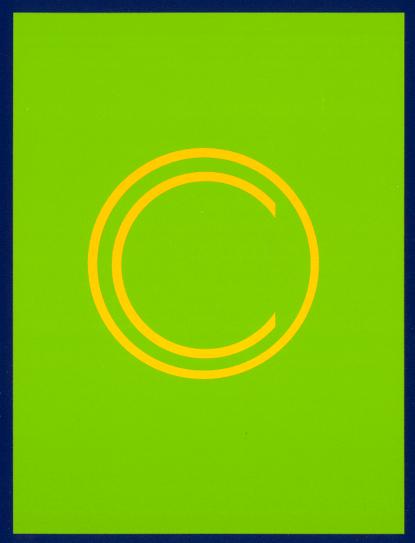


COPYRIGHT BOARD



ANNUAL REPORT 1991 – 92





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

Dear Mr. Minister:

It is my pleasure to transmit to you, pursuant to section 66.9 of the *Copyright Act*, the fourth Annual Report of the Copyright Board, covering the period from April 1, 1991 to March 31, 1992, for submission to Parliament.

Yours sincerely,

Michel Hétu Vice-Chairman and Chief Executive Officer

BOARD MEMBERS AND STAFF as of 30 June 1992

Chairperson: Mr. Justice Donald Medhurst

Vice-Chairperson and

Chief Executive Officer: Michel Hétu, Q.C.

Members: Dr. Judith Alexander

Michel Latraverse

General Counsel: Mario Bouchard

Secretary: Philippe Rabot

Researcher/Analyst: Pierre Lalonde

Administrative Officer: Ivy Lai

Secretary to the

Board Members: Denise Fournier

Secretary to the

Board Secretary: Francine Blais

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A. INTRODUCTION

CHAIRMAN'S MESSAGE

During the year covered by this report, the Board received new tariff applications for the retransmission of distant television and radio signals and for the public performance of music.

For retransmission rights, nine collecting bodies representing copyright owners from around the world proposed tariffs for 1992, 1993 and 1994. Associations representing cable operators from across Canada and five provincial governments participated in the inquiry the Board held concerning these tariffs.

In the case of the public performance of music, the 1991 tariff approved by the Board during the year contains reductions for commercial radio stations which are low users of music protected by copyright and for non commercial radio stations. The Board received a higher than usual number of objections to the tariff proposed by SOCAN for 1992. That tariff is still being considered by the Board and will form a large part of its workload in the second half of 1992. The Board also granted six licences for the use of published works where the copyright owner was unlocatable. The number of users availing themselves of this new recourse

instituted in 1989 continues to rise. A recent publication by the Board explains how to prepare a licence application and discusses the criteria used by the Board for granting licences.

Donald Medhurst

CHIEF EXECUTIVE OFFICER'S MESSAGE

Legislation to merge the Copyright Board with the Trade Marks Opposition Board, and creating the Intellectual Property Tribunal, is scheduled to be introduced in Parliament in 1992. The same avenues of recourse will remain at the disposal of both copyright owners and users of their works. Furthermore, the Tribunal will enjoy the same degree of independence and the same powers of inquiry as the Copyright Board.

The Copyright Board and its predecessor, the Copyright Appeal Board, have played an important role in Canadian society for close to 60 years. The creation of the Intellectual Property Tribunal will mark a new beginning. This measure, announced by the Minister of Finance in the Budget of 25 February 1992, follows a study of the Canadian intellectual property and litigation system conducted by Ottawa lawyer Gordon F. Henderson for the Department of Consumer and Corporate Affairs. In his report, presented in 1991, Mr. Henderson proposed the creation of a new tribunal to deal with many aspects of intellectual property, including the current jurisdictions of the Copyright Board and the Trade Marks Opposition Board. This tribunal should be structured to provide a common support staff of professional and administrative personnel.

Applications which the Copyright Board will begin considering before the merger comes into effect will not be affected. The Copyright Board will continue to be responsible for considering any tariff and licence applications filed before that date.

Michel Hétu

B. ORGANIZATION AND FUNCTIONS OF THE BOARD

Detailed information on the Board's resources is contained in its Expenditure Plan for 1992-93 (Part III of the Estimates), which was tabled before Parliament, on February 28, 1992

The Board's jurisdiction

The Copyright Board came into existence on February 1, 1989, upon proclamation of the provisions of the *Act to amend the Copyright Act, S.C.* 1988, c. 15, that created the Board and established its jurisdiction in the following areas:

- The establishment of tariffs for the public performance of music (sections 67 to 69);
- The adjudication of disputes concerning the copyright royalties to be paid by users of copyright-protected works to licensing bodies engaged in the collective administration of copyright (sections 70.2 to 70.4); and
- The consideration of applications for non-exclusive licences to use published works whose copyright owner is unlocatable (section 70.7).

