



COPYRIGHT BOARD



ANNUAL REPORT
1990 – 91

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His Excellency
The Governor in Council

May it please your Excellency:

I have the pleasure to present to your Excellency in Council the annual report of the Copyright Board for the 1990-91 financial year.

Respectfully submitted,

The Honourable Pierre Blais, P.C, M.P.
Minister of Consumer and Corporate Affairs



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 1990-91 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

CHAIRMAN'S MESSAGE



Undoubtedly one of the most significant activities of the Board during the year ended 31 March 1991 is the establishment for the first time of royalties for the retransmission of television and radio signals. This authority, vested in the Board by the 1989 amendments to the *Copyright Act*, is a vivid illustration of the important role Parliament provided for this new agency. However, this is but one aspect of the Board's mandate. The payment of copyright royalties, which the Board ensures are fair and equitable, affects every community across Canada, as all have their share of copyright owners and users of copyrighted works. In 1990, copyright royalties set by the Board totalled an estimated \$100 million and this represents only part of overall copyright payments in Canada.

Throughout its first full year since its creation, the Board signalled its determination, through its decisions and inquiries, to be responsive, fair and meticulous in carrying out its responsibilities.

The Board faces many challenges in the coming year and its workload is projected to continue to increase. New 1992 tariffs for retransmission of television and radio signals and public performance of music will be under consideration in the fall of 1991. And the Board's two other areas of jurisdiction will need considerable attention: that of licence applications to set copyright royalties and related terms and conditions under section 70.2 of the *Copyright Act*, and licence applications to use published works of unlocatable copyright owners under section 70.7 of the *Act*.

Donald Medhurst

CHIEF EXECUTIVE OFFICER'S MESSAGE



From an administrative standpoint, the challenge facing our agency is how to manage efficiently and effectively a steadily increasing workload within the current fiscal restraints of the federal government. The Copyright Board has not been untouched by budget reductions for 1990-91 and 1991-92; in 1990-91 it managed to protect delivery of its services by streamlining operations to meet those reductions. It will strive to do the same in 1991-92.

The increase from two to six person-years allotted to the Board for 1990-91 allowed the creation of two new officer positions, General Counsel and Researcher/Analyst, and two additional support staff positions. These resources provide the Board with much needed assistance to issue decisions expeditiously and to respond to a rapidly growing number of public and media inquiries about the Board's mandate, organization and decisions.

The Board is planning to move to new premises in Ottawa before the end of 1991. These will include a hearing room as well as caucus rooms that will be available to the parties and their counsel.

Corporate objectives for 1991-92 will be to make the Board better known through its decisions and activities and to streamline its operations. The Board is committed to the objectives of Public Service 2000 and will continue to participate in the implementation of its task force recommendations.

Michel Héту

BOARD MEMBERS



Member

Dr. Judith Alexander

Member

Michel Latraverse

***Vice-Chairman and
Chief Executive Officer***

Michel Hétu, Q.C.

Chairman

The Honourable
Mr. Justice Donald Medhurst

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 Vice-Chairman was appointed for a five-year term on 1 February 1989; all other current Board members were appointed on 5 October 1989 for three years. All serve on a full-time basis, with the exception of the Chairman.

Bibliographical information for each of the current members is found on page 4 of the 1989-90 annual report.

The *Copyright Act* states that the Chairman must be a judge, either sitting or retired, of a superior, county or district court. The Chairman's responsibilities consist in directing the work of the Board and apportioning its caseload among the members. In matters before the Board, the Chairman casts the deciding vote in the case of a tie.

The Vice-Chairman is designated by the *Copyright Act* as the Board's Chief Executive Officer. In the Chairman's absence or when the position of Chairman is vacant, the Vice-Chairman exercises all of the Chairman's powers and functions.

PART I

MANDATE AND ORGANIZATION

MANDATE

As described in the *Copyright Act*, the Copyright Board has jurisdiction in four areas:

- it establishes the copyright royalties to be paid each year by cable systems and other retransmitters for distributing distant television and radio signals and determines how these royalties are to be divided among the various collecting bodies (*sections 70.61 to 70.67*);
- it establishes the royalties to be paid for the public performance of musical works (*sections 67 to 69*);

