



ANNUAL
REPORT

2004.
2005



Copyright Board of Canada



Copyright Board
Canada



Commission du droit d'auteur
Canada

The Honourable David L. Emerson, P.C., M.P.
Minister of Industry
Ottawa, Ontario
K1A 0A6

Dear Mr. Minister:

I have the honour of transmitting to you for tabling in Parliament, pursuant to section 66.9 of the *Copyright Act*, the seventeenth Annual Report of the Copyright Board of Canada for the financial year ending March 31, 2005.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'S. Callary'.

Stephen J. Callary
Vice-Chairman and
Chief Executive Officer

56 Sparks Street, Suite 800, Ottawa, Ontario K1A 0C9
Telephone: (613) 952-8621 Fax: (613) 952-8630
Web Site: www.cb-cda.gc.ca

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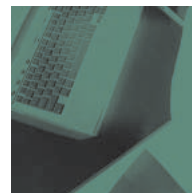
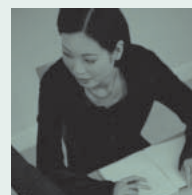
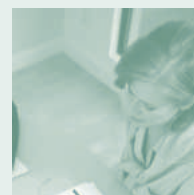
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Board Members and Staff

as of March 31, 2005

<i>Chairman:</i>	The Honourable Justice William J. Vancise
<i>Vice-Chairman and Chief Executive Officer:</i>	Stephen J. Callary
<i>Members:</i>	Francine Bertrand-Venne Sylvie Charron Brigitte Doucet
<i>Secretary General:</i>	Claude Majeau
<i>General Counsel:</i>	Mario Bouchard
<i>Director of Research and Analysis:</i>	Gilles McDougall
<i>Clerk of the Board:</i>	Lise St-Cyr
<i>Manager, Corporate Services:</i>	Ivy Lai
<i>Registry Officers:</i>	Nadia Campanella Tina Lusignan
<i>Financial and Administrative Assistant:</i>	Joanne Touchette
<i>Administrative Assistant:</i>	Manon Huneault
<i>Informatics Officer:</i>	Michel Gauthier



Chairman's Message

I am pleased to present the 2004-2005 Annual Report of the Copyright Board of Canada. This report, the first since my nomination as Chairman, describes the Board's activities during the year in discharging its mandate and responsibilities under the *Copyright Act*. A number of interesting challenges and issues presented themselves during the first year of my term and I look forward to considering them and others in the years to come.

The Board held two hearings and one pre-hearing conference during 2004-2005. In the first hearing, the Board considered the amount of royalties payable to the Canadian Broadcasters Rights Agency (CBRA) for the fixation and reproduction of works and communication signals by commercial media monitors for the years 2000-2005 and by non-commercial media monitors for the years 2001-2005.

The second hearing required the Board to consider the royalties payable by commercial radio stations for the years 2003-2007 for the communication to the public by telecommunication of musical works in the repertoire of the Society of Composers, Authors and Music Publishers of Canada (SOCAN) and of published sound recordings forming part of the Neighbouring Rights Collective of Canada (NRCC) repertoire.

The pre-hearing conference, held on February 15, 2005, dealt with procedural matters to expedite the hearing pertaining to the SOCAN's tariff for ringtones.

During the year, the Board issued six decisions. The first dealt with various SOCAN tariffs the Board had certified in the previous fiscal year and for which the reasons were issued on June 18, 2004. The second, issued on December 14, 2004, extended indefinitely, on an interim basis, the application of the certified 2003-2004 Private Copying Tariff until a final decision is rendered. The third, issued on January 14, 2005, certified the royalties to be collected by the Educational Rights Collective of Canada (ERCC) from educational institutions for the reproduction and performance of works or other subject-matters communicated to the public by telecommunications for the period 2003-2006. The fourth, also issued on January 14, 2005, certified NRCC's tariff pertaining to the Canadian Broadcasting Corporation (radio). The fifth was issued on February 25, 2005, certifying SOCAN-NRCC tariffs applicable to pay audio services for the years 2003-2006. And finally, on March 29, 2005, the Board issued its decision on the royalties to be collected by CBRA for the fixation and reproduction of works and communication signals by commercial media monitors for the years 2000-2005 and by non-commercial media monitors for the years 2001-2005.

All of the foregoing decisions are described in greater detail in the present Report.

In 2004-2005, the Board issued 16 non-exclusive licences for the use of published works for which copyright owners could not be located. The Board also issued three decisions dismissing applications for licences.



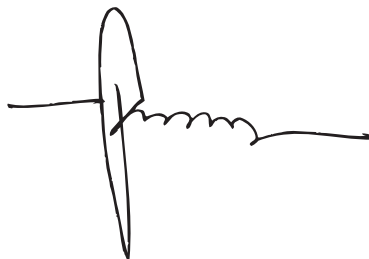
In the first two applications there was a complete lack of evidence that the works had been published and in the other, the applicant sought to reproduce anonymous works published more than fifty years ago which were in the public domain.

The Board initiated procedures in this fiscal year, which will result in hearings in the fall of 2005, 2006 and early 2007. Some of these hearings will be very challenging. The Board will consider for the first time the tariff payable for the reproduction of musical works by online music services. It will

also consider the royalties payable by educational institutions for the reprographic reproduction of works in Access Copyright's repertoire.

From the foregoing, it can be seen that the year 2004-2005 was a busy and productive period for the Board.

On a personal note, I would like to thank my colleagues on the Board as well as the staff and personnel for their support and assistance throughout the year. Their expertise and dedication make the work of the Board possible.

A handwritten signature in black ink, consisting of a large, stylized initial 'W' followed by a series of connected loops and a horizontal line extending to the right.

The Honourable William J. Vancise



The Board is an economic
regulatory body empowered
to establish royalties...

Mandate of the Board

The Copyright Board of Canada was established on February 1, 1989, as the successor of the Copyright Appeal Board. The Board is an economic regulatory body empowered to establish, either mandatorily or at the request of an interested party, the royalties to be paid for the use of copyrighted works, when the administration of such copyright is entrusted to a collective-administration society. Moreover, the Board has the right to supervise agreements between users and licensing bodies, issue licences when the copyright owner cannot be located and may determine the compensation to be paid by a copyright owner to a user when there is a risk that the coming into force of a new copyright might adversely affect the latter.

The *Copyright Act* (the “Act”) requires that the Board certify tariffs in the following fields: the public performance or communication of musical works and of sound recordings of musical works, the retransmission of distant television and radio signals, the reproduction of television and radio programs by educational institutions and private copying. In other fields where rights are administered collectively, the Board can be asked by a collective society to set a tariff; if not, the Board can act as an arbitrator if the collective society and a user cannot agree on the terms and conditions of a licence.

The Board’s specific responsibilities under the *Act* are to:

- ▶ certify tariffs for the public performance or the communication to the public by telecommunication of musical works and sound recordings [sections 67 to 69];
- ▶ certify tariffs, at the option of a collective society referred to in section 70.1, for the doing of any protected act mentioned in sections 3, 15, 18 and 21 of the *Act*. [Sections 70.1 to 70.191];
- ▶ set royalties payable by a user to a collective society, when there is disagreement on the royalties or on the related terms and conditions [sections 70.2 to 70.4];
- ▶ certify tariffs for the retransmission of distant television and radio signals or the reproduction and public performance by educational institutions, of radio or television news or news commentary programs and all other programs, for educational or training purposes [sections 71 to 76];
- ▶ set levies for the private copying of recorded musical works [sections 79 to 88];
- ▶ rule on applications for non-exclusive licences to use published works, fixed performances, published sound recordings and fixed communication signals, when the copyright owner cannot be located [section 77];

... ▶



- ▶ examine, at the request of the Commissioner of Competition appointed under the *Competition Act*, agreements made between a collective society and a user which have been filed with the Board, where the Commissioner considers that the agreement is contrary to the public interest [sections 70.5 and 70.6];
- ▶ set compensation, under certain circumstances, for formerly unprotected acts in countries that later join the Berne Convention, the Universal Convention or the Agreement establishing the World Trade Organization [section 78].

In addition, the Minister of Industry can direct the Board to conduct studies with respect to the exercise of its powers [section 66.8].

Finally, any party to an agreement on a licence with a collective society can file the agreement with the Board within 15 days of its conclusion, thereby avoiding certain provisions of the *Competition Act* [section 70.5].



Operating Environment

Historical Overview

In 1925, PRS England set up a subsidiary called the Canadian Performing Rights Society (CPRS). In 1931, the *Copyright Act* was amended in several respects. The need to register copyright assignments was abolished. Instead, CPRS had to deposit a list of all works comprising its repertoire and file tariffs with the Minister. If the Minister thought the society was acting against the public interest, he could trigger an inquiry into the activities of CPRS. Following such an inquiry, Cabinet was authorized to set the fees the society would charge.

Inquiries were held in 1932 and 1935. The second inquiry recommended the establishment of a tribunal to review, on a continuing basis and before they were effective, public performance tariffs. In 1936, the *Act* was amended to set up the Copyright Appeal Board.