The Minister of Consumer and Corporate Affairs may also direct the Board to conduct studies on any matters pertaining to its jurisdiction.

In that same year, 1989, the *Canada-United States Free Trade Implementation Act, S.C.* 1988, c.65, amended the *Copyright Act* [the *Act*] to provide the Board with the jurisdiction to establish tariffs for the retransmission of distant television and radio signals (sections 70.61 to 70.67).

Members of the Board

The requirements, mandate and functions of the Board members are described at section 66 of the *Act*.

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 Honourable Donald Medhurst.

Chairman, has been a justice of the Alberta Court of Queen's Bench since 1979. He previously served on that province's District Court. Mr. Justice Medhurst is a part-time member of the Board, appointed for a three-year term in October 1989.

Michel Hétu, Q.C., Vice-Chairman, was the Head of Legal Services, at the Federal Department of Communications from 1981 to 1988. In that capacity, he was extensively involved in the reform of copyright law. He was also a member of the Copyright Appeal Board from 1982 to 1989, when it was replaced by the Copyright Board. Mr. Hétu is a full-time member of the Board, appointed for a five-year term in February 1989.

Judith Alexander, Member, has held various teaching positions in Economics since 1972 at the University of Kentucky, the University of Regina, Simon Fraser University and Carleton University. She has been an economist with the Patented Medicine Prices Review Board and, from 1986 to 1988, she was the Director of Regulatory Affairs of the Bureau of

Competition Policy, within the Federal Department of Consumer and Corporate Affairs. Dr. Alexander has also been a member of the Medical Care Insurance Commission of Saskatchewan. She is a full-time member of the Board, appointed for a three-year term in October 1989.

Michel Latraverse, Member, was a member of the Economic Council of Canada from 1986 to 1988. He has held senior management positions in various Quebec based corporations. Mr. Latraverse is a member of the Chamber of Notaries of Quebec. He is a full-time member of the Board, appointed for a three-year term in October 1989.

The *Act* requires that the Chairman 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 the deciding vote in the case of a tie.

The Vice-Chairman is designated as the Board's Chief Executive Officer, exercising direction over the Board and supervision of its staff.

The Board's staff

The Board has a staff of six employees, three of which report to the Chief Executive Officer - the General Counsel, the Secretary and the Researcher-Analyst.

The General Counsel provides legal advice on proposed tariff and licence applications before the Board. The General Counsel also represents the Board before the Courts in matters involving its jurisdiction or decisions.

The Secretary plans the Board's operations, serves as its Registrar, represents the Board in its relations with members of parliament, provincial governments, the media and the public and directs the preparation of the Board's reports to Parliament and to the Federal government's central agencies.

The Researcher-Analyst provides economic expertise to the Board on matters raised by proposed tariffs and licence applications and conducts studies on specific aspects of rate regulation.

To avoid the cost of additional administrative staffing, the Board entered into a support services agreement with the Department of Consumer and Corporate Affairs. The Department provides support services and expert advice in personnel, administrative and financial matters. The Board appreciates the excellent services provided under this agreement.

C. RETRANSMISSION RIGHTS

The Board's jurisdiction

Pursuant to sections 70.61 to 70.66 of the *Act*, the Board sets the royalties to which copyright owners are entitled for the retransmission of the signals of television and radio stations in Canada by cable systems, master antenna television systems (MATV), low-power television systems (LPTV) or direct-to-home satellite services. Tariffs established by the Copyright Board state how much each retransmitter must pay and how these royalties are distributed amongst the *collecting bodies* that represent the copyright owners.

Payment of retransmission royalties became compulsory on January 1, 1990, as a result of amendments to the Act included in the Canada-United States Free Trade Implementation Act, S.C. 1988, c.65. On October 2, 1990, the Board established tariffs for 1990 and 1991 which allocated television royalties to nine collecting bodies and radio royalties to three collecting bodies. The carriage of a signal by a retransmitter attracts royalty payments if that signal is regarded as a distant signal, as defined under the Local and Distant Signal Regulations, SOR/89-254. No royalties are payable for the retransmission of local signals, namely, the signals of stations from the same community as that served by the retransmitter.

