



# **COPYRIGHT BOARD**



**ANNUAL REPORT**  
**1989 – 90**

Copyright Board  
Canada



Commission du droit d'auteur  
Canada

August 31, 1990

The Honourable Pierre Blais, P. C., M. P.  
Minister of Consumer and Corporate Affairs  
Ottawa, Ontario  
K1A 0C9

Dear Mr. Minister:

On behalf of the Copyright Board, I have the honour to submit the annual report of the Board for the 1989-90 financial year.

This report is submitted pursuant to section 66.9 of the *Copyright Act*.

Yours very truly,

Michel Héту  
Vice-Chairman and  
Chief Executive Officer

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## **CHAIRMAN'S MESSAGE**

This is the Board's first annual report to cover a full twelve months of operations. It is one of the mechanisms by which the Board accounts for the way it has discharged its responsibilities and expended public funds. It can also serve other purposes. We hope that this report will allow the reader to understand the significance of the role this new agency plays in ensuring that copyright fees are fair and reasonable.

The report describes the activities of our Board in 1989-90. During that period, the Board devoted much of its attention to considering the first-ever tariff in Canada for the retransmission of distant radio and television signals. One cannot overstate the significance of the issues the Board is being called upon to address in its decision, slated for publication during the 1990-91 fiscal year.

We have inherited the jurisdiction of the former Copyright Appeal Board which for over fifty years had been responsible for approving annual tariffs for the public performance of music. Our jurisdiction, however, is much wider and provides new avenues of recourse to copyright owners and users of works protected by copyright. This report provides the background concerning the Board's organization and the formulation of its mandate.

This has been a path-breaking year for the Board. Four people from very diverse backgrounds have been brought together to fulfill an extremely important mandate. I have been impressed by the vitality and vigour of my colleagues as well as their determination to work together, always in a spirit of collegiality and goodwill.

My colleagues and I look forward to the many challenges facing the Board in the coming years. Striking a balance between providing fair compensation to creators, artists, writers, performers and other copyright owners while giving Canadians reasonable and equal access to works protected by copyright may at times be a daunting task. Nevertheless, the Board appreciates that it must exercise leadership in this area.

*Donald H. Medhurst*

**CHIEF EXECUTIVE  
OFFICER'S  
MESSAGE**

The Board became operational on February 1, 1989, only two months before the 1989-90 fiscal year which this report covers. From an administrative standpoint, the past year has seen significant developments. In establishing its infrastructure, the Board relied extensively on the Department of Consumer and Corporate Affairs and the Public Service Commission which together provided support services and expertise in matters of human resources and administration. Their assistance has been invaluable. Furthermore, the Board owes a special debt of gratitude to Mr. Michel Léger, who was its first Secretary, for his contribution in this area.

Additional person-years Treasury Board has allocated for 1990-91 will ensure that consideration of applications and tariff proposals pending before the Board proceeds expeditiously. However, the Board's workload will undoubtedly increase steadily and significantly in subsequent years. The Board has not yet begun to feel the effect of the new avenues of recourse granted by the *Act* to licensing bodies and users of works protected by copyright, but this effect will most likely be significant.

A major objective of the coming year will be to broaden public awareness of our mandate, organization and activities. The Board will also continue to provide timely and complete responses to all requests for information. The Board is committed to being accessible to all concerned with the use of copyright material in Canada.

*Michel Héту*

## **BOARD MEMBERS**

**THE HONOURABLE  
MR. JUSTICE  
DONALD H. MEDHURST**  
*Chairman*

Mr. Justice Medhurst received his law degree from the University of Alberta in 1950. After practicing law in Calgary and Medicine Hat, Alberta, he was appointed a justice of the District Court of Alberta in 1974. He was elevated to the Alberta Court of Queen's Bench in 1979.

**MICHEL HÉTU, Q.C.**  
*Vice-Chairman & Chief  
Executive Officer*

Mr. Hétu received his law degree from the University of Ottawa in 1965 and pursued graduate studies at the University of Geneva, Switzerland. He joined the Department of Justice in 1972. Until 1981, he occupied various legal positions within the federal government. From 1981 to 1988, he was Head of Legal Services, at the Department of Communications. In that capacity, he was extensively involved in copyright law reform. He also served as a part-time member of the Copyright Appeal Board from 1982 to 1988.