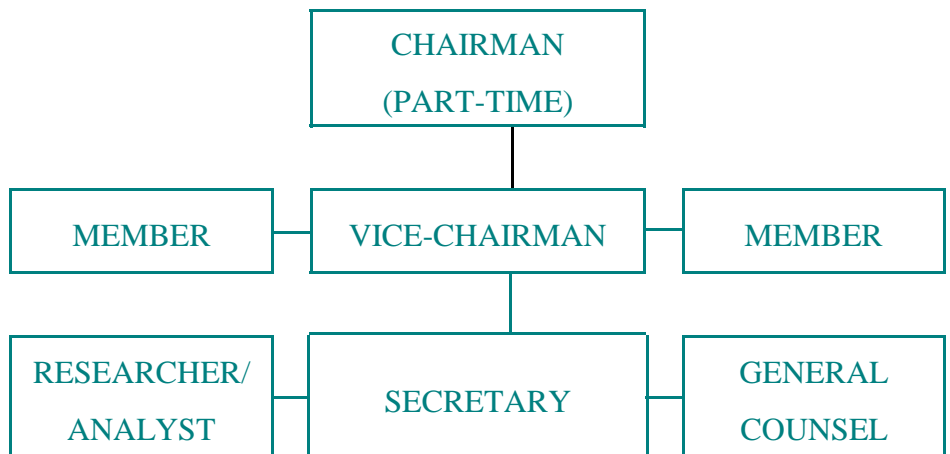
- it arbitrates in disputes on the copyright royalties to be paid by users of copyright-protected works to licensing bodies that administer these works (*sections 70.2 to 70.4*);

and

- in cases where the copyright owner of a published work is un-locatable, the Board can, on application, grant non-exclusive licence authorizing the use of that work (*section 70.7*).

Furthermore, the Minister of Consumer and Corporate Affairs may direct the Board to conduct studies on any matters that concern its jurisdiction.

COPYRIGHT BOARD ORGANIZATIONAL STRUCTURE



ORGANIZATION

In 1990-91, the first full year that this new agency has operated with a fully constituted Board, Treasury Board increased its person-year allocation from two to six. Three staff members - the General Counsel, the Secretary and the Researcher/Analyst - report directly to the Vice-Chairman.

The General Counsel provides legal advice to the Board members concerning the tariff proposals and licence applications under consideration by the Board. The General Counsel also represents the Board before the Courts.

The Secretary directs the Board's administrative operations and also acts as Registrar. The Secretary handles relations with parliamentarians, governments, the media and the public. The Secretary also ensures that the

Board fulfills its reporting requirements to Parliament and to central agencies.

The Researcher/Analyst provides technical expertise to the Board on matters raised by proposed tariffs and licence applications filed with the Board and conducts studies on specific aspects of rate regulation in the field of copyright.

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BOARD PERSON-YEARS

	<i>1991-92</i>	<i>1990-91</i>
Person-Years Controlled by Treasury Board	6	6
Other	3	3

“Other” represents the Vice-Chairman and members, who are Order in Council appointees. The Chairman, who serves on a part-time basis, is not regarded as a person-year of the Copyright Board.

COPYRIGHT BOARD EXPENDITURES

	<i>Estimates</i> 1990-91 <i>(\$000)</i>	<i>Actual</i> 1989-90 <i>(\$000)</i>
Personnel		
Salaries and wages	460	231
Contributions to employee benefit plan	90	45
<i>Total (Personnel)</i>	550	276
Goods and Services		
Transportation and Communications	59	90
Information	30	74
Professional and special services	197	209
Rentals	28	55
Purchases repair and upkeep	2	-
Utilities, materials and supplies	26	37
<i>Total (Goods and Services)</i>	342	466
Total operating	892	742
Capital	17	102
Total expenditures	909	843

PART II

ACTIVITIES

RETRANSMISSION RIGHTS: THE 1990-91 ROYALTIES

Amendments to the *Copyright Act* resulting from the *Canada-United States Free Trade Agreement Implementation Act* provide that, beginning in 1990, the act of “retransmitting” television and radio signals considered “distant” in Canada is protected by copyright. Therefore, the users of these signals must pay “fair and equitable compensation” to the copyright owners of the works contained in these signals. The definition of “distant signal” was established by the Governor in Council on 9 May 1989 through the *Local and Distant Signal Regulations*, SOR/89-254. By far the most prominent group of retransmitters of distant signals are cable operators, but can also include operators of multiple-antenna television systems (MATV), and low-power television systems (LPTV) and direct-to-home satellite services.