The Board can set tariffs to apply for one year or several years. To claim a share of the royalties, a collecting body must file a

statement of proposed royalties with the Copyright Board at least six months before the beginning of the year in which the new tariff is to come into effect. Statements are published by the Board in the *Canada Gazette*. Within 28 days of that publication, retransmitters and their representatives are entitled to file objections with the Board to the proposed statements. The collecting bodies have a right of reply.

On completion of its inquiry, the Board publishes the approved tariffs in the *Canada Gazette*. Within 30 days, any person may apply to the Minister of Consumer and Corporate Affairs to have Cabinet review the manner in which the Board established the amount of royalties to be paid by the retransmitters.

In establishing the tariffs, the Board must comply with the following requirements of the *Act*:

The manner of determining the royalties must be *fair and equitable*. To that effect, Cabinet can make regulations establishing criteria to which the Board must have regard. Such criteria came into effect for the first time on November 28, 1991, with the adoption of the *Retransmission Royalties Criteria Regulations*,

(SOR/91-680). Three criteria are mentioned:

- (a) royalties paid for the retransmission of distant signals in the United States under the retransmission regime in the United States;
- (b) the effects on the retransmission of distant signals in Canada of the application of the Broadcasting Act and regulations made thereunder; and
- (c) royalties and related terms and conditions stipulated in written agreements in respect of royalties for the retransmission of distant signals in Canada that have been reached between collecting bodies and retransmitters and that are submitted to the Board in their entirety.
- The Board cannot discriminate between copyright owners on the grounds of national origin or place of residence.
- The Board must establish a preferential rate for small retransmission systems, which are defined under the Definition of Small Retransmission Systems Regulation, (SOR/89-255) as systems which retransmit signals to no more than 1,000 In order not to interrupt the premises in a community.

 Newfoundland, the Public Brand Service and the Canadian File intervene in the proceedings.

 Television Production Association intervene in the proceedings.

 In order not to interrupt the provalities, the Board approved.

Highlights of 1991-92

During the past year, the Board considered new retransmission tariffs. The tariffs it approved in October 1990 expired at the end of December 1991.

In June 1991, nine collecting bodies filed statements of proposed royalties for the retransmission of television signals in 1992 and 1993. Six statements were for 1994 as well. The statement proposed by the *International Olympic Committee* was withdrawn in March 1992. Three collecting bodies filed statements of proposed royalties for the retransmission of radio signals during 1992 and 1993, and one for 1994 as well. (See appendix A of this report for a list of collecting bodies and the interests they represent)

The Canadian Cable Television Association (CCTA), Canadian Satellite Communications (CANCOM) and Regional Cablesystems Inc. filed objections to the proposed statements for television and radio.

The Board granted the governments of British Columbia, Ontario, Quebec, Nova Scotia and Newfoundland, the *Public Broadcasting Service* and the *Canadian Film and Television Production Association* leave to intervene in the proceedings.

In order not to interrupt the payment of royalties, the Board approved interim radio and television tariffs in November 1991. At

that time, it seemed highly unlikely that the Board could complete its inquiry into the new tariffs by January 1, 1992, when the existing tariffs expired. The royalty rates under these tariffs are the same as those which were in effect in 1990 and 1991. These tariffs will remain in effect until the conclusion of the Board's inquiry, when they will be replaced by the new tariffs.

To allow the collecting bodies to complete the preparation of their evidence in this inquiry, the Board postponed the start of its hearings into the proposed statements until March 1992. They ended in June, following the testimony of some 60 witnesses and the filing of over 200 exhibits by the collecting bodies and the objectors.

In their statements, the collecting bodies sought an increase in the royalty rate payable by the retransmitters. Some of them also sought an additional royalty for the retransmission of U.S. "superstations" introduced in Canada in 1991. The statements called into question the criteria under which retransmitters serving less than 6,000 premises should benefit from reduced rates as well as the size of those reductions. Several collecting bodies also sought a greater share of the royalties than that which they were awarded by the Board in the last round.

The objectors contended that the royalty rates were already too onerous in most instances, that no additional charge should be levied for the retransmission of superstations and that

the Board should continue to apply the same definition for small systems.

This is the first time that the Board has had criteria from the Governor in Council to consider in establishing the tariff formula. The Board received from the collecting bodies, the objectors and the intervenors different interpretations as to what these criteria implied.

The Board's decision is expected before the end of 1992.

Federal Court of Appeal decision on the 1990-91 tariffs

The Canadian Cable Television Association and several collecting bodies had challenged the Board's decision on the 1990-91 tariffs before the Federal Court of Appeal. In a unanimous judgment issued on June 3, 1991, the Court rejected all the applications for review. The Supreme Court of Canada later denied one collecting body, namely, the Canadian Broadcasters Rights Agency, leave to appeal from this judgment.