**JUDITH A. ALEXANDER**

Dr. Alexander graduated from the University of Calgary with a B.A. in Economics in 1966 and pursued graduate studies at Simon Fraser University, obtaining an M.A. in 1969 and a Ph.D. in 1974. Between 1972 and 1986, she occupied various teaching positions at the University of Kentucky, the University of Regina and Simon Fraser University. She also served as part-time Commissioner on the

Medical Care Insurance Commission of Saskatchewan from 1979 to 1984. From 1986 to 1988, she was Acting Director of Regulatory Affairs, Bureau of Competition Policy, at the Department of Consumer and Corporate Affairs. Before her appointment to the Copyright Board, she was an economist at the Patented Medicine Prices Review Board.

**MICHEL LATRAVERSE**

Mr. Latraverse received his law degree from the University of Montreal in 1961 and obtained a Master's degree in Business Administration (M.B.A.) from Columbia University in New York in 1965. He is a member of the Chamber of Notaries of Quebec. Prior to joining the Board, he spent over 20 years acquiring a strong background in financial and business management in the private sector. He has held several corporate directorships and from 1986 to 1988 served as a member of the Economic Council of Canada.

## **PART I:**

### **MANDATE AND ORGANIZATION**

#### **CHAPTER 1 MANDATE**

The legislation which establishes the Copyright Board and describes its jurisdiction is the *Copyright Act* [the *Act*].

An *Act to amend the Copyright Act*, passed by Parliament in 1988, provided for the Board to replace the Copyright Appeal Board. The Board was also given the jurisdiction to adjudicate rate disputes between licensing bodies and users of works protected by copyright as well as the authority to issue non-exclusive licenses for the use of published works if the owner of the copyright in that work cannot be located.

The Board's jurisdiction was further expanded by the *Canada-United States Free Trade Agreement Implementation Act*, passed in December 1988. The Board was charged with the responsibility of approving tariffs for the retransmission of distant radio and television signals. Two regulations passed by the Governor in Council and published in the *Canada Gazette* on May 9, 1989 have an impact on the Board. Firstly, the *Local Signal and Distant Signal Regulations* specify what constitutes a distant signal, the retransmission of which gives rise to copyright liability. Secondly, the *Definition of Small Retransmission Systems Regulations* specify that small retransmitters who are entitled under the *Act* to a preferential rate, are those serving a maximum of 1,000 premises in the same community.

#### **CHAPTER 2 ORGANIZATION**

The *Copyright Act* provides for the Board to be composed of a Chairman, a Vice-Chairman and a maximum of three other members, appointed by the Governor in Council. They are to hold office during good behaviour for a term not exceeding five years and may be reappointed once. They may serve part-time or full-time. The current chairman, Mr. Justice

Medhurst, and two board members, Dr. Alexander and Mr. Latraverse, were appointed on October 5, 1989 for a three year period. The Vice-Chairman, Mr. Héту was appointed on February 1, 1989 for five years. All, except the Chairman, serve on a full-time basis.

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. In matters before the Board, the Chairman casts a deciding vote in case of a tie.

The Vice-Chairman, as the Board's Chief Executive Officer, supervises and directs the Board's staff. Furthermore, the Vice-Chairman exercises all of the Chairman's powers and functions, in the Chairman's absence or when the position is vacant.

The *Copyright Act* indicates that employees and officers of the Board are appointed in accordance with the *Public Service Employment Act*. The Board may also retain the services of technical experts.

The Board's staff in 1989-90 consisted of the Secretary to the Board and one secretarial support position. The Board also retained the services of ad hoc legal counsel to assist in the

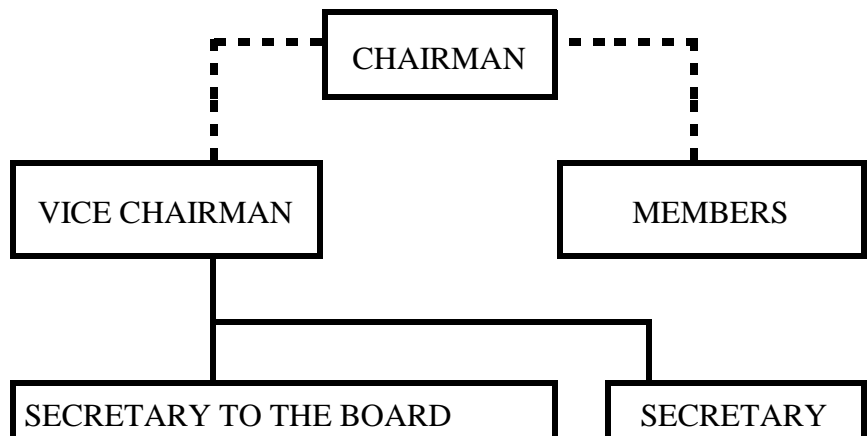
retransmission case and to represent the Board before the Federal Court of Canada in the CTV case (infra).