On February 1, 1989, the Copyright Board of Canada took over from the Copyright Appeal Board. The regime for public performance of music was continued, with a few minor modifications. The new Board also assumed jurisdiction in two new areas: the collective administration of rights other than the performing rights of musical works and the licensing of uses of published works whose owners cannot be located. Later the same year, the *Canada-US Free Trade Implementation Act* vested the Board with the power to set and apportion royalties for the newly created compulsory licensing scheme for works retransmitted on distant radio and television signals.

Bill C-32 (An Act to amend the *Copyright Act*) which received Royal Assent on April 25, 1997, modified the mandate of the Board

by adding the responsibilities for the adoption of tariffs for the public performance and communication to the public by telecommunication of sound recordings of musical works, for the benefit of the performers of these works and of the makers of the sound recordings (“the neighbouring rights”), for the adoption of tariffs for private copying of recorded musical works, for the benefit of the rights owners in the works, the recorded performances and the sound recordings (“the home-taping regime”) and for the adoption of tariffs for off-air taping and use of radio and television programs for educational or training purposes (“the educational rights”).

General Powers of the Board

The Board has powers of a substantive and procedural nature. Some powers are granted to the Board expressly in the *Act* and some are implicitly recognized by the courts.

As a rule, the Board holds hearings. No hearing will be held if proceeding in writing accommodates a small user that would otherwise incur large costs. The hearing may be dispensed with on certain preliminary or interim issues. No hearings have been held yet for a request to use a work whose owner cannot be located. This process has been kept simple. Information is obtained either in writing or through telephone calls.

The examination process is always the same. The collective society must file a statement of proposed royalties which the Board publishes in the *Canada Gazette*. Tariffs always come into effect on January 1. On or before the preceding 31st of March, the collective society must file a proposed statement of royalties. The users targeted by the proposal (or in the case of private copying, any interested person)

or their representatives may object to the statement within sixty days of its publication. The collective society in question and the opponents will have the opportunity to argue their case in a hearing before the Board. After deliberations, the Board certifies the tariff, publishes it in the *Canada Gazette* and explains the reasons for its decision in writing.

Guidelines and Principles Influencing the Board's Decisions

The decisions the Board makes are constrained in several respects. These constraints come from sources external to the Board: the law, regulations and judicial pronouncements. Others are self-imposed, in the form of guiding principles that can be found in the Board's decisions.

Court decisions also provide a large part of the framework within which the Board operates. Most decisions focus on issues of procedure, or apply the general principles of administrative decision-making to the peculiar circumstances of the Board. However, the courts have also set out several substantive principles for the Board to follow or that determine the ambit of the Board's mandate or discretion.

The Board also enjoys a fair amount of discretion, especially in areas of fact or policy. In making decisions, the Board itself has used various principles or concepts. Strictly speaking, these principles are not binding on the Board. They can be challenged by anyone at anytime. Indeed, the Board would illegally fetter its discretion if it considered itself bound by its previous decisions. However, these principles do offer guidance to both the Board and those who appear before it. In fact, they are essential to ensuring a desirable amount of consistency in decision-making.

Among those factors, the following seem to be the most prevalent: the coherence between the various elements of the public performance of music tariffs, the practicality aspects, the ease of administration to avoid, as much as possible, tariff structures that make it difficult to administer the tariff in a given market, the search for non-discriminatory practices, the relative use of protected works, the taking into account of Canadian circumstances, the stability in the setting of tariffs that minimizes disruption to users, as well as the comparisons with "proxy" markets and comparisons with similar prices in foreign markets.

Organization of the Board

Board members are appointed by the Governor in Council to hold office during good behaviour for a term not exceeding five years. They may be reappointed once.

The *Act* states that the Chairman must be a judge, either sitting or retired, of a superior, county or district court. The Chairman directs the work of the Board and apportions its caseload among the members.

The *Act* also designates the Vice-Chairman as Chief Executive Officer of the Board, exercising direction over the Board and supervision of its staff.



From left to right

Stephen J. Callary, Brigitte Doucet, the Honourable Justice William J. Vancise, Francine Bertrand-Venne and Sylvie Charron

Chairman

The Honourable William J. Vancise, a justice of the Court of Appeal for Saskatchewan, was appointed part-time Chairman of the Board for a five-year term commencing in May 2004. In 1996 Mr. Justice Vancise was appointed Deputy Judge of the Supreme Court of the Northwest Territories. He was appointed to the Court of Queen's Bench in 1982 and to the Court of Appeal for

Saskatchewan in November 1983 where he continues to serve. Mr. Justice Vancise received his Queen's Counsel designation in 1979. He joined Balfour and Balfour as an associate in 1961 and in 1963 he was named a partner at Balfour, McLeod, McDonald, Laschuk and Kyle, where he became a managing partner in 1972. Mr. Justice William Vancise earned an LL.B. from the University of Saskatchewan in 1960 and was called to the Saskatchewan Bar in 1961.

Vice-Chairman & Chief Executive Officer

Stephen J. Callary is a full-time member appointed in May 1999 and reappointed in 2004 for a five-year term. Mr. Callary has served as Managing Director of consulting firms, RES International and IPR International; as Executive Director of TIMEC – the Technology Institute for Medical Devices for Canada; and as President of Hemo-Stat Limited and Sotech Projects Limited. He has extensive international experience dealing with technology transfer, software copyrights and patents and the licensing of intellectual property rights. From 1976 to 1980, Mr. Callary worked with the Canadian Radio-television and Telecommunications Commission (CRTC), the Privy Council Office (PCO) and the Federal-Provincial Relations Office (FPRO). He has a B.A. degree from the University of Montreal (Loyola College) and a B.C.L. degree from McGill University. He was admitted to the Quebec Bar in 1973 and pursued studies towards a Dr.jur. degree in Private International Law at the University of Cologne in Germany.

Members

Francine Bertrand-Venne is a full-time member appointed in June 2004 for a five-year term. Prior to her appointment, Ms. Francine Bertrand-Venne was General Manager of the *Société professionnelle des auteurs et des compositeurs du Québec* (SPACQ). She was also legal counsel for labour relations, the *Copyright Act* and the *Broadcasting Act*. Ms. Bertrand-Venne is a graduate of the University of Sherbrooke (L.L.B. in 1972).

Sylvie Charron is a full-time member appointed in May 1999 and reappointed in 2004 for a five-year term. Before joining the Copyright Board, she was an Assistant

Professor with the University of Ottawa's Faculty of Law (French Common Law Section) and worked as a private consultant in broadcasting, telecommunications and copyright law. Prior to her law studies, she worked with the Canadian Radio-television and Telecommunications Commission (CRTC) for 15 years. Ms. Charron is a graduate of the University of Ottawa (B.Sc. Biology in 1974, M.B.A. in 1981 and LL.B. – Magna cum laude in 1992). Ms. Charron is a member of the Canadian Association of Law Teachers, of the *Association des juristes d'expression française de l'Ontario* (AJEFO), of the Council of Canadian Administrative Tribunals and is former Vice-Chair of the Ottawa Chapter of Canadian Women in Communications and past Executive Director of the Council of Canadian Law Deans.

Brigitte Doucet is a full-time member appointed in November 2001 for a five-year term. Prior to her appointment, Ms. Doucet was Legal Counsel, Labour Relations with *l'Association des producteurs de films et de télévision du Québec* since October 1999. She has also been active in the copyright and music fields as well as in business law. Furthermore, she lectured at the *Institut Trebas* on *Les affaires de la musique*. Prior to her law studies, Ms. Doucet was an information technology consultant for more than eight years. Ms. Doucet is a graduate of the University of Montreal (LL.B. in 1993).

Note: Detailed information on the Board's resources, including financial statements, can be found in its Report on Plans and Priorities for 2005-2006 (Part III of the Estimates) and the Performance Report for 2004-2005. These documents are or will soon be available on the Board's Web site (www.cb-cda.gc.ca).

Public Performance of Music

Background

The provisions under sections 67 onwards of the *Act* apply to the public performance of music or the communication of music to the public by telecommunication. Public performance of music means any musical work that is sung or performed in public, whether it be in a concert hall, a restaurant, a hockey stadium, a public plaza or other venue. Communication of music to the public by telecommunication means any transmission by radio, television or the Internet. Collective societies collect royalties from users based on the tariffs approved by the Board.

Hearings

During 2004-2005, the Board held one hearing and one pre-hearing conference. The hearing, held in May and June 2004, pertained to the royalties to be paid by commercial radio stations in 2003-2007 for the communication to the public by telecommunications of musical works in the repertoire of the Society of Composers, Authors and Music Publishers of Canada (SOCAN) and of published sound recordings of musical works, forming part of the Neighbouring Rights Collective of Canada (NRCC) repertoire. The pre-hearing conference, held on February 15, 2005, dealt with procedural matters relating to SOCAN's tariff for ringtones.

Decisions of the Board

The Board issued three decisions in 2004-2005. The first one pertained to various SOCAN tariffs the Board certified in the previous fiscal year and for which the reasons were issued on June 18, 2004. The second

one, rendered on January 14, 2005, certified NRCC's tariff pertaining to the Canadian Broadcasting Corporation radio. And finally, the third one, rendered on February 25, 2005, certified SOCAN-NRCC tariffs applicable to pay audio services for the years 2003-2006.