The Federal Court of Appeal's judgment establishes the following:

• The Board was entitled to set a lower rate for retransmission systems serving between 1,000 and 6,000 premises, even though they are not considered to be *small retransmission* systems. The Court stated that "the Act does not expressly prohibit the

creation of classes of intermediatesized systems".

- Broadcasters do not have a copyright over the compilation of television programs (the so-called *broadcast day*) since "there is nothing to be copyrighted in addition to the actual shows being broadcast, which have already been copyrighted by their owners".
- Sports teams do not enjoy copyright in the games they organize because "the unpredictability in the playing of a football or hockey game is so pervasive, despite the high degree of planning, that it cannot be said to be copyrightable".
- The Board was entitled to dispose of preliminary legal issues, in this case that of whether a contract between the American television network *ABC* and the *National Football League* (NFL) assigned copyright in telecast of NFL games to the NFL or to ABC: "it cannot perform its mandate without making a legal determination about those rights".

D. PUBLIC PERFORMANCE OF MUSIC

The Board's jurisdiction

Pursuant to section 67 of the *Act*, a licensing body for performing rights in musical and dramatico-musical works can apply to the Board for a tariff setting out the royalties which any user of those works in Canada is

required to pay. The licensing body must file a proposed tariff with the Board at least four months before the beginning of the year in which the tariff is to apply. The Board then publishes the statement in the *Canada Gazette* and provides any music user affected by the tariff with an opportunity to file an objection.

The Society of Composers, Authors and Music Publishers of Canada (SOCAN) is the only licensing body for the public performance of music in Canada. Its creation, in 1990, resulted from the merger of the Composers, Authors and Publishers Association of Canada (CAPAC) and the Performing Rights Organization of Canada (PROCAN).

The 1991 Tariff

The 1991 tariff approved by the Board marks the first time a tariff was issued for SOCAN. It was published in the *Canada Gazette* on July 20, 1991. This tariff contains the following features:

The Board recognized that commercial radio stations that dedicate less than 20 per cent of air time to playing music which remains under copyright should not be paying as much to SOCAN as other commercial stations. Therefore, the royalty rate of 3.2 per cent of monthly gross receipts was lowered to 1.4 per cent in their case (tariff 1.A). Stations that could benefit from the lower rate are those which devote

- much of their air time to playing music in the public domain or to airing news and public affairs programs.
- radio stations was reduced from 3.2 per cent of their annual gross operating costs to 2.7 per cent (tariff 1.B). This adjustment was deemed necessary by the Board to reflect the financial difficulties faced by non-commercial stations. The Board also noted that "relating the royalties paid to the audience share would bring about a more equitable result", although this could not be taken into account in the 1991 tariff since no reliable evidence was presented to the Board.
- The basis on which the Canadian Broadcasting Corporation's radio and television tariffs are calculated was modified (tariffs 1.C and 2.D). The Board decided that two factors were relevant the CBC's audience ratings and the proportion of copyrighted music in its programming compared to that for commercial stations.
- The Board's decision establishes the *Industrial Products Prices Index (IPPI)*, rather than the *Consumer Prices Index* (CPI), as the basis for calculating annual adjustments to the tariff. The Board had used the IPPI for the first time in setting the 1990 tariff for Radio-Quebec (tariff 2.C). The Board explained in its decision that "for the"

- user who buys a public performance licence from SOCAN, music is not a consumption good, but an input into the production of the consumer good: programming 'shows' and so forth".
- Any cost-savings for SOCAN resulting from the merger of CAPAC and PROCAN are its to keep. No tariff reductions are warranted by this occurrence. The Board stated:

Any determination as to the effect a modification in the market structure ought to have on tariffs must be made with a view to the Board's mandate. The Board was created to prevent performing rights societies - whose existence was made necessary by the very nature of the music performance rights market - from upsetting the balance of market power that ought to exist between copyright owners and users. The Board fulfills this mandate by regulating the price paid by the user. Therefore, it is that price, not the amount of money or services that a copyright owner receives, that ought to serve in determining who shall benefit from the efficiency gains associated with the merger.

SOCAN and the CBC both applied to the Federal Court of Appeal to have this

decision set aside. These applications are expected to be heard by the Court before the end of 1992.

