

Bill C-86: Copyright Board Reform in Action

Casey Chisick, Eric Mayzel, Jessica Zagar

November 20, 2018

On October 29, 2018, highly-anticipated Copyright Board reform amendments were tabled with the House of Commons as part of Bill C-86, a budget implementation bill that contains the legislative elements of the new National IP Strategy.

Bill C-86 includes amendments to the *Copyright Act* that are intended to modernize the legislative framework relating to the Copyright Board of Canada. The amendments seek to facilitate more efficient decision-making processes and timelier decisions by the Board and to add clarity to Board proceedings by introducing substantive criteria to be considered by the Board in fixing royalties.

Bill C-86 represents the culmination of consultations launched in August 2017 by the Minister of Innovation, Science and Economic Development (ISED) and the Minister of Canadian Heritage (Heritage), jointly with the Copyright Board of Canada, on proposed legislative and regulatory changes to the Board's decision-making processes.

The proposed reform includes a number of significant changes pertaining to the Copyright Board and the collective administration of copyright.

A Single Regime for All Collective Societies

In its current form, the *Copyright Act* provides separate “regimes” for the collective administration of the performing rights in works and other subject matter,¹ on one hand, and various other rights, such as the reproduction right,² on the other.

Bill C-86 would collapse those regimes into a single set of rules and requirements that would apply to most collective societies.³ One of the key changes would be that performing rights collectives, such as SOCAN and Re:Sound, would no longer be required to file tariffs, and would be entitled to enter into negotiated agreements for uses of works that previously required a tariff. Like other collectives, SOCAN and Re:Sound would be entitled to file tariffs on a voluntary basis, and would also be able to apply to the Copyright Board to fix royalties in individual cases if they are unable to reach agreement with users.

However, a significant distinction would remain. Under the *Copyright Act*, only a performing rights collective may, in an action to enforce a tariff, elect to claim statutory damages in an amount of between three and 10 times the amount of the applicable royalties. Bill C-86 would limit that option to the public performance of musical works and performers' performances of those works, excluding even the collective that administers

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performing rights in the corresponding sound recordings. It is not immediately clear why those other performing rights collectives would no longer be eligible for statutory damages, let alone why other collective societies would not be entitled to seek statutory damages when all collectives would otherwise be subject to the same regulatory regime.

Establishing New Timelines

A common concern about the tariff-setting process is that tariffs are routinely certified years after they have expired, with significant retroactive effect as a result. Bill C-86 proposes to address that issue with substantial revisions to the existing timelines for filing and objecting to tariffs. The proposed amendments include timelines for tariffs to be filed earlier and remain effective longer.

Under the current regime, proposed tariffs must be filed by March 31st of the year before the proposed effective date of the tariff and notices of objections must be filed within 60 days of publication of the proposed tariff in the *Canada Gazette*. The *Copyright Act* does not specify a minimum tariff period and, in practice, collective societies file proposed tariffs for anywhere from one to five years.

Under the proposed amendments, proposed tariffs would need to cover a minimum of a three-year period and be filed by October 15th of the second calendar year in which the proposed tariff is to take effect. For example, a tariff proposed to take effect on January 1, 2021 would need to be filed no later than October 15, 2019 and would need to apply through December 31, 2023 or later. Notices of objections to a proposed tariff would need to be filed within 30 days of the publication of the proposed tariff – which, going forward, could be published by the Board however it sees fit, thus potentially reducing delays associated with publication in the *Gazette*.

The effect of these amendments would be, among other things, to move the tariff examination process up by six to eight months. That could have a significant impact on the timing of tariff certification, especially if the Board is able to take advantage of other procedural amendments to streamline other aspects of its process.

Many participants in the consultation process advocated for amendments that would require the Board to issue tariff decisions within a specific timeframe, as is the case in the United States. Although those deadlines did not find their way into the proposed amendments, Bill C-86 would empower the Governor in Council to set additional timelines by regulation. That power appears to cement the government's ability to establish fixed deadlines if that turns out to be necessary to meet the objective of timelier Board decisions.