SOCAN Multiple Licensing of Premises and Related Issues, 1998-2007

The proposed tariffs that were the object of this decision were filed by SOCAN between 1997 and 2003. In the fall of 1998, the Board initiated an examination of various tariffs which had raised many complaints or objections, particularly by the Canadian Restaurant and Foodservices Association (CRFA), the Hotel Association of Canada (HAC) and several small rural communities in Alberta. In general, these users complained of the unfairness of having to pay royalties under separate tariffs for music use in the same premises and the excessive financial burden of having to pay cumulative minimum fees, either for several events or tariffs.

Hearings dealing with these issues were held on February 4 to 6, 2002, and on June 17 and 18, 2003. The Board subsequently certified the following tariffs (some of which were non-contested or for which agreements were reached):

- ▶ Tariff 1.A (Commercial Radio) 2000-2002
- ▶ Tariff 1.B (Non-Commercial Radio Other Than the CBC) 2000-2004
- ▶ Tariff 2.B (Ontario Educational Communications Authority) 2000-2004

- ▶ Tariff 2.C (Société de télédiffusion du Québec) 1998-2007
 - ▶ Tariff 3.A (Cabarets, Cafes, Clubs, etc. – Live Music) 1999-2004
 - ▶ Tariff 3.B (Cabarets, Cafes, Clubs, etc. – Recorded Music Accompanying Live Entertainment) 1999-2004
 - ▶ Tariff 3.C (Adult Entertainment Clubs) 2000-2004
 - ▶ Tariff 4.B.2 (Classical Music Concerts, Annual Licence for Orchestras) 2003-2007
 - ▶ Tariff 5.A (Exhibitions and Fairs) 1999-2004
 - ▶ Tariff 6 (Motion Picture Theatres) 2004
 - ▶ Tariff 7 (Skating Rinks) 1999-2004
 - ▶ Tariff 10.A (Strolling Musicians and Buskers; Recorded Music) 1999-2004
 - ▶ Tariff 10.B (Marching Bands; Floats with Music) 1999-2004
 - ▶ Tariff 11.A (Circuses, Ice Shows, etc.) 2000-2004
 - ▶ Tariff 11.B (Comedy Shows and Magic Shows) 2000-2004
 - ▶ Tariff 12.A (Theme Parks, Ontario Place Corporation and Similar Operations) 2000-2004
 - ▶ Tariff 12.B (Paramount Canada's Wonderland and Similar Operations) 1998-2003
 - ▶ Tariff 13.A (Public Conveyances – Aircraft) 1999-2004
 - ▶ Tariff 13.B (Passenger Ships) 2000-2004
 - ▶ Tariff 13.C (Railroad Trains, Buses and Other Public Conveyances) 2000-2004
 - ▶ Tariff 14 (Performance of an Individual Work) 2000-2004
 - ▶ Tariff 15.A (Background Music) 1999-2004
 - ▶ Tariff 15.B (Telephone Music on Hold) 2000-2004
 - ▶ Tariff 20 (Karaoke Bars and Similar Establishments) 1998-2004
 - ▶ Tariff 21 (Recreational Facilities Operated by a Municipality, School, College, University, Agricultural Society or Similar Community Organizations) 2000-2004
- The Board also certified Tariff 8 (Receptions, Conventions, etc.) for the years 1999-2004 and Tariff 18 (Recorded Music for Dancing) for the years 1998-2004, which received special consideration in this decision. Finally, the Board dealt with the following issues: the fairness of minimum fees, the burden of multiple licences and the adjustment of tariffs to account for inflation.

Tariff 8 (Receptions, Conventions, etc.)

Under the last certified tariff for 1998, the operator of the premises paid for each reception, convention or assembly, or for each day a fashion show is held, \$28.75 for an event that does not include dancing and \$57.55 for one that does. These rates, and the tariff structure, had been the same since 1991.

This tariff always generated numerous complaints or objections in relation to its cost, invariableness to event size or excessive administration costs. During the period under examination, SOCAN made several proposals intended to respond to these preoccupations by reducing the administrative burden or by modifying the rate structure so that it vary with the size of the event.

The Board concluded that SOCAN's proposed changes to Tariff 8 took into account, to a large extent, the main arguments advanced by the various objectors to this tariff over the years. For example, the quarterly terms of payment proposed by SOCAN should help reduce the administrative burden of the tariff.

The Board also accepted the objectors' view that the tariff should vary according to the size of the event. The tariff certified for the years 2002 and 2003, which cuts the rates for smallest rooms, is the following:

Room Capacity (Seating and Standing)	Fee Per Event	
	Without Dancing	With Dancing
1 to 100	\$20.00	\$40.00
101 to 300	\$28.75	\$57.55
301 to 500	\$60.00	\$120.00
Over 500	\$85.00	\$170.00

For 2004, the Board granted to SOCAN an adjustment of the rates to reflect inflation, in accordance with the methodology described later.

Tariff 18 (Recorded Music for Dancing)

The last certification of this tariff dated back to 1997 and consisted of the following rates for an annual licence:

Premises Accommodating No More Than 100 Patrons		
Months of Operation	1 to 3 Days of Operation	4 to 7 Days of Operation
6 months or less	\$184.44	\$258.25
More than 6 months	\$258.25	\$372.13
Premises Accommodating More Than 100 Patrons		
20 per cent more than the fees established above, for every 20 additional clients		

SOCAN generally argued that the current tariff was much too low and that this became obvious when compared to Tariff 3.C for adult entertainment clubs. An establishment that can accommodate 200 persons pays between \$2,184 and \$3,066 under Tariff 3.C. An establishment with the same capacity pays only \$744 under Tariff 18. SOCAN alleged that the proposed increase would reduce the distortion and would only have a modest impact on the users' financial situation.

Objectors to the tariff, CRFA and HAC, argued that the proposed increases were excessive, that the impact on the financial situation of users was underestimated and that royalties increased too quickly in relation to the size of the premises.

The Board accepted SOCAN's argument that Tariff 18 was too low and modified the tariff to better reflect the value of this type of music use.

The Board accepted the views of the objectors that the rate base increased too quickly for premises that can accommodate more than 100 patrons. The progression in the 1997 certified tariff increased the rate by 20 per cent for each additional 20 clients after the first 100 clients. The Board certified a slower progression, which increases the rate by 10 per cent for each additional 20 clients after the first 100 clients.

The Board was aware that the tariff it certified involved a significant increase, but nonetheless considered that the resulting rates were fair and equitable and remained at reasonable levels. As proposed by SOCAN, the Board agreed to spread the rate increase over the five years between 1998 and 2002. It did so by distributing the tariff increase equally over these years. The rates certified for 2002 and 2003 were the following (the rates for 2004 were adjusted for inflation):

Premises Accommodating No More Than 100 Patrons		
Months of Operation	1 to 3 Days of Operation	4 to 7 Days of Operation
6 months or less	\$260	\$520
More than 6 months	\$520	\$1 040
Premises Accommodating More Than 100 Patrons		
10 per cent more than the fees established above, for every 20 additional clients		

Minimum Fees

It was primarily the small rural communities that raised the issue of fairness of minimum fees, which led SOCAN to prepare a report and propose options.

Having considered the evidence, the Board was convinced of the importance of maintaining minimum fees. An excessive reduction or elimination of the minimums, while clearly favouring small users, would be generally unfair even if, in some particular cases, there might not be other solutions. The Board accepted SOCAN's arguments that such a decrease or elimination would make the collection of fees from small users unprofitable and would be equivalent to issuing a free licence. In the Board's opinion, it was reasonable that the minimum fees allow SOCAN to recover a portion of the costs incurred through the issuance of a licence. The minimum fees however should also reflect the intrinsic value of SOCAN's music and repertoire.

The Board reiterated the importance that SOCAN's tariffs reflect three overarching principles.

Minimum fees should be characterized by *internal coherence*, such that they should take into account the entire structure of the tariffs and the characteristics of the users to which these tariffs apply. Minimum fees should be adjusted so that the number of users who pay them is neither proportionally too high nor too low.

Minimum fees should reflect the intrinsic value of music for users, as well as SOCAN's administrative costs in issuing a licence. It may be expected, therefore, that there will be some *horizontal harmonization* of the minimum fees among the different tariffs, especially when similar uses of music are involved.

Finally, in the case of those tariffs where per event licences are issued, an *annual licence* also comprising a minimum fee should be available. This annual licence would limit the impact of maintaining minimum fees on small users by enabling them to accrue events on an annual basis and thereby paying a lower fee than what they would pay if the tariff were applied to each event. This licence should be so formulated as to be available only to small users.

Multiple Licences

Participants raised the argument that the need to pay fees for several types of licences imposed an excessive burden on users. Yet, the Board concluded that the evidence on file showed that only a minority of users need more than one SOCAN licence and that they do not face major problems. Nevertheless, the Board commented or intervened in the following areas.

First, the Board recognized that identifying the licences a user requires can be complex; it encouraged SOCAN to continue its efforts in this area.