The Secretary to the Board ensures the Board's effectiveness by being accountable for the organization, progress and follow-up of its work as well as the planning, management and administration of daily operations. The Secretary also ensures that the Board deals effectively with the parties appearing before it, members of Parliament and senators, the media and the general public.

An organizational chart appears on this page.

Treasury Board has approved 6 person-years for the Board, during the 1990-91 fiscal year. This is an increase of 4 person-years over 1989-90. These additional resources will be used to hire one senior legal counsel, one researcher and to staff two secretarial support positions.

### COPYRIGHT BOARD ORGANIZATIONAL CHART



### BOARD PERSON-YEARS

	1990-91	1989-90
Person-Years Controlled by Treasury Board	6	2
Other	3	3
	<b>9</b>	<b>5</b>

“Other” represents the Vice-Chairman and members, as Order in Council appointees. As for the Chairman, he is not considered as one of the Board's person-years.



## COPYRIGHT BOARD EXPENDITURES

	Estimates 1989-90 (\$000)	Actual* 1988-89 (\$000)
<hr/>		
<i>Personnel</i>		
Salaries and Wages	294	7
Contributions to Employee Benefit Plans	45	-
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Total (Personnel)	339	7
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<i>Goods and Services</i>		
Transportation and Communications	107	2
Information	71	-
Professional and special services	228	3
Rentals	76	-
Purchases repair and upkeep	4	-
Utilities, materials and supplies	22	20
<hr/>		
Total (Goods and Services)	508	25
<hr/>		
Total (Operating)	847	32
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Capital	115	118
<hr/>		
<b>Total expenditures</b>	<b>962</b>	<b>150</b>

\* Expenditures for the first two months of operation: February 1, 1989 to March 31, 1989

## PART II: ACTIVITIES

### CHAPTER 1 RETRANSMISSION RIGHTS

#### Background

Until recently, retransmission did not attract copyright protection. Only “radiocommunication” did. This was confirmed in the 1954 judgment of the Exchequer Court in the *Canadian Admiral* case. The Court found that the retransmission by a cable company of the telecast of a local football game constituted neither a performance in public nor a communication of that work by radio communication.

With the rapid growth of the Canadian cable industry in the 1970s and 80s, the non-compensation of copyright owners for the retransmission of their works became a significant issue in Canada and elsewhere. In February 1986, the Federal government accepted the recommendation of the Parliamentary Standing Committee on Communications and Culture to create a retransmission right as part of its review of the *Copyright Act*.

Copyright owners in the United States were interested in this issue because their works represented a sizeable portion of what was being retransmitted in Canada. Under the *Free Trade Agreement*, Canada committed itself to imposing copyright liability on cable operators for providing television and radio signals to their subscribers that could not be received off-air, the so-called “distant signals”.

Amendments to the *Copyright Act* resulting from the *Canada-United States Free Trade Agreement Implementation Act* specify that the retransmission tariffs approved by the Copyright Board must be “fair and equitable” and must not discriminate “between copyright owners on the ground of their nationality or residence”.

#### Procedure

The Copyright Board approves tariffs for “collecting bodies” which collect the royalties under the tariff and distribute them among the copyright owners whom they represent.

The collecting bodies file proposed tariffs with the Board by June 30, in the year preceding that in which the tariffs are to become effective. The proposed tariffs are published in the *Canada Gazette*. Any retransmitter may file an objection with the Board within 28 days of the date of publication. The collecting bodies have the right to reply to the objections.

The Board may approve the proposed tariffs as formulated or it may modify them. For that purpose, it can seek from the collecting bodies and objectors any additional information or evidence deemed necessary, and convene an oral hearing.

The tariffs approved by the Board are published in the *Canada Gazette*. The Governor in Council may vary the decision of the Board as to the manner of determining the amount of royalties to be paid by retransmitters, within 90 days of the date the Board certifies the tariffs.

The tariffs approved by the Board apply as of January 1. If the Board has not finished considering the proposed tariffs by that date, the tariffs, once approved, will be effective retroactively.

