that Board will set the rate anywhere between \$3 million and \$12 million. In this case, the radio station would rationally settle and agree to pay \$7.5 million and save the cost of the Board proceedings. The Board's eagerness to venture into deciding legal questions, the adoption of vague and overbroad mandate, its view that it can compel objectors (or even users who aren't directly before it) to answer intrusive interrogatories, all increase the complexity cost and delay of participating in Board proceedings, make its decision less predictable, and allow CMOs to effectively to avoid scrutiny. Very few users can afford repeating this process every few years.

87. This problem can lead to another one, namely higher barriers to competition between users. If only large incumbent users with deep pockets can afford participating in Board proceedings, they could strategically be willing to settle on paying higher fees that they can afford paying but that their small or fledging competitors cannot. This one aspect of what is known in the competition law and economics literature as "raising rivals' costs".⁷⁷

88. Note that there is no symmetry between the parties. There is no upward limit on what the CMO can propose. CMO can file an excessively high or onerous proposed tariff and threaten to impose it on users, but users cannot file an equally excessive or onerous counterclaim demanding that the CMO or its members pay them. The most ambitious claim that users can advance in some cases is that certain acts do not require licences or that the CMO failed to provide sufficient basis for calculating a fee for them. If the Board agrees with them then the effective fee for those acts would be zero, but there is no certainty that the Board would agree with them. This means not only that there is very little downside for CMOs who file ambitious proposed tariffs. In fact, the current system encourages them to file such ambitious tariffs and advance the most expansive theories of liability.

89. It would be useful to contrast this situation with that in the U.S., where CMOs recognize that attempts to overreach might prompt either the government or users to initiate antitrust actions against them.⁷⁸

⁷⁷ Steven C Salop & David T Scheffman, "Raising Rivals' Costs" (1983) 73:2 Am Econ Rev 267.

⁷⁸ In the US, the main Performing Rights Organizations, ASCAP and BMI operate under consent decrees entered between them and the US Government, following antitrust proceedings brought by the Department of Justice (DOJ). Overreach might prompt the DOJ to withdraw or seek to revise the consent decrees. These consent decrees aren't binding on users who are free to initiate antitrust lawsuits. Recently, SESAC, a third CMO, agreed to pay US\$58.5

90. There is also no symmetry in the ability of parties to impose costs on each other. CMOs business model revolves around collecting licence fees and maximizing their collection. CMOs only collect rent for the right to use content, but they do not produce, distribute, sell, communicate or market it. Participating in Board and related proceedings is their main business and the associated costs are the costs associated with their core business and they have very few opportunity costs. If they anticipate that pursuing outlandish claims could improve their ability to collect fees they would incur it without considering whether the money could be used for more productive activities. In other words, for CMOs, Board proceedings present a very attractive investment opportunity: it involves almost no risk, some positive return is almost guaranteed, and there are scarcely any better investment opportunities. By contrast, users are engaged in a wide variety of activities and the cost of challenging CMOs' demand isn't limited to the direct cost of hiring lawyers or experts but also includes the opportunity costs of those resources. They can't expect to earn anything from participating in Board proceedings, only to minimize the risk of being required to pay excessive royalties. The resources that they have to spend on those proceedings, in terms of money as well as managerial time and attention, normally could be better spent on improving their core productive activities.

91. Moreover, while CMOs' "investment" in Board proceedings can be expected to yield them direct and long-term supra-competitive returns, users who successfully challenge CMOs' overreach confer the same benefits on their competitors and therefore can only expect to earn a normal, competitive return. Therefore, CMO's have greater incentives to advance outlandish claims than users have incentive to challenge them.⁷⁹

92. *Re: Sound v. Motion Picture Theatre Associations of Canada*⁸⁰ illustrates this point. In that case, the Court confronted the question of whether the broadcasting of sound recordings incorporated into the soundtrack of a cinematographic work requires payment of royalties to performers and makers of the sound recordings. The statutory definition of the term "sound

million to settle an antitrust class action brought against it by a group of local TV stations. The settlement also contains an ongoing oversight mechanism, similar to the one under the consent decrees that ASCAP and BMI are subject to. See, *Meredith Corp v SESAC, LLC*, [2015] 87 F Supp 3d 650 (SDNY) at 657.