Second, in recognition of the overlapping that could result from the acquisition of more than one licence by the same user, the Board said that it would be favourable to having the parties attempt to reach a proposal for a new multifunctional tariff for several different uses of music in the same hall.

Third, the Board certified Tariffs 8 (Receptions, Conventions, etc.) and 21 (Recreational Facilities) taking into account many of the concerns raised by small users in relation to multiple licences.

Adjustment of Tariffs to Account for Inflation

The Board last considered the issue of adjustment of fixed tariffs to account for inflation in 1993. It concluded that while inflation is but one factor among others in adjusting tariffs, it is desirable to allow some adjustment for inflation in the fixed amounts of the tariffs.

Since music is an input, the Board indicated in 1993 that the tariffs should follow the prices of the other inputs in the economy. Consequently, the Industrial Product Price Index (IPPI) appeared to be the best index to use in adjusting tariffs. For practical reasons however, the Board decided to use the annual increase in the Consumer Price Index (CPI) less 2 per cent, an easy-to-use formula whose fluctuations followed those of the IPPI.

This time, the Board accepted SOCAN's argument that economic efficiency does not mean that the prices of all inputs must vary in lockstep. Economic efficiency means, rather, that the price of a good varies with its cost of production. Since the CPI reflects a wider

basket that includes services, it constitutes a better approximation of the "cost of production" of SOCAN licences than the IPPI. However, to ensure some balance between music users and copyright owners, the Board decided to adjust the fixed tariffs by a percentage equal to the average annual variation of the CPI less 1 per cent.

NRCC Tariff 1.C (CBC – Radio), 2003-2005

On April 2, 2002, NRCC filed its statement of proposed royalties for the years 2003 to 2007. One of the tariff items targeted the radio of the Canadian Broadcasting Corporation (CBC), who objected to the tariff proposal. Subsequently, NRCC and CBC agreed on a monthly royalty rate of \$80,000 for 2003, 2004 and 2005, which is identical to the one certified for 1998-2002.

Taking note of the agreement, the Board certified for 2003-2005 a tariff identical (except for some minor modifications) to the one certified for 1998-2002. NRCC's tariff proposal as well as CBC's objections are maintained for the years 2005 and 2006.

SOCAN-NRCC Pay Audio Services Tariff, 2003-2006

For the years 2003 and 2004, SOCAN and NRCC filed separate tariff proposals for pay audio services. These services are digital music services offered to direct-to-home satellite or digital cable broadcasting subscribers. Bell ExpressVu, CBC/SRC (Galaxie), the Canadian Cable Television Association, Corus Entertainment Inc. (Max Trax) and Star Choice Communications Inc. objected to the proposals. DMX Music Inc. objected to NRCC's tariff for 2004.

For the years 2005 and 2006, SOCAN and NRCC filed a joint statement of proposed royalties. They proposed rates of 12.35 and 5.85 per cent of affiliation payments, respectively. This corresponded to the rates the Board would have certified for 1997 to 2002, had it not applied a 10 per cent discount because the tariff was new. The rates proposed for small systems were half of the main rates. No one objected to the proposed tariffs.

On January 26, 2004, after the Federal Court of Appeal dismissed NRCC's application for judicial review of the 1997-2002 pay audio tariff, NRCC informed the Board that an agreement had been reached involving SOCAN and all objectors. The latter subsequently withdrew their objections provided that the tariff certified for 2003-2006 be the same as the one proposed for 2005 and 2006. The tariff certified by the Board for the period 2003-2006 reflects the agreement.





The nature of the relevant market demanded a certain stability.

Retransmission of Distant Signals

Background

The *Act* provides for royalties to be paid by cable companies and other retransmitters for the carrying of distant television and radio signals. The Board sets the royalties and

allocates them among the collective societies representing copyright owners whose works are retransmitted.

In 2004-2005, no hearings were held nor any decisions rendered.

Private Copying

Background

The private copying regime entitles an individual to make copies of sound recordings of musical works for that person's personal use (a "private copy"). In return, those who make or import recording media ordinarily used to make private copies are required to pay a levy on each such medium. The Board sets the levy and designates a single collecting body to which all royalties are paid. Royalties are paid to the Canadian Private Copying Collective (CPCC) for the benefit of eligible authors, performers and producers.

The regime is universal. All importers and manufacturers pay the levy. However, since these media are not exclusively used to copy music, the levy is reduced to reflect non-music recording uses of media.

Decision of the Board

On March 5, 2004, CPCC filed its proposed tariff for 2005. Four associations and corporations, including a group of retailers of blank audio recording media, objected to the proposal.

CPCC subsequently asked that the matter be expedited. The retailers objected to this and asked that the Board adopt for 2005 an interim tariff that would be at least 25 per cent lower than the 2003-2004 certified tariff. In its decision of December 14, 2004, the Board, with the agreement of CPCC and the other objectors, extended indefinitely, on an interim basis, the application of the *Private Copying Tariff, 2003-2004*. The Board found that the arguments of the retailers in support of a lower interim tariff were without merits. The nature of the relevant market demanded a certain stability.

Educational Rights

Background

Sections 29.6, 29.7 and 29.9 of the *Act* came into force on January 1, 1999. Since then, educational institutions and persons acting under their authority can, without the copyright owner's authorization, copy programs when they are communicated to the public and perform the copy before an audience consisting primarily of students. In a nutshell, institutions can copy and perform news and news commentaries and keep and perform the copy for one year without having to pay royalties; after that, they must pay the royalties and comply with the conditions set by the Copyright Board in a tariff. Institutions can also copy other programs and subject-matters and keep the copy for assessment purposes for thirty days; if they keep the copy any longer, or if they perform the copy at any time, the institution must then pay the royalties and comply with the conditions set by the Board in a tariff.

Decision of the Board

On March 27, 2002, the Educational Rights Collective of Canada (ERCC) filed its statement of proposed royalties to be collected from educational institutions for the years 2003 to 2006.

The tariff proposal contained rates higher than the ones certified for 1999-2002. The Association of Community Colleges of Canada, the Association of Universities and Colleges of Canada, the Canadian Schools Board Association and the Council of Ministers of Education, Canada objected to it.

On December 18, 2002, the Board had extended on an interim basis the application of the tariff it had certified for 1999-2002, with minor changes to the reporting requirements. On September 20, 2004, ERCC informed the Board that it had reached an agreement with the objectors, who subsequently withdrew their objections. On January 14, 2005, the Board certified for the period 2003-2006, a tariff identical to the interim tariff.



Media Monitoring

Background

Sections 70.12 to 70.191 of the *Act* give collective societies that are not subject to a specific regime the option of filing a proposed tariff with the Board. The review and certification process for such tariffs is the same as under the specific regimes. The certified tariff is enforceable against all users; however, in contrast to the specific regimes, agreements signed pursuant to the general regime take precedence over the tariff.

Hearings

In 2004-2005, the Board held one hearing pertaining to media monitoring.

Decision of the Board

On March 26, 2005, the Board rendered the following decision.

Broadcasters hold the right to reproduce their programs and to fix their communication signals. A commercial media monitor systematically monitors the media sources of information with a view to providing its clients with information that interests them. In the process, they reproduce programs and fix the communication signals that carry them. To do either, they require a licence.

The Canadian Broadcasters Rights Agency (CBRA) is the exclusive agent for the vast majority of Canadian private radio and television broadcasters in the media monitoring market. In that role, it is governed by sections 70.1 to 70.6 of the *Act*. It has the option of negotiating individual agreements or seeking certification of a tariff that applies to all users with whom it has not agreed on a licence. It chose to do both.

CBRA first filed two series of proposed tariffs. The first targeted commercial media monitors, the second provincial and federal institutions that perform their own media monitoring. It then reached agreements with ten commercial monitors representing at least 95 per cent of the market in Canada, as well as with some provincial governments. Those who had filed objections ceased to pursue them. Only CBRA participated in the one-day hearing into this matter. The decision deals separately with commercial and non-commercial media monitors.

The original tariff proposals were based on certain assumptions about how monitors operate, many of which had to be set aside. The terms of the licences CBRA had issued differed significantly from the original tariff proposal. The CBRA asked that the certified tariff reflect these significant changes.

The Board noted the unusual nature of the situation it was asked to address. CBRA had reached agreements with virtually all the relevant market. No one was taking issue with the new tariff proposal. It was up to the Board to identify many of the issues that are addressed in the rest of these reasons, some of which for future reference. Despite this, the Board still felt in the end that it was certifying a tariff based on an understanding of the media monitors' business practices and needs that it considered less than fully satisfactory.

Commercial Media Monitors

Two legal issues first retained the Board's attention.

The first arose because the new tariff proposal probably was more demanding for some than the original tariff proposal. The Board

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considered whether the *ultra petita* principle ought to apply in the circumstances. According to that principle, a decision-maker cannot grant more than what was asked. The Board has always considered it possible to set higher rates if this could be done fairly. There are cogent reasons why *ultra petita* ought not to apply in proceedings before the Board. The Board has the power to certify tariffs. To apply the principle would defeat that power. The principle also causes serious problems in setting the terms and conditions of a tariff. The choice of a tariff formula largely dictates what are the appropriate terms and conditions. Applying the principle would have resulted in a certified tariff that did not reflect the media monitors' business practices. The Board noted that in a decision issued on December 14, 2004 which is abstracted elsewhere in this report, the Federal Court of Appeal appeared to endorse the analysis outlined above.