Under the *Act*, in order for copyright owners of retransmitted works to be entitled to copyright royalties, the “collecting bodies” which represent them must file proposed statements of royalties with the Copyright Board at least six months prior to the year in which the statements come into effect. The Board then publishes these proposed statements in the *Canada Gazette*. Any retransmitter may challenge a proposed statement by filing an objection with the Board within 28 days of publication. After reviewing the proposed statements,

objections and replies thereto, the Board will determine what further inquiry is required, including the possibility of an oral hearing.

It is up to the Board either to approve the statements as filed or modify them according to the *Act*. The Board’s decision must not discriminate between copyright owners on the grounds of national origin or place of residence, must include a preferential rate for small retransmission systems (defined by regulation SOR/89-255, 9 May 1989, as serving no more than 1,000 premises), and must comply with any criteria established by the Governor in Council for the purpose of determining what constitutes a “fair and equitable” tariff.

On 29 June 1991, the Governor in Council published a proposed regulation in the *Canada Gazette* which would establish criteria.

On 2 October 1990, the Board established the royalties for both 1990 and 1991. Estimates of the royalties to be generated over this period are just over \$100 million for the retransmission of television signals, and \$600,000 for the retransmission of radio signals.

Television tariff rates vary according to the number of premises to which a cable system retransmits distant signals. Systems serving no more than 1,000 premises pay a flat annual rate of \$100. For larger systems retransmitting distant signals to more than 1,000 premises, the monthly royalty rate ranges from 20¢ to 70¢ per premise.

Discounts apply to rooms in hotels, hospitals, nursing homes and other health care facilities.

For retransmitting distant radio signals, copyright royalties have been set at an annual 4¢ per subscriber. However, systems with no more than 1,000 subscribers are charged an annual flat rate of \$10.

In 1990-91, nine of the 11 collecting bodies who filed a tariff proposal in relation to television tariffs were awarded a share of the royalties. The two collecting bodies which received no part of the award were the Canadian Reprography Collective (CANCOPY), and the American College Sports Collective (ACS). CANCOPY, acting on behalf of Canadian book writers, withdrew its proposed tariff. ACS, which had presented its claim on behalf of copyright owners in telecasts of games of the National Collegiate Athletic Association, did not appear at the Board’s hearings and filed no evidence.

The decision followed an 11-month inquiry by the Board, including 58 days of public hearings. Each of the collecting bodies and objectors had the opportunity to present evidence and argument in support of their positions as to what the level of the royalties should be and their distribution among the collecting bodies. The objectors were the Canadian Cable Television Association (CCTA), Canadian Satellite Communications (CANCOM) and C1 Cablesystems.

The Board also received written interventions from the governments

of British Columbia and Nova Scotia and some twenty cable operators in British Columbia, Manitoba, Ontario, Québec, New Brunswick and Nova Scotia.

The *Copyright Act* provides for a right of appeal to the Governor in Council, on the manner of determining the amount of copyright royalties, but not the apportionment among the collecting bodies. Appeals were filed against the 1990-91 tariffs approved by the Board. Cabinet issued its decision on 28 December 1990, dismissing the

appeals. The Board's retransmission decision was also challenged before the Federal Court of Appeal by several parties. The applications for review were heard in May 1991. The Court dismissed the applications, on 3 June 1991.

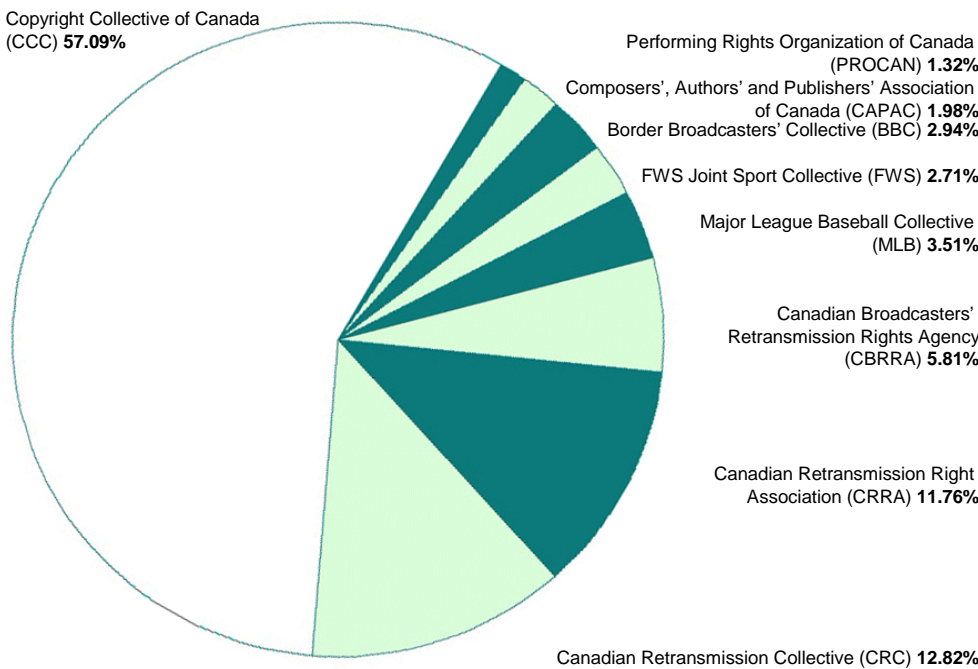
With all tariffs approved by the Board set to expire on 31 December 1991, collecting bodies seeking the approval of a tariff for 1992 are required, pursuant to subsection 70.61(2) of the *Copyright Act*, to file proposed tariffs with the Board no later than 30 June 1991.