The 1992 Tariff

Thirty-five objections were filed to SOCAN's proposed statement of royalties for 1992. In February 1992, the Board began a series of hearings to consider the various issues under contention. These include the tariffs applicable to commercial radio stations (tariff 1.B), commercial television stations (tariff 2.A.1), TVOntario (tariff 2.B), bars and restaurants (tariff 3), concerts (tariff 4), movie theatres (tariff 6), sports grounds (tariff 9), circuses and ice shows (tariff 11), pay and specialized television services on cable (tariff 17), dance halls (tariff 18) and karaoke bars (tariff 20). The hearings should be completed in the fall of 1992. Those for commercial television stations will also serve to set the tariffs proposed for 1990 and 1991.

In the meantime, agreements between SOCAN and the objectors were reached on the tariffs applicable to non-commercial radio stations (tariff 1.B), the Canadian Broadcasting Corporation (tariffs 1.B and 2.D), fairs and exhibitions (tariff 5.A), Canada's Wonderland (tariff 12), and aircrafts (tariff 13.A).

Board decisions and rulings before the Courts

In December 1991, CAPAC and PROCAN withdrew their applications to the Federal Court of Appeal to have the Board's decision on the 1990 tariff set aside. CAPAC and PROCAN had been challenging the lowering of the minimum rate for concerts to \$20 for each event.

The Board's jurisdiction to consider tariffs for commercial television networks (tariff 2.A.2) and for non-broadcast services (tariff 17) is to be reviewed this year by the Federal Court of Appeal. In 1990, the Trial Division ruled that the Board had jurisdiction to consider tariff 17 but not tariff 2.A.2. (See the Board's 1990-91 annual report, page 12).

The Trial Division will also be ruling in 1992 on an application from SOCAN challenging an order of the Board directing it to inform its licensees of the rate increase being sought. At the same time, the Court will decide whether the Board can grant intervenor status to anyone other than a user of music.

E. UNLOCATABLE COPYRIGHT OWNERS

Under section 70.7 of the *Act*, the Board can grant licences authorizing the use of published works where the copyright owner is unlocatable. Licences which are granted are non-exclusive and valid only in Canada.

In 1991-92, the Board granted five of 10 applications filed during the year and one licence from a previous application.

The following organizations and individuals were granted licences by the Board:

- Centre Alpha au Pied de la Lettre, of Iroquois Falls, Ontario, to copy and adapt extracts from a book ("Jouons Ensemble" by Forest-Ouimet), to be used in teaching reading, writing and arithmetic.
- Royal Canadian Artillery Museum, of Canadian Forces Base Shilo, Manitoba, to use extracts from a book (Canada's V.C.'s, by George Machum), in an exhibition on Victoria Cross recipients from Manitoba.
- *HBJ HOLT Canada*, of Toronto, Ontario, to reprint six pages from a book (*Man of Steel: The Story of Sir Sandford Fleming*, by Hugh Maclean) in a textbook with a press run of 50,000.

- **UP** *Productions*, of Scarborough, Ontario, to include a cartoon clip (*Popeye: Lost and Foundry*) in a feature film.
- Goose Lane Editions, of Fredericton, New Brunswick, to reproduce a photograph on the cover of a novel with a press run of 4,000.
- Sofia Monton, of Norwood, Ontario, to copy extracts from a book (Famous Libel and Slander Cases of History, by Clark Gavin) to teach a course on art appreciation

F. APPLICATIONS UNDER SECTION 70.2 OF THE ACT

Under section 70.2 of the *Act*, the Board is empowered to set the copyright royalties payable by users of copyrighted works if, for the administration of copyright, the copyright owner is represented by a *licensing body*. The Board intervenes only at the request of the licensing body or the user.

In 1991-92, no applications were filed with the Board.

An earlier application from the *Society for Reproduction Rights in Canada (SODRAC)* seeking to set the royalties payable by 18 Quebec film distributors to reproduce the musical content of films on videocassette was withdrawn after the parties reached an agreement.

G. AGREEMENTS FILED WITH THE BOARD

Under section 70.5 of the *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 being 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*.

During 1991-92, three agreements were filed with the Board. They are as follows:

- A two-year agreement between the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) and the Canadian Recording Industry Association (CRIA) setting the royalties to be paid to SODRAC for the mechanical reproduction of music at 5.9 cents per song, per record.
- A one-year agreement between the Canadian Reprography Collective (CANCOPY) and the Minister of Education for Ontario allowing schools in that province to reproduce up to 10% of any published material for use by teachers and students. The licence fee was set at \$2 million.
- A similar one-year agreement between *CANCOPY* and the *Government of Manitoba* with a licence fee of \$200,000.

H. INFORMATION TO THE PUBLIC

Three initiatives were launched by the Board in the past year in an effort to better respond to the needs and expectations of the public.

BULLETIN, the Board's new quarterly report launched in October, provides information on the Board's most recent