Streamlining Procedures and Introduction of Case Management

Bill C-86 contains the express direction that all matters before the Board are to be dealt with “as informally and expeditiously as the circumstances and considerations of fairness permit.” Similar statutory directions

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apply to other administrative bodies, including the Competition Tribunal. The direction is likely to enable the Board to continue streamlining its processes, and encourage the timely rendering of decisions, without compromising the quasi-judicial nature of Board proceedings or rules of procedural fairness.

The proposed amendments would also formalize case management in Board proceedings. Directions or orders of a case manager would be deemed to have been made by the Board, and would be subject to judicial review. It is reasonable to expect that the parties, and the Board itself, would be interested in using case management to help streamline complicated proceedings if these proposed amendments are made.

Introducing Statutory Rate-Setting Criteria

The proposed amendments introduce a statutory requirement that the Board fix royalty rates that are “fair and equitable” considering (i) what would have been agreed to between a willing buyer and a willing seller in a competitive market environment with all relevant information, at arm’s length and free of external constraints (ii) the public interest (iii) any other factors prescribed by regulation and (iv) any other criterion that the Board considers appropriate.

A royalty standard reflecting market-based principles, including willing-buyer/willing-seller models, is consistent with many other jurisdictions across the world. Australia, the US, the UK and various countries in the EU all use market proxies for guidance in their rate-setting processes. Although the introduction of a similar standard in Canada could increase the predictability of Board decisions, it remains to be seen whether the Board’s ability to consider “any other criterion” that it considers appropriate will work at cross-purposes to that goal.

Withdrawing or Amending Proposed Tariffs

Bill C-86 would expressly permit a collective society to apply to the Board for leave to withdraw or amend a proposed tariff before it is approved. The Board, in turn, would be required to approve that request if it is satisfied that certain criteria, which appear designed to ensure that users are not prejudiced by a withdrawal or amendment, are met.

The ability to withdraw or amend a proposed tariff may be of greater importance under the *Copyright Act* as amended, given that a proposed tariff would have to cover a period of no less than three years. Especially in the digital world, business models often evolve quickly, sometimes requiring that licensing models evolve accordingly.

Broader Prohibitions on Enforcement

Bill C-86 extends the so-called “prohibition on enforcement” to apply to anyone who has “paid or offered to pay” the royalties set out in an approved tariff or a proposed tariff that applies to uses covered by an

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existing tariff, as well as to anyone who has “offered to pay” the royalties proposed in a tariff of first impression⁴ “and that will apply ... once the tariff is approved.”

That would represent a significant departure from the status quo. Currently, the prohibition applies only to a person who has paid or offered to pay royalties under an *approved* tariff, not a *proposed* tariff. That prohibition prevents a collective society from discriminating between users, by affording all users access to the same rates, terms, and conditions once a tariff is approved. The policy rationale underlying the proposed amendments is less apparent, particularly if they are interpreted to require only that a user offer to pay the royalties in a proposed tariff *after* it is approved. Instead of maintaining a level playing field, this could tilt the balance against collective societies, who might be precluded from collecting royalties from active users for years at a time.

Conclusion: A New Era for the Copyright Board

An efficient and effective the Copyright Board is vital to the Canadian creative economy. The amendments proposed in Bill C-86 are a welcome step toward reforming the processes of the Board and, once implemented, should help promote timeliness, efficiency, and predictability. As the bill continues to work its way through the House and the Senate, with a view to becoming law before the end of 2018, the government is to be applauded for embracing the opportunity to undertake a thoughtful and thorough review of collective administration in Canada.

¹ The so-called “performing rights” regime, which is governed by sections 67 to 68.2 of the *Copyright Act*.

² The so-called “general” regime, which is governed by sections 70.1 to 70.191 of the *Copyright Act*.

³ Bill C-86 includes specific provisions pertaining to the retransmission right, private copying, and the reproduction of broadcasts by educational institutions.

⁴ Meaning the first tariff proposed for a particular use of copyright-protected material.