Also, shortly before the hearing on this matter, the Supreme Court of Canada issued its decision in the matter of *CCH Canadian Ltd. v. Law Society of Upper Canada* [2004 SCC 13]. The decision contains two rulings concerning the concept of fair dealing that may be relevant to certain tariffs. The first is that profit-driven research may constitute fair dealing. The second is that the person who facilitates another person's fair dealing may be entitled to the same protection as the first person. This left open the possibility that certain activities of media monitors may not constitute protected uses for which they would require a licence. The Board concluded this was neither the time nor the place to dispose of this issue.

As for the rate, CBRA initially sought royalties of 25 per cent of a monitor's income for the reproduction of the broadcasters' programs and 25 per cent for the fixation of their signals.

The rate finally agreed upon was 9 per cent. Given the record of the proceedings and evidence on foreign practices, the Board concluded that this was a fair rate under the circumstances.

No one objected to the provisions of the new tariff proposal. Still, the Board addressed a number of issues.

Thus, the Board explained why it had included revenues obtained through an indirect use of the CBRA repertoire in the rate base. A monitor cannot prepare notes, conduct research or provide access to a database of excerpts until it has reproduced a broadcaster's programs and fixed its signal. Therefore, it makes sense to include the revenues from these activities in the rate base.

The Board also ensured that the certified tariff did not include provisions that could be assimilated to an illegal subdelegation of the Board's discretionary powers. It allowed broadcasters to impose an embargo on works that are otherwise part of the licensed repertoire; though problematic, the request was supported by eminently practical reasons. By contrast, the Board did not grant CBRA the discretion to add to the reporting requirements imposed on users.

The Board agreed to some extent that earlier licensing agreements provided a benchmark the Board could use in setting a tariff. Having said this and given, among other things, how highly concentrated the market was, the tariff became not so much the norm as a backdrop that will apply by default where CBRA and a monitoring firm are unable to reach an agreement. Under those circumstances, differences between the tariff and the licences should be clearly thought out and doubts generally should be resolved

in favour of users. The manner in which a monitor is informed of changes in CBRA's membership is a case in point. Appended to each licence is a list of CBRA members. The tariff proposal was silent on the issue. In the end, the Board required that CBRA provide an updated membership list from time to time or post and maintain such a list on a publicly accessible website.

CBRA also wanted that monitors be required to supply a list of customers once a year. Even though it had some misgivings, the Board concluded that the request was reasonable. While it is not needed for the purposes of distribution, the information will allow CBRA to gain a better understanding of the market in which its repertoire is being used. The confidentiality concerns that were raised were not without merit, however. Customer lists often constitute highly sensitive and valuable information. For that reason, the tariff prevents that information from being used for purposes other than those for which it is provided.

Finally, CBRA asked that interest on late payments be calculated according to a different formula than the one usually used in the Board's tariffs. The Board concluded that it would not be appropriate to adopt the proposed interest clause without further justification. The matter could be the subject of a wider debate in the context of another proceeding where the point of view of other interested parties could be heard.

It should be noted that the tariff imposes less demanding reporting requirements on monitors whose yearly revenues are less than \$100,000.

Non-Commercial Media Monitors

Some institutions outsource their media monitoring; others do their own. At the time of the hearings, CBRA had signed agreements with three provincial governments and had reached an agreement in principle with part of the Canadian government.

The proposed tariff was somewhat confusing in its definition of "monitor". It targeted federal and provincial government departments, agencies and Crown corporations, Parliament and legislative assemblies, and federal and provincial political parties and organizations. The certified tariff extends to members of Parliament and of legislative assemblies and to registered parties. There was no need to mention represented parties or constituency offices of members of Parliament or of legislative assemblies. Finally, the Board was not willing to extend the ambit of the tariff to such vaguely defined entities as political organizations. CBRA did not seek a tariff that would apply to municipalities, private corporations, not-for-profit associations or charitable institutions.

The non-commercial tariff mirrors the commercial tariff as much as possible. Main differences concern the rate base, the purpose of the monitoring and the adaptation of terms and conditions to the peculiar circumstances of non-commercial monitors. Where the Board was unconvinced by the underlying rationale put forward by CBRA, no distinction was made. Further differences had to be made between the non-commercial tariff and the non-commercial licences. Thus, while it is possible in a licence to provide added clarity

to the definition of the rate base or the determination of the uses that will be allowed, that is not possible in the case of a tariff that will apply to circumstances that cannot be fully predicted. A section was added in respect of exemptions regarding below-threshold media monitoring costs, reflecting the exemptions afforded in the commercial tariff.

Following up on its agreement in principle with the Attorney General of Canada, CBRA proposed a further set of provisions targeting institutions or groups of institutions with more than 15 decentralized monitoring offices, generating less than \$100,000 in royalties in a given year. The addition of this option would have overly complicated the text of the tariff. The certified tariff does not offer this additional option.

The commercial tariff takes effect on January 1, 2000. The non-commercial tariff takes effect on January 1, 2001.

Those are the dates for which the tariffs had been filed. Based on available information, the Board estimated that the agreements with commercial monitors and the attending tariff would generate royalties in the order of three-quarters of a million dollars per year, while the agreements with non-commercial monitors and attending tariff would trigger yearly payments of slightly more than one hundred thousand dollars.

The decision notes that throughout the process, CBRA was willing to listen to the concerns of users and to thoroughly respond to the Board's numerous questions. It also notes the willingness displayed by the Attorney General of Canada in helping gather and generate information that made it possible to better understand how media monitoring takes place within the federal government.



Arbitration Proceedings

Pursuant to section 70.2 of the *Act*, the Board can arbitrate disputes between a collective society that represents copyright owners and the users of the works of those owners. Its intervention is triggered by application by either the collective society or the user.

In 2004-2005, one application was filed with the Board by Access Copyright.

On March 31, 2004, Access Copyright filed its first proposed tariff for the reprographic reproduction of works in its repertoire for use in elementary and secondary schools. The proposal is for the years 2005 to 2009; it does not target Quebec. It was published in the *Canada Gazette* on April 24, 2004. A coalition of ministers of education and Ontario school boards objected to it; hearings into the matter are scheduled to start in January 2007.

The pan-Canadian licence that was in effect at the time the proposed tariff was filed expired on August 31, 2004. On July 13, 2004, Access Copyright filed an application to set the terms and conditions of a licence for the period from September 1 to December 31, 2004. It also asked for an interim decision that would apply from September 1, 2004 until the tariff was certified.

On August 27, 2004, Access Copyright sent to the Board copy of an agreement setting out the terms and conditions of an interim licence for the relevant period and withdrew its request for an interim decision. Access Copyright maintained its request for a permanent licence and for a tariff; these will be addressed in later decisions.



Unlocatable Copyright Owners

Pursuant to section 77 of the *Act*, the Board may grant licences authorizing the use of published works, fixed performances, published sound recordings and fixed communication signals, if the copyright owner is unlocatable. However, the *Act* requires licence applicants to make reasonable efforts to find the copyright owner. Licences granted by the Board are non-exclusive and valid only in Canada.

Since its inception in 1989, the Board has issued 150 licences. In 2004-2005, 38 applications were filed with the Board and 16 licences were issued as follows:

- ▶ *Don Pedro Payne*, Ottawa, Ontario, for the reproduction of architectural plans created by Concept Gennic Inc. – Building & Design Technology for the property located at 91-93 Arlington Avenue in Ottawa.
- ▶ *Deerpark Management Limited*, Ottawa, Ontario, for the reproduction of architectural plans created by Peter Pivcko for the property located at 99 Holland Avenue in Ottawa.
- ▶ *Dr. Paul Jackson*, Montreal, Quebec, for the reproduction in a book of a cartoon by Stewart Cameron published in 1943 in his book entitled *Basic training daze: candid cartoons of you and me in the army* (publisher unknown).
- ▶ *Aaron Burnett*, Winnipeg, Manitoba, for the mechanical reproduction of the song lyrics *A Leaf Fan's Dream* written by Doug Moore (publisher unknown), published in 1961 as a single and in 1996 on the record album *Early Canadian Rockers, Vol. 3*, Collector Records, Holland.
- ▶ *Richard Brant*, Ottawa, Ontario, for the reproduction of architectural plans created in 1952 by James Moor and Sons Ltd. for the property located at 126-128 Baseline Road in Ottawa.
- ▶ *Morrison Hershfield Limited*, Ottawa, Ontario, for the reproduction of architectural plans created by McDonald Developments, Roy Allen & Associates and J.G. Knowlton Ltd. for the property located at 2716 Richmond Road in Ottawa.
- ▶ *Eric Charron*, Ottawa, Ontario, for the reproduction of architectural plans created by "Tracey" on February 12, 1990 for the two-story addition to the property located at 27 Monk Street in Ottawa.
- ▶ *Sarah Houriham*, Ottawa, Ontario, for the reproduction of architectural plans created by Maclean and Associates in 1990 for the property located at 522 Mariposa Crescent (Rockcliffe) in Ottawa.
- ▶ *Anne Marie Barter and Randy Sauvé*, Ottawa, Ontario, for the reproduction of architectural plans created in 1976 by Campeau Homes for the property located at 166 Bourbon Street in Ottawa.
- ▶ *Summit REIT Property Management Ltd.*, Calgary, Alberta, for the reproduction of architectural plans created in 1975 by K. Robert Trueman, architect, for the property located at 3501, 54th Avenue SE in Calgary.