⁷⁹ William M Landes & Richard A Posner, *The Political Economy of Intellectual Property Law* (American Enterprise Institute Press, 2004) at 14.

⁸⁰ *Re: Sound v Motion Picture Theatre Associations of Canada*, [2012] 2 SCR 376 (SCC) (available on <http://canlii.ca/t/fs0vc>).

recording” “excludes any soundtrack of a cinematographic work where it accompanies the cinematographic work,” but the term “soundtrack” is not defined. Re:Sound asked the Copyright Board to approve a tariff that would apply to music in soundtracks of cinematographic works, essentially arguing that “excludes” means “includes” (or to put it more charitably, that the definition applies only to commissioned recordings, but “does not exclude a pre-existing sound recording that is incorporated into a soundtrack”).⁸¹

93. Unsurprisingly, the Board rejected that interpretation swiftly, and that the Federal Court of Appeal and the Supreme Court did the same. More puzzling could be Re:Sound’s willingness to incur the legal costs of advancing its rather hopeless interpretation. However, Re:Sound estimated that if its theory were accepted, it would be able to collect additional “\$45 million annually - a 300% increase from current levels”.⁸² From an investment perspective, incurring legal costs that might yield an almost guaranteed cash flow of \$45 million annually, even if at a low probability, seems entirely rational.

94. By contrast, as noted above, users can’t expect to profit from participating in Board proceedings, only to minimize the risk of being required to pay excessive royalties. The resources that they have to spend on those proceedings, in terms of money as well as managerial time and attention, normally could be better spent on improving their core productive activities.

B. Reducing the Incentive to Play Board Games

95. While many of the proposals in the Discussion Paper could address some of the problems in the Board’s operations, many of them draw a symmetry between CMOs and users. The notion that the rules governing the Board’s proceedings should apply to CMOs and users symmetrically sounds intuitively appealing, but this intuition is misguided.

96. The issue of interrogatories and other procedures for the gathering of information and the production of evidence illustrates the problem with symmetrically applied rules. Objectors understandably resist providing information that would assist the CMOs in making the case for their proposed royalties or terms, but CMOs frequently claim that they are entitled to receive

⁸¹ *Ibid*, para 7.

⁸² Factum of Appellant in *Re:Sound*, *supra* note 80. Available at http://www.scc-csc.gc.ca/WebDocuments-DocumentsWeb/34210/FM010_Appellant_ReSound.pdf, para 1.

financial and other information from users in order to determine the royalties they wish to get approved, and the Board has taken it for granted that it has the power to compel users to provide such information.

97. We wish to challenge the soundness of this assumption. First of all, the Board does not have the power to regulate users, only CMOs. Therefore, while the Board might justifiably have powers to compel CMOs to produce evidence and other information that would assist the Board to set royalties, it is far from obvious that it should have the same power vis-à-vis users. Users who participate in Board proceedings have good incentive to provide any evidence that would support their claims that proposed royalties are too high or proposed terms and conditions too onerous. If they have evidence that would support their claims but they fail or decline to furnish it, then the Board would be justified in concluding that their claim was weak.

98. But users would understandably resist providing information that would assist the CMOs. Objectors are not defendants in a civil lawsuit. A plaintiff is required to provide information to make its case because it wishes to impose on the defendant something that the defendant would not otherwise volunteer to do. A defendant is required to provide relevant information to the plaintiff, because if the plaintiff has been able to defeat the defendant's motion to dismiss or motion for a summary judgment it has shown that it has been wronged by the defendant, at least on a preliminary basis. But objectors are not defendants alleged to have done something wrong. By definition, they are users who wish to comply with the law but also want to ensure that the cost of compliance does not become unreasonable. The Board's power to require information from CMO is a natural corollary of its power to regulate them, but power to compel users to provide information is not because users are not the regulatees.