### **The 1990-91 Tariffs**

Eleven collecting bodies have filed proposed tariffs for 1990 and 1991. All of them concern television signals and three pertain to radio signals as well. Three objections were filed. One of the collecting bodies, the Canadian Reprography Collective (CANCOPY), has since withdrawn its tariff proposal.

The collecting bodies represent four types of creators: program suppliers, broadcasters, sports leagues and music copyright owners.

Tables appearing at the end of this chapter identify the collecting bodies and objectors as well as the interests they represent.

In September 1989, and after consulting with the parties, the Board issued a Directive on Procedure designed to ensure that the proceedings would be conducted as efficiently and simply as possible with appropriate procedural safeguards. This directive provided for pre-hearing submission of interrogatories and evidence by all parties, and set out the rights of intervenors.

A subsequent notice from the Board indicated that only written interventions would be accepted. Twenty-two intervenors, mostly cable systems, made submissions to the Board.

Hearings began on November 20, 1989 and were completed on May 10, 1990. The Board sat for 57 days; 33 days in Toronto and 24 in Ottawa. Evidence was adduced from some 80 witnesses.

The Board's decision will be issued during the 1990-91 fiscal year.

## THE COLLECTING BODIES

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<i>Category</i>	<i>Interests being represented</i>
<b>Program suppliers</b>	
Canadian Copyright Collective (CCC)	U.S. independent motion picture and television production industry for all drama and comedy programming, except that carried on stations of the Public Broadcasting System (PBS) in the United States.
Canadian Retransmission Collective (CRC)	Drama and comedy producers outside the United States; TV Ontario and PBS.
<b>Broadcasters</b>	
Canadian Retransmission Right Association (CRRA)	The Canadian Broadcasting Corporation (CBC)/Société Radio-Canada (SRC); Radio-Quebec; the American Broadcasting Corporation (ABC); the Columbia Broadcasting System (CBS); and the National Broadcasting Corporation (NBC).
Canadian Broadcasters Retransmission Rights Agency (CBRRA)	The CTV, TVA, Quatre-Saisons and Global television networks and their affiliates; independent television stations and the privately-owned affiliates of the CBC and Radio-Canada networks.
Border Broadcasters' Collective (BBC)	U.S. commercial television stations located near the Canadian border.
<b>Sports leagues</b>	
FWS Joint Sports Claimants (FWS)	Teams of the National Hockey League, the National Basketball Association, the Canadian Football League, and the National Football League.
Major League Baseball Collective of Canada (MLB)	Major League Baseball teams.

American College  
Sports Collective  
of Canada (ACS)

Claimants for broadcasts of games of the National  
Collegiate Athletic Association (NCAA).

**Music copyright owners:**

Performing Rights  
Organization of  
Canada (PROCAN)

Copyright owners for music running through  
programming.

and

Composers, Authors  
and Publishers  
Association of  
Canada (CAPAC)

**THE OBJECTORS**

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*Name*

*Interests Represented*

Canadian Cable  
Television  
Association  
(CCTA)

545 licensed cable television undertakings.

Canadian Satellite  
Communications  
(Cancom)

A multiple channel radio and television distribution  
business that delivers signals by satellite to cable  
systems and households.

C1 Cablesystems

Five regional companies, each managing groups of  
small cable systems.

## CHAPTER 2 PUBLIC PERFORMANCE OF MUSIC

### Background

Until 1989, annual tariffs for the public performance of musical works were considered and approved by the Copyright Appeal Board. Tariffs for subsequent years fall under the jurisdiction of the Copyright Board. Procedure before the new Board is similar in most respects to that before the previous Board, with two notable exceptions.

Firstly, proposed tariffs must now be filed with the Board, rather than with the Minister of Consumer and Corporate Affairs. Likewise, publication of the tariff proposals and the approved tariffs is now the responsibility of the Board.

Secondly, tariffs may now be approved for more than one year.

### Procedure

Performing rights societies file their proposed tariffs with the Board by September 1, in the year preceding that in which they are to become effective. The proposed

tariffs are published in the *Canada Gazette*. Any prospective user may file an objection with the Board within 28 days of the date of publication. The performing rights societies have the right to reply to the objections.

The Board may approve the proposed tariffs as formulated or it may modify them. For that purpose, it can seek from the performing rights societies and objectors any additional information or evidence deemed necessary and convene an oral hearing.

The tariffs approved by the Board apply as of January 1. If the Board has not finished considering the proposed tariffs by that date, the tariffs, once approved, will be effective retroactively.