- ▶ *Maloney Property Management Inc.*, Ottawa, Ontario, for the reproduction of mechanical and electrical plans created by J. G. Knowlton Ltd. for the property located at 250 Rideau Place in Ottawa.
- ▶ *Alastair Gale Inc. Architect and Planning Consultant*, Ottawa, Ontario, for the reproduction of architectural plans created by J. Morris Woolfson, architect, for the property located at 218 Maclaren Road in Ottawa.
- ▶ *CRESA Partners*, Calgary, Alberta, for the reproduction of mechanical and electrical plans created by Hrudko Bustos Engineering of Calgary for the property located at 2905, 12th Street NE in Calgary.
- ▶ *Controlex Corporation*, Ottawa, Ontario, for the reproduction of architectural plans ordered by Macdonald Developments in 1990 for the property located at 4025 Innes Road in Ottawa.
- ▶ *Trigenex inc.*, Ste-Julie, Québec, for the reproduction of architectural plans created in 1977 by Angelo A. Kolenc for the property located at 33 Banner Road in Ottawa.
- ▶ *Robin Langdon*, Record Producer of Toronto, Ontario, for the mechanical reproduction on CD of five musical works (authors and publishers unknown).

In addition, the Board rendered three decisions dismissing applications. In two instances, there was complete absence of evidence that the works had been published. The first one, filed by the Canadian Centre for Architecture of Montreal was for the reproduction and display, in the context of the exhibition *Les années 60 : Montréal voit grand*, three photographs taken in 1955, 1957 and 1967 which are at the National Archives of Canada. Neither the applicant nor the National Archives of Canada were able to provide any hint whatsoever of publication. The other application, filed by the Office of the Lieutenant Governor of Quebec, was for the reproduction, in a book on the history of lieutenant governors of Quebec, of a photograph taken on the opening day of the November 1959 legislative session. The name of the photographer was unknown and the applicant was unable to provide any evidence that the picture had been published.

As for the application filed by Ms. Dominique Marquis of Montreal, she wanted to reproduce headlines and excerpts from articles published in *L'Action catholique* between 1910 and 1938. Based on the record, the Board concluded that the identity of those who authored what the applicant sought to reproduce was not known. Consequently, the Board concluded that the works were anonymous works published more than fifty years ago. Hence, there was no doubt, pursuant to paragraph 6.1(a) of the *Copyright Act*, that the works were in the public domain.



SOCAN Tariff 22 (Music on the Internet)

On October 27, 1999, the Board issued its first decision dealing with SOCAN's proposed Tariff 22 concerning the communication to the public of musical works on the Internet. On May 1, 2002, the Federal Court of Appeal granted in part SOCAN's application for judicial review of the Board's decision. On March 27, 2003, the Supreme Court of Canada granted leave to appeal from the decision. On June 30, 2004, the Court reversed part of the decision of the Court of Appeal.

The decision reached a number of conclusions each of which will constitute significant guidelines when time comes for the Board to set certain tariffs. These conclusions appear to rely on two basic principles. The Court reiterated that in its recent decisions, it sought to balance between promoting the public interest in the encouragement and dissemination of works and obtaining a just reward for the creator. The Court then added that the use of Internet should be facilitated rather than discouraged, but this should not be done unfairly at the expense of the creator of the works.

The relevant conclusions can be stated as follows.

First, a communication by telecommunication occurs when music is transmitted from the host server to the end user.

Second, it is the content provider who effects a telecommunication. Each transmission must be looked at individually to determine whether in that case, an intermediary merely

acts as a conduit or whether it is acting as something more. Generally speaking, however, only the person who posts a musical work communicates it.

Third, an Internet communication that crosses one or more national boundaries "occurs" at a minimum in the country of transmission and in the country of reception. Copyright infringement occurs in Canada where there is a real and substantial connection between this country and the communication at issue. An analysis of Canadian decisions and of European, American, Australian and French legislation on the issue led to the conclusion that Parliament could regulate a communication so long as it presented a real and substantial connection with Canada. Furthermore, Parliament intended to exercise its copyright jurisdiction to impose liability on every participant in an Internet communication with such a connection to Canada. In terms of the Internet, relevant connecting factors would include the situs of the content provider, the host server, the intermediaries and the end user. The weight to be given to any particular factor will vary with the circumstances and the nature of the dispute.

Fourth, paragraph 2.4(1)(b) of the *Act*, when stating that participants in a telecommunication who only provide the means of telecommunication necessary are deemed not to be communicators, is not a simple exception to the violation of copyright; rather, it is an important element of the balance struck by the statutory scheme. Whatever means are reasonably useful and proper to achieve the benefits of enhanced economy and efficiency are "necessary". So long as an Internet intermediary does not itself engage

in acts that relate to the content of the communication, whose participation is content neutral and confines itself to providing “a conduit” for information communicated by others, then it will fall within paragraph 2.4(1)(b). The person who makes the work available for communication is not the host server provider but the content provider. Having said this, a service provider can play many roles. Copyright liability may attach to the added functions. The protection provided by paragraph 2.4(1)(b) relates only to a protected function.

So, the Court concluded that caching for the purpose of enhancing Internet economy and efficiency is “necessary” within the meaning of paragraph 2.4(1)(b). The means “necessary” are means that are content neutral and are necessary to maximize economy and cost-effectiveness. Parliament has decided that there is a public interest in encouraging intermediaries who make telecommunications possible to expand and improve their operations without the threat of copyright infringement. To impose copyright liability on intermediaries would obviously chill that expansion and development, as the history of caching demonstrates. That interpretation best promotes the public interest in the encouragement and dissemination of works of the arts and intellect without depriving copyright owners of their legitimate entitlement. Caching is content neutral and ought not to have any legal bearing on the communication between the content provider and the end user.

Fifth, when massive amounts of non-copyrighted material are accessible to the end user, it is not possible to impute to the Internet service provider, based solely

on the provision of Internet facilities, an authority to download copyrighted material as opposed to non-copyrighted material. Copyright liability may attach if the service provider has notice that a content provider has posted infringing material on its system and fails to take remedial action. Still, an overly quick inference of “authorization” would put the service provider in the difficult position of judging whether the copyright objection is well founded, and to choose between contesting a copyright action or potentially breaching its contract with the content provider. A more effective remedy to address this potential issue would be the enactment by Parliament of a statutory “notice and take down” procedure as has been done in the European Community and the United States.

For his part, LeBel J. would have affirmed the Board’s determination that an Internet communication occurs within Canada when it originates from a server located in Canada. Stakeholders need to know with a degree of certainty whether they will be liable in Canada for a communication of copyrighted works. The test provided by the Board is practically sound and provides the requisite predictability. It best accords with the meaning and purpose of the *Act* and accords with the principle of territoriality of international copyright law. It is a straightforward and logical rule and readily applicable by the Board in setting tariffs, by the courts in infringement proceedings and by solicitors in providing advice to their clients.

By contrast, the real and substantial connection test is used mostly in the recognition and enforcement of judgments from other provinces or countries. It is not a principle of legislative

jurisdiction and applies only to courts. It is inconsistent with the territoriality principle in that it may reach out and grasp content providers located in Bangalore who post content on a server in Hong Kong based only on the fact that the copyrighted work is retrieved by end users in Canada. Its application raises privacy issues, by encouraging the monitoring of an individual's surfing and downloading activities. Privacy interests of individuals will be directly implicated where owners of copyrighted works or their collective societies attempt to retrieve data from Internet service providers about an end user's downloading of copyrighted works. One should therefore be chary of adopting a test that may encourage such monitoring.

[*Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers*, [2004] 2 S.C.R. 427, 2004 SCC 45]

Private Copying

The Board's decision of December 12, 2003, certifying the *Private Copying Tariff, 2003-2004* triggered three applications for judicial review. The Federal Court of Appeal heard the applications on October 12 and 13, 2004. On December 14, 2004, the Court granted one of the applications for part.

The applications raised four issues. First, is the private copying regime constitutionally valid? Second, could the Board rule that the zero-rating program operated by the Canadian Private Copying Collective (CPCC) had no legal basis? Third, could the Board set levies on memory embedded in digital audio recorders? Fourth, could the Board set rates that were higher than what CPCC had requested?

Constitutional validity

A coalition of retailers argued that the private copying regime is not copyright law, that the levy scheme is a tax and that the regime is excessively broad and vague and not sufficiently connected to copyright law. The Court disagreed.