99. In fact, compelling users to provide information can be antithetical to the purposes of the regulatory scheme. Any firm with market power would like to get any information about its consumers that would allow it to assess their willingness to pay and elasticity of demand in order to find the highest price that a particular consumer or a type of consumer would be willing to pay. Indeed, sellers often develop various ways of assessing those factors and encourage its consumers to reveal such information. But sellers are not entitled to receiving such information and consumers are not legally obliged to provide it. Nothing would please a monopolist more than the ability to

get the state impose such a duty on its customers, which is precisely what the Board is willing to do as a matter of course.

100. We do not suggest that the Board under no circumstance should have the power to require information from objectors but the Board should be mindful that the exercise of such power could be antithetical to its mandate as it could be used to help CMOs to enhance their market power. Care must be taken that the regulatory scheme itself does not become an “instrument[] of oppression and extortion”.⁸³

101. Similar problems may arise from any existing or proposed procedural or evidentiary rules that apply symmetrically to CMOs and users.

VII. THE MANDATE OF THE COPYRIGHT BOARD SHOULD REMAIN LIMITED TO ENSURING THE BENEFITS OF COLLECTIVE ADMINISTRATION WHILE PREVENTING ANTICOMPETITIVE EXERCISE OF CMOs’ MARKET POWER

102. We submit that the mandate of the Board should be limited to attaining the benefits of collective administration of copyright while preventing CMOs from exercising their collective market power and minimizing other anti-competitive outcomes of collective administration. In performing its rate-setting function, the Board should seek to set rates corresponding, to the extent possible, to those that exist or would exist in a market place where right holders compete among themselves. In addition the Board should not approve tariffs unless it is satisfied that collective administration is indeed the most efficient to administer the relevant rights and that the proposed scheme does not lessen competition more than is necessary to achieve the benefits.

103. As discussed in the next section, this leads to a number of potential reforms that are likely to significantly increase Board efficiency, reduce the number of matters before the Board, and streamline those matters that are within the Board’s competency and mandate. We believe that this can be accomplished without undermining the public interest in a robust copyright marketplace nor the balance of interests between rights-holders and the public.

104. We submit that the public interest is better served by a more limited role for the Board in the copyright marketplace. By attempting to do everything from deciding issues of law to

⁸³ *Vigneux, supra* note 15 at 354.

attempting to balance the interests of rights-holders and the public, the Board becomes a central planner of a marketplace that is in no need of one. It manages to undermine both the public interest and the interests of rights-holders by denying them the ability to bargain and negotiate within the context of an open market.⁸⁴ It also opens itself up to regulatory capture by the copyright industries by creating an overly-complex regulatory environment that only well-financed interests can navigate. Where markets are functional, those markets should be left to operate without interference. It is only where markets fail that an administrative regulator is necessary.

105. Therefore, to limit the scope of the Board's mandate to rate setting comports with its original function, and its most important current function, which is to avoid the potential abuses of monopoly power. While there is substantial authority for the proposition that the Board protects the public interest by limiting the potential abuses of this monopoly power, there is considerably less theoretical support for the Board to take on the functions of statutory interpretation, nor attempting to promote the health of the copyright industries. Any such assumed mandates bears the risk of moving well beyond the Board's expertise, undermining functional markets, and leading to regulatory capture. We therefore submit that the mandate of the Board excludes such unnecessary and dangerous functions. As discussed in the next section, this has the benefit of significantly reducing the Board's workload and streamlining its procedures.

A. Screen Proceedings for Necessity: A Competitive Impact Assessment

106. The Board was established to ensure that the public obtains the benefits from collective management of copyrights, where appropriate, while being protected from monopolistic abuses. Accordingly, the Board's powers and operations must be derived from and guided by this mandate.

107. Whether the public benefits from collective administration in particular cases, and whether the details of a specific collective licensing scheme adequately ensure that the benefits to the public outweigh the costs depends on a variety of factors. In our opinion, asking this question should be part of the regulatory process.