### The 1990 Tariffs

The Board received tariff proposals from the Performing Rights Organization of Canada (PROCAN) and the Composers, Authors and Publishers Association of Canada (CAPAC). Forty-two objections were also filed. They concern the following tariffs:

- Commercial Television Stations (no. 2A.1);
- Commercial Television Networks (no. 2A.2);
- Radio-Quebec (no. 2.C);
- Live Performances at Theatres or other Places of Entertainment (no. 4);
- Exhibitions and Fairs (no. 5);

- Motion Picture Theatres (no. 6);
- Receptions, Conventions, Assemblies and Fashion Shows (no. 8);
- Public Parks, Streets and Squares (no. 10);
- Music Suppliers (no. 16);
- Transmitters of Non Broadcast Services (no. 17);
- Fitness Activities (no. 19).

After the proposed tariffs were filed, the Board was notified of an agreement between the performing rights societies and the Canadian Broadcasting Corporation (CBC) on the tariff for CBC Radio (no. 1.D) and Television (no. 2.D). The performing rights societies also reached an agreement with TV Ontario (no. 2.B).

The uncontested tariffs were approved by the Board and published in the *Canada Gazette*, on January 13, 1990.

Two of the contested tariffs are proposed for more than one year: commercial television networks (5 years) and transmitters of non-broadcast services (2 years).

The length of the proceedings relating to the 1990-91 retransmission tariff prevented the Board from completing consideration of the contested tariffs.

Developments that have arisen since the end of the 1989-90 fiscal year include the withdrawal of all objections to tariffs 6, 10 and 19, the Board conducting a hearing for tariff

2.C and judgements of the Federal Court, Trial Division, estopping the Board from considering tariffs 2A.2 and 17.

In the case of tariff 2A.2, concerning commercial television networks, the CTV Television Network sought and obtained a writ of prohibition preventing the Board from considering and approving the tariff. PROCAN, CAPAC and the Copyright Board have filed appeals from this judgement to the Federal Court of Appeal.

As for tariff 17, an application for a similar writ of prohibition was made by one of the objectors, the Canadian Cable Television Association (CCTA). The Court has ordered the Board not to consider this tariff until further notice.

### CHAPTER 3 OTHER RIGHTS ADMINISTERED COLLECTIVELY

#### Procedure

The 1988 amendments to the *Copyright Act* created a dispute settlement mechanism available to “licensing bodies”, representing groups of copyright owners, and persons wishing to use the works of these owners. They may apply to the Board to adjudicate disputes concerning the royalties to be paid or related terms and conditions.

#### Applications Received During the Year

One application was filed during the 1989-90 fiscal year. It was made by the Society for Reproduction Rights of Authors, Composers, and Publishers in Canada (SODRAC).

SODRAC is a licensing body representing, in this instance, copyright owners of music in films. The application concerns the amount of royalties Cinema Plus Distribution should have to pay for reproducing films on videocassette. Both *Cinema Plus* and *L'Association des producteurs de films et de vidéo du Québec* are contesting this application.

The Board will issue its decision during the 1990-91 fiscal year following a hearing.

### CHAPTER 4 UNLOCATABLE COPYRIGHT OWNERS

Under section 70.7 of the *Act*, the Board has jurisdiction to grant non-exclusive licences authorizing the use of published works if the copyright owner cannot be located.

The Board did not issue any licences in 1989-90.

Many enquiries have been made to the Board concerning the criteria for granting licences. Prospective applicants are reminded that they must undertake “reasonable efforts” to locate the copyright owner. The Board will consider granting a licence only if the evidence indicates, on a balance of probabilities, that the owner cannot be located.

Persons seeking to make an application under this section should be aware that licences granted by the Board are valid only in Canada.

## **CHAPTER 5 AGREEMENTS FILED WITH THE BOARD**

Under section 70.5 of the *Copyright Act*, any agreement authorizing a person to use a work in a licensing body's repertoire can be filed with the Board within 15 days of the agreement. That filing exempts the parties from prosecution for violation of the *Competition Act*. However, if the Director of Investigation and Research considers the agreement to be contrary to the public interest, the Director can ask the Board to examine it.

Two agreements were filed with the Board during the year. Both concern sound recordings. These are agreements between the Society for Reproduction Rights of Authors, Composers, and Publishers in Canada (SODRAC) and the Canadian Recording Industry Association (CRIA) and between SODRAC and CBS Records Canada inc.