The private copying regime is in pith and substance copyright law. The essential element of the federal competence over copyright involves the establishment of a legal framework allowing rights holders to be rewarded for the reproduction of recorded music by third parties. The regime achieves this. It legalizes private copying while providing that rights holders are compensated. The price of doing so is sometimes borne by persons who do not private copy. Still, every element of the regime is sufficiently linked to Parliament's goal to compensate rights holders.

The levy is not a tax, but a regulatory charge. A tax usually is: (1) enforceable by law, (2) imposed pursuant to the authority of Parliament, (3) levied by a public body, and (4) imposed for a public purpose. Also, if a nexus exists between the quantum charged and the cost of the service provided, or if the levy is so connected to a regulatory scheme that treating it as a tax would frustrate federalism, the charge is not a tax but a fee.

The Board had reasoned that the levies were not imposed by it since it cannot set the tariff process in motion nor collect the amounts owing. It also held that, although the regime was enacted for the benefit of the Canadian public, it is inaccurate to say that the levies were for a public purpose. The Court disagreed on both counts. The levy supports the creators and the cultural industries by

striking a balance between the rights of creators and users. As such, the levy is collected for a public purpose, even though it is paid directly to rights holders. CPCC initiates the process and collects the levies, but the Board sets the levy. As such the levy is levied by a public body.

This left the question of whether the levy is a regulatory charge. Factors to consider include the presence of: (1) a complete and detailed code of regulation; (2) a specific regulatory purpose which seeks to affect the individual behaviour; (3) actual or properly estimated costs of the regulation; and (4) a relationship between the regulation and the person being regulated. Applying these factors, the Board held that the regime was a regulatory scheme. The Court agreed.

Though simply expressed and organized, the scheme is both complex and detailed. The Board's valuation model links the levy rate to the revenue shortfall for rights holders resulting from copying by consumers. As such, the regime is a complete and detailed code of regulation that meets the first factor.

The levy is computed in order to advance the statutory scheme. The Board must ensure that there is a correlation between the extent of the private copying that occurs by the use of the blank media and the levies that are certified with respect to such media. This satisfies the third factor.

By making blank media available to consumers, manufacturers and importers allowed for the proliferation of consumer copying and thereby caused the need for the regime. Retailers argued that manufacturers and importers are not responsible for the illegal acts of consumers.

However, to have "caused the need" for a regulation, it is not necessary for the manufacturers and importers to have been responsible for private copying in the legal sense. It is enough that they have provided the means by which private copying takes place. This takes care of the fourth factor.

The second factor is also present. By legalizing private copying, the regime enables and may encourage individuals to copy recorded music on blank media. This in turn may encourage the wider dissemination of recorded music and increase creative efforts by rights holders through increased sales of blank media. As such, the levy affects the behaviour of individuals.

The legality of the zero-rating program

The zero-rating program was initiated by CPCC on a voluntary basis. Users first obtain a certificate number allowing them to purchase media levy-free from authorized manufacturers, importers and distributors, who are also required to register with CPCC and sign agreements.

The program has been the subject of inconsistent rulings by the Board. However, the Board has throughout taken the position that the exemption extended by CPCC under the program is not authorized under the *Act*. In *Private Copying I*, the Board, without objecting to the program, indicated that it could not take it into account in setting the levy. In *Private Copying II*, the Board held that, although it could not create exemptions, it could take the program into account in setting the levy. In *Private*

Copying III, the Board held both that it could not take the program into account in setting the levy and that the program had no legal basis and was therefore illegal.

CPCC submitted that the Board exceeded its jurisdiction in declaring the program to be illegal and, by extension, CPCC's zero-rating agreements. The *Act* does not grant the Board the power to rule upon the legality of private agreements unless this is necessarily linked to its rate-setting function. By declaring the program to be illegal, the Board ignored CPCC's right to waive the collection of statutory debts owing to it. In any event, CPCC said, the decision was both incorrect in law and unreasonable.

Before deciding whether the Board erred in law when it held that it should disregard the zero-rating program in setting a levy, the Court thought it important to deal with the inability of CPCC or the Board to create exemptions from the levy. The Board held that the program is not authorized by the *Act* essentially because if Parliament had intended to insulate non-copyers from the effects of the regime, it would have so provided or would have provided the Board with the tools to accommodate those persons.

The Board's conclusion that it does not have the power to create exemptions was not contested. If a statute specifies exceptions to a general rule, other exceptions generally are not to be read in. Subsections 82(2) and 86(1) of the *Act* provide exceptions to the levy. Parliament expressly empowered Cabinet to exclude from liability certain media. Finally, paragraph 87(a) provides that Cabinet, and not the Board or collecting bodies, may make regulations respecting procedures for the operation of the section 86 exemption. It

cannot credibly be suggested that Parliament envisaged that CPCC could create and administer exemptions that are not explicitly created by the statute.

The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. The strongest argument in favour of an implicit authority to grant the exemptions which underlie the zero-rating program was the suggestion that this program goes some way to achieving statutory objectives. However, it must still be shown that Parliament intended such a grant. The Board, having confronted this question, concluded that it did not have the legal authority to create exemptions. It noted the total absence of legislative control over the power being claimed by CPCC and the importance of the consequences flowing from the zero-rating program. CPCC would effectively regulate the market for blank CDs, thereby engendering distribution problems by forcing sales outside the normal supply chain. The Board expressed reservations about the fairness of the program and its potential for arbitrariness. Realizing the impact of the program, the Board did not accept that Parliament could have intended such an extensive grant without providing for a framework for its exercise.

The question then was whether the zero-rating program was relevant to setting the levy. This was akin to asking whether Parliament intended the cost of the levy to be passed on to all end users, or only to those who actually copy music. The Court ruled that it would have been unreasonable for the Board to have concluded that it should take the zero-rating program into account.

The Board explained that the levy was intended to apply to all blank media regardless of their use and that the zero-rating program created an exemption contrary to that intent by excluding from the levy persons who do not private copy. These exemptions have a direct impact on the levies set by the Board. If the exemptions are not authorized, the levy must be calculated on the basis that all purchasers of blank media will pay it. If the exemptions are authorized, the levy must be adjusted upwards to account for the levy-free purchases of blank media under the program. The holding that the zero-rating program is “illegal” simply meant that the Board would disregard it when setting the levy.

CPCC argued that the Board exceeded its jurisdiction by ruling on the legality of private agreements with the program participants and that the effect of the Board’s decision was to take away the common law right of rights holders to waive the payment of levies. The Court did not read the Board’s decision as holding that the program, to the extent that it is based on the waiver by rights holders of their rightful entitlement, is illegal. The Board made it clear that CPCC can forego the collection of levies legally owing to it. However, it can no longer expect that the Board will compensate it for the negative impact of the program on its revenues.

CPCC argued that the Board has no choice but to take the impact of the program into account, just as it must take into account any other market reality. The Board rejected this proposition. It came to realize that CPCC was attempting to introduce through the back door the very exemption which it had twice refused to recognize. This is what led the Board

to hold that it would no longer compensate rights holders for the effect of the program on CPCC’s revenues. In so doing, the Board committed no reviewable error.

Does a digital audio recorder contain an audio recording medium?

An “audio recording medium” is “a recording medium, regardless of its material form, onto which a sound recording may be reproduced and that is of a kind ordinarily used by individual consumers for that purpose, excluding any prescribed kind of recording medium.” The issue was whether permanently embedded memory incorporated into a digital audio recorder retains its identity as an “audio recording medium.”

The Board held that memory incorporated into some device does not lose its identity so as to take it outside the definition. In effect, it looked through the device being sold and reached the permanently embedded memory found therein. The Canadian Storage Media Alliance (CSMA) argued that embedded memory becomes integrated in, and inseparable from, the device, and thus loses its separate identity. In the alternative, it submitted that the Board created an exemption by only imposing a levy on memory when it is embedded in a recorder and not when the identical memory is embedded in other electronic devices.