⁸⁴ See Ariel Katz, "The Potential Demise of Another Natural Monopoly: Rethinking the Collective Administration of Performing Rights" (2005) 1:3 *Journal of Competition Law and Economics* 541; Ariel Katz, "The Potential Demise of Another Natural Monopoly: New Technologies and the Administration of Performing Rights" (2006) 2:2 *Journal of Competition Law and Economics* 245

108. A recent decision from the Federal Court of Appeal points at this direction. The Court reaffirmed that “the role of the Board, ‘as established by statute, has been described as one to fix rates and the terms, in the public interest, for royalties to be assessed.’”⁸⁵ The Court also confirmed an earlier holding that CMOs are not entitled to getting their tariffs approved and that the Board was not “duty-bound” under the *Act* to certify and fix a royalty rate for any proposed tariff.⁸⁶ The Court held that while the Board rate-setting powers may not allow it to modify the proposed related terms and conditions or to intervene in the contractual relationships between the CMOs and its members, the Board may still decline to certify the tariff when if it not satisfied with the proposed terms.

109. Therefore, we believe that the Board should not certify a tariff without being satisfied that the underlying licensing scheme is the most efficient way to administer copyrights in the particular setting, that the benefits outweigh the costs, and that scheme does not impair competition more than is minimally necessary to achieve the benefits. Put simply, it would be unreasonable for the Board to approve a tariff that does not satisfy such conditions because certifying it, while beneficial to the CMO or its members, would not be in the public interest.

110. More specifically, we suggest that every tariff proceeding should include a “competitive impact assessment”. That is, *before* the Board approves a tariff the arrangement should be assessed from a competition angle, asking whether the proposed arrangement increases efficiency and whether there is no alternative that is less impairing of competition, or otherwise includes conditions that impose on users (or copyright owners) unnecessary restraints. For example, before deciding the tariffs for all-you-can-eat blanket licenses to broadcast musical works on the radio, there should be an assessment of whether there is a less competition-impairing arrangement. Only if the conclusion that there is none is reached then should the Board determine the tariff.

111. We suggest that this kind of assessment become part of every tariff proceeding but particularly in cases of inaugural tariffs.

112. We believe that such an assessment will increase efficiency in that at least some of the tariff proceedings that the Board presently hears will become extraneous. This is because the

⁸⁵ *Canadian Copyright Licensing Agency (Access Copyright) v. Alberta*, *supra* note 55, para 110.

⁸⁶ *Ibid*, para 116.

arrangements at the base of these tariff proceedings are most likely not justified from a competition angle (they needlessly impair competition and do not increase efficiency).

113. There is a long-standing symbiotic relationship between competition law and copyright collectives. CMOs, by their very nature, raise questions relating to monopolies and competition, and often the Competition Bureau (the Bureau) will have the expertise and tools to better address these questions or the knowledge to assist the Board. Thus, an important way by which we can increase the Board's efficiency is by greater cooperation and involvement of the Bureau, especially in cases involving copyright management organizations.

114. The Bureau has the tools and institutional competence to assess the competitive impact.⁸⁷ Therefore, the Board should request that the Bureau conduct such an assessment. Conversely, the Bureau can and should conduct such an assessment in its own initiative. Both the *Copyright Act* and the *Competition Act*, already include provisions allowing for (and even, arguably, requiring) the Bureau's involvement.

115. The Commissioner of Competition can examine agreements between CMOs and users filed under ss. 70.5-70.6 of the *Copyright Act*. Section 125 (1) of the *Competition Act* states that: "The Commissioner, at the request of any federal board, commission or other tribunal or on his own initiative, may, and on direction from the Minister shall, make representations to and call evidence before the board, commission or other tribunal in respect of competition, whenever such representations are, or evidence is, relevant to a matter before the board, commission or other tribunal, and to the factors that the board, commission or other tribunal is entitled to take into consideration in determining the matter."⁸⁸

116. Section 70.5 of the *Copyright Act* immunizes only the vertical aspects of agreements between CMOs and users. The horizontal aspects are not immune from s 45 of the *Competition Act*. While the existence of a regulatory scheme for overseeing CMOs may provide some immunity

⁸⁷ See e.g.: Competition Bureau *Enforcement Guidelines Intellectual Property* at: [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-IPEG-e.pdf/\\$file/cb-IPEG-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-IPEG-e.pdf/$file/cb-IPEG-e.pdf). Especially Chapters 4 and 5.