**PUBLIC PERFORMANCE OF MUSIC
THE 1990 TARIFFS**

During the year, the Board issued one decision approving with amendments a number of disputed items contained in the 1990 tariff proposals for CAPAC and PROCAN. It also began considering the 1991 tariffs proposed by SOCAN, the merged operation of CAPAC and PROCAN. The approved tariffs were published in the *Canada Gazette* on 8 December 1990. They concern the following uses: Radio-Québec telecasts (Tariff 2.C); in live performance at theatres and other places of entertainment (Tariff 4); at exhibitions and fairs (Tariff 5); in motion picture theatres (Tariff 6); at receptions, conventions, assemblies and fashion shows (Tariff 8); in public parks, streets and squares (Tariff 10); by suppliers of background music services (Tariff 16); and in fitness activities (Tariff 19). Several tariff items, to which no objections were filed, had already been approved by the Board in January 1990.

In the case of Tariff 2.C, the Radio-Québec tariff, the Board set the total amount of royalties payable to CAPAC and PROCAN at \$219,600 for 1990, a reduction from the tariff of \$258,000 set by the former Copyright Appeal Board in 1989. The Board stated two reasons for reducing the annual royalty: first, Radio-Québec's audience share declined by 11 percent between 1987 and 1989; second, the Board determined that annual adjustments

**1990-91 Retransmission Royalties
Distribution of Royalties between the collecting bodies**



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to the tariff to account for price variations should be based on the industrial Products Prices Index (IPPI), and not on the Consumer Price Index (CPI), as the previous Board had done. The Board recalculated the adjustment using 1987 as the base year, the last year for which an objection had been filed to this tariff.

With respect to Tariff 4 (concerts), the Board lowered the minimum fee from \$33 per society to \$10 with the following explanation:

The Board is concerned with minimum payments in general, and their size, variation and incidence in particular. It believes that such factors as the nature of the revenues derived from these minimum payments and their sect on compliance with the tariffs ought to be examined. The reduction of the minimum fee applicable to tariff item 4 is a temporary remedial measure.

CAPAC and PROCAN applied to the Federal Court of Appeal to review this aspect of the Board's decision. Judgment is expected in the coming year.

The amendment to Tariff 5 (exhibitions and fairs) pertains to the definition of "attendance" and "attendee", both which now specifically exclude "exhibitors and staff". Other than that, the approved tariff reflects what was proposed by the societies.

Tariffs proposed for commercial television (Tariff 2.A) and for non-

broadcast services (Tariff 17) were not approved because they are the subject of litigation before the Courts. Two judgments issued during 1990-91 by the Federal Court, Trial Division, established that it was within the Board's jurisdiction to approve Tariff 17 (*Canadian Cable Television Association v. Copyright Board et al.*, Court file: T-1662-90, 16 January 1991) but not Tariff 2A.2 (*CTV Television Network v. The Copyright Board et al.*, court file: T-2617-89; 12 April 1990), which applies specifically to commercial television networks. These judgments were appealed to the Federal Court of Appeal which is expected to hear the matter in the coming year.

Both judgments pertained to the interpretation of an amendment to section 3 of the *Copyright Act* proclaimed in 1989 which added "to communicate the work to the public by telecommunication" to the list of acts protected by copyright.