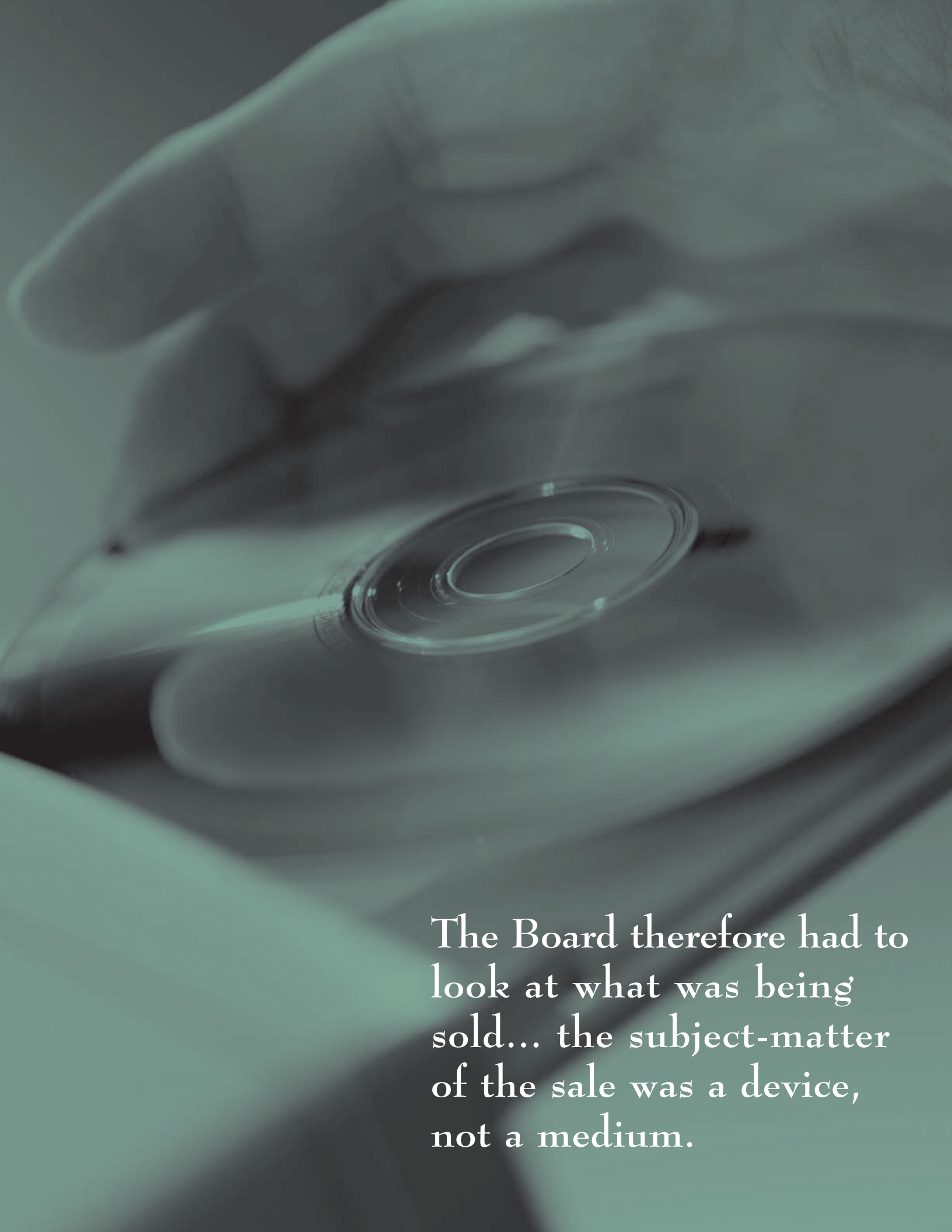
Although the Board purported to establish a levy on the embedded memory, it acknowledged that this memory could not, looked at on its own, allow for the establishment of the levy; it is the device that is the defining element of the levy and not the memory incorporated therein.

The Court found that the Board cannot establish a levy and determine the applicable rates by reference to the device and yet assert that the levy is being applied on something else. It understood why the Board wanted to bring MP3 players within the ambit of the regime. However, as desirable as this might seem, the authority for doing so still has to be found in the *Act*. The Board focussed on the phrase “regardless of its material form” to hold that Parliament intended that a levy be established on a medium, regardless of its incorporation into a device. The Court found a number of problems with this analysis. First, if memory does not become an “audio recording medium” unless and until it is incorporated into the appropriate device, it is difficult to see how memory can be said to remain a medium when embedded into a device. Second, upon being incorporated into a device, memory undergoes no change in form. It is therefore difficult to see how the Board could rely on the phrase “regardless of its material form” to justify its conclusion. Furthermore, to rely on this phrase, the Board first had to identify an “audio recording medium”. According to its own reasons, a memory is not an “audio recording medium” unless and until embedded into a digital audio recorder. The phrase on which the Board relied to “see through” a digital audio recorder and reach the memory embedded therein did not support its conclusion.

The Board acknowledges that, when it enacted Part VIII, Parliament could not have envisioned recent technological developments. Parliament was aware that blank audio tapes were the cause of the harm to rights holders and had been made aware of proposals in other countries (including the U.S.) to extend the levy to the hardware which recorded and played these blank audio tapes. Still, it chose to limit the levy to blank medium. This shows that the definition of “audio recording medium” stands in contradistinction with a recorder or similar device as these were known to exist at the time and whose function it is to record and play blank audio tapes. No one has ever pretended that tape recorders came within the ambit of the definition. A digital audio recorder is not a medium. The Board erred when it held that it could certify a levy on the memory integrated into a digital audio recorder.

Finally, the liability for the payment of the levy can only arise “on selling or otherwise disposing of those blank audio recording media”. The Board therefore had to look at what was being sold and determine whether the subject-matter of the sale came within the ambit of the definition. The subject-matter of the sale was a device, not a medium. In the absence of such a sale, no liability can arise for the levy. As Part VIII now reads, there is no authority for certifying a levy on such devices or the memory embedded therein.



A close-up photograph of a hand holding a CD-ROM. A pen nib is touching the surface of the CD, creating a series of concentric ripples that spread outwards. The entire image has a teal or cyan color cast. The text is overlaid in the bottom right corner.

The Board therefore had to look at what was being sold... the subject-matter of the sale was a device, not a medium.

Continued... "Court Decisions"

Ultra petita

The last issue was whether the Board could set a levy beyond that sought by CPCC and, if so, whether the levy in question was set within the bounds of fairness.

CSMA submitted that nothing in the *Act* empowers the Board to disregard the *ultra petita* principle. Proposed tariffs are published; stakeholders are given a period within which to file written objections. If the Board could unilaterally certify a tariff higher than that proposed, the purpose of the notice period would be undermined. Alternatively, the applicants argued that setting a levy beyond the tariff published also was unfair to those who might have intervened if the approved rate had been advertised.

The *ultra petita* principle is generally understood to mean that a Court will not make a ruling beyond what is requested by the parties. The legislator is free to remove administrative tribunals from the constraints of the principle. This will often be the case, as tribunals are generally created to advance interests that go beyond those of the parties who appear before them. The Court found subsections 83(8) and (9) of the *Act* particularly relevant. Their language is not as clear as that for other administrative tribunals (e.g., *National Transportation Act*); still, upon being seized with a proposed tariff, the Board retains the discretion to establish a tariff that is fair and equitable, and to set such terms and conditions as the Board considers appropriate.

In this instance, the Board explained that it could not set the rate based on the model proposed by CPCC because it was too complex and used instead its own model which resulted in a marginal increase. In fixing royalties, the Board must take account of numerous factors, including the competing interests of the parties and the requirement that the levy be fair and equitable. Given the Board's role, its broad discretion and the language of subsections 83(8) and (9), the *ultra petita* principle did not prevent the Board from deviating as it did from the proposed tariff.

There remained the issue of fairness. The levy only exceeded the amount requested for two of the four typical formats of non-removable "flash" memory incorporated into digital audio recorders, and was less than what would have applied to higher capacity recorders. There was no evidence suggesting that concerned persons who did not participate would have done so if they had known that the resulting tariff would be marginally higher than that applied for. This showed in the Court's view that the Board had properly assessed the situation and arrived at the correct conclusion when it said that no unfairness would result from the increase which it authorized.

[*Canadian Private Copying Collective v. Canadian Storage Media Alliance (F.C.A.)* [2005] 2 F.C. 654]

Agreements Filed with the Board

Pursuant to the *Act*, collective societies and users of copyrights can agree on the royalties and related terms of licences for the use of a society's repertoire. Filing an agreement with the Board pursuant to section 70.5 of the *Act* within 15 days of its conclusion, shields the parties from prosecutions pursuant to section 45 of the *Competition Act*. The same provision also grants the Commissioner of Competition appointed under the *Competition Act* access to those agreements. In turn, where the Commissioner considers that such an agreement is contrary to the public interest, he may request the Board to examine it. The Board then sets the royalties payable under the agreement, as well as the related terms and conditions.

In 2004-2005, 368 agreements were filed with the Board, totalling 4,045 agreements filed since the Board's inception in 1989.

Access Copyright, which licenses reproduction rights, such as photocopy rights, on behalf of writers, publishers and other creators, filed 303 agreements granting various institutions and firms a licence to photocopy works in its repertoire. These agreements were concluded with various educational institutions, libraries, non-profit associations and copy shops.

The *Société québécoise de gestion collective des droits de reproduction* (COPIBEC) filed 41 agreements. COPIBEC is the collective society which authorizes in Quebec the reproduction of works from Quebec, Canadian (through a bilateral agreement with Access Copyright) and foreign rights holders. COPIBEC was founded in 1997 by *l'Union des écrivaines et écrivains québécois* (UNEQ) and the *Association nationale des éditeurs de livres* (ANEL). The agreements filed in 2004-2005 have been concluded with various organizations and municipalities in the Province of Quebec, and one with the Government of Quebec.

Access Copyright and COPIBEC have also filed an agreement they jointly entered into with the National Bank of Canada.

The Audio-Video Licensing Agency (AVLA), which is a copyright collective that administers the copyright for owners of master and music video recordings, has filed, for its part, 22 agreements.

Finally, the Canadian Broadcasters Rights Agency (CBRA) filed one agreement it entered into with the commercial media monitor CNW Group Ltd. CBRA represents various Canadian private broadcasters who create and own radio and television news and current affairs programs and communication signals.