⁸⁸ See also the Bureau's Guidelines regarding competition advocacy in Chapter 6.

under the “regulatory conduct defense”,⁸⁹ the defence is not sweeping.⁹⁰ Moreover, the *Copyright Act* prevent the application of the abuse of dominance provisions of the *Competition Act* to CMOs, and nothing in the *Copyright Act* should prevent the application of s 90.1 to the agreements between right holders constituting the CMO or between them and the CMO.⁹¹

B. Promote Competitive Markets and Private Negotiation

117. The screening function described above can identify the cases where collective licensing is justified because it is indeed the only, or the most efficient way to administer the underlying copyrights. However, the Board should also ensure that collective licensing is not the only option available to users, and that approval of the collective scheme does not unduly hinder the emergence of competitive alternatives.

118. For example, when the CMO administer the copyrights on an exclusive basis, or otherwise interferes with the ability of its members to transact directly with users or through other intermediaries, it prevents or erects barriers to the emergence of more competitive alternatives. Removing such barriers has been an essential feature in the oversight of CMOs in the US and should also be adopted in Canada.

119. In addition, the Board should also consider whether an all-you-can-eat blanket licence is justified, or whether pay-per-use options could be just as efficient. As two of us discuss in another paper, an all-you-can-eat blanket licence tends to encourage the use of works from the CMOs repertoire and discourage the use of other content. While this effect can benefit the CMO and its members, it can distort the production of creative content and harm creators who are not members of the CMO or do not wish to be.⁹²

⁸⁹ *Competition Act*, RSC 1985, c C-34 [*Competition Act*], s 45(7).

⁹⁰ Competition Bureau, “‘Regulated’ Conduct”, (1 September 2010), online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03273.html>>.

⁹¹ S 90.1(1) provides “If, on application by the Commissioner, the Tribunal finds that an agreement or arrangement — whether existing or proposed — between persons two or more of whom are competitors prevents or lessens, or is likely to prevent or lessen, competition substantially in a market, the Tribunal may make an order

(a) prohibiting any person — whether or not a party to the agreement or arrangement — from doing anything under the agreement or arrangement; or

(b) requiring any person — whether or not a party to the agreement or arrangement — with the consent of that person and the Commissioner, to take any other action.”

⁹² Ariel Katz & Eden Sarid, *Who Killed the Radio Star? How Music Blanket Licenses Distort the Production of Creative Content in Radio* (2018).

C. Periodically Review Tariffs and Collective Societies

120. Many cases of collective administration and longstanding tariffs have been around for a substantial period so that their function or need is rarely questioned. We submit that the Board (and, where relevant, the Bureau) as part of its mandate to serve the public interest, periodically initiate a review of these, even if they not contested.

121. By periodically reviewing the need for collective administration in certain fields and reviewing the tariffs set therein, the Board will serve the public interest by ensuring that monopolistic licensing scheme do not exist when they are not necessary.

122. In the case of rights for “equitable remuneration” and other instances where the *Act* mandates a collective scheme, we recommend considering statutory provisions that require periodic review or include sunset clauses.

VIII. CONCLUSION

123. The Copyright Board’s mandate has swelled to include far too much over the past three decades. What should have remained an institution designed to ensure efficient administration of copyright while preventing monopolistic abuse has evolved into a quasi-judicial body that attempts to control and entire marketplace based upon vague notions of fairness and equity. From a regulator body with a narrow and specific mandate, operating in a well-understood regulatory framework, the Copyright Boards has transformed into a regulator lacking a theory of regulation. This has opened the Board up to unnecessary proceedings rife with unnecessary interrogatories, arguments, and evidence.

124. It must be remembered that, with respect to pubic copyright policy, the Board is a single tool within a larger toolbox. It serves broader public policy goals by carrying out its mandate. But it is a mistake to think that its mandate is, or can be, to achieve those broader public policy goals. Such a mandate undermines itself.

125. This submission has argued that a clear and limited mandate that focuses the Board on setting collective copyright licensing fees at market-equivalent rates will unburden the Board of much of this excess, and return it to its rightful place within broader copyright policy. This submission has identified a number of practical reforms that follow from such a mandate.

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