The *Canadian Cable Television Association* decision establishes that this amendment means that copyright protection is extended to the music included in the signal of pay and specialty services, such as movie and news channels, home shopping and alphanumeric services that cable systems offer to their subscribers. This copyright liability is in addition to the royalties cable systems must pay for retransmitting distant signals, which refer exclusively to signals available over the air and free of charge.

The *CTV Television Network* judgment, on the other hand, indicates that music copyright owners are not entitled to receive payments from commercial television networks for network programming when it is transmitted to the network stations and affiliates. Instead, only the stations are liable at the point of airing these programs.

Previous tariffs approved by the Copyright Appeal Board did not include a network tariff. Network liability for such transmission had been rejected by the Supreme Court of Canada (see *CAPAC v. CTV* [1968] S.C.R. 676; 55 C.P.R. 132). This was prior to the 1989 amendments.

THE 1991 TARIFFS

Since CAPAC and PROCAN are now merged into the one body, SOCAN, only one set of proposed tariffs was filed with the Board for 1991. Objections were filed to tariffs 1.A (commercial radio), 1.B (non-commercial radio), 1.C (Canadian Broadcasting Corporation-Radio), 2.A (commercial television networks and stations), 2.C (Canadian Broadcasting Corporation-Television), 4 (live performances at theatres and other places of entertainment), 7 (skating rinks), 8 (receptions, conventions, assemblies and fashion shows), 9 (baseball, football and other sports grounds), 10 (public parks, streets and squares), 11 (circuses and ice shows), 16 (music suppliers), 17 (non-broadcast services) and 19

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(fitness activities). All objections to tariffs 7, 8, 9, 10, 11, 16 and 19 were withdrawn.

At the request of SOCAN and several objectors, the Board agreed to delay consideration of tariffs 2.A and 17 because the same tariffs for 1990 are before the Courts.

Hearings which started in February 1991 concern all other tariffs to which objections were filed and a number of matters which are pertinent to all tariff items, including tariff rationales and structures; the impact and expected benefits of the merger of CAPAC and PROCAN; the nature of SOCAN's repertoire; its agreements with foreign societies; and the manner in which it determines how royalties are distributed to its members.

The Board's hearings were completed early in 1991-92.

SECTION 70.2 APPLICATIONS

Last year's annual report referred to an application under section 70.2 of the *Copyright Act* presented by the Society for Reproduction Rights in Canada (SODRAC) to set copyright royalties to be paid by *Cinéma Plus Distribution*. The application concerned the right to reproduce the musical portion of films on videocassette. In September 1990, SODRAC notified the Board that it had reached an agreement with *Cinéma Plus*. This agreement thereby resulted in the Board losing its

jurisdiction to dispose of the matter, pursuant to section 70.3 of the *Act*.

In February 1991, SODRAC presented another application to the Board concerning 69 film distributors based in the Province of Québec, proposing that the terms of the agreement reached with *Cinéma Plus* apply to these users as well, including Alliance/Vivafilm, Astral, CF/P Distribution and France Film.

UNLOCATABLE COPYRIGHT OWNERS

During 1990-91, the Board received eight applications under section 70.7 of the *Copyright Act* for non-exclusive licences authorizing the use of published works for which the copyright owner could not be located.

The Board issued one licence, to *Maclean Hunter Limited*, authorizing the reproduction in a promotional calendar of 12 works of art which had been represented on *Chatelaine* magazine covers in the 1930s. The licence fee was set at \$6643 for the authorized print run of 10,000 calendars.

An application from *Alphabétisation Ontario* to reproduce and adapt extracts from a textbook was still under consideration at year end.

An application from *The Imperial Oil Review* could not be considered because it did not concern "published" works. The applicant wished to reproduce on a magazine cover a painting by an unlocatable artist.

The Board concluded that the *Act* did not treat a painting which has not been reproduced in a catalogue as a "published" work.

In the case of the five remaining applications, licences were not granted because the information provided by the applicants failed to satisfy the Board that the copyright owners were unlocatable. In each case, the Board identified specific and readily available measures which might trace the copyright owner. The applicants were directed to take these measures.

AGREEMENTS FILED WITH THE BOARD

Under section 70.5 of the *Copyright Act*, agreements concluded between licensing bodies acting on behalf of copyright owners, and users of the works of these owners, may be filed by any of the parties to the agreement within 15 days of the agreement having been concluded. These agreements may be the subject of an investigation by the Board if it receives a request to that effect from the Director of investigation and Research appointed under the *Competition Act*. In 1990-91, no agreements were filed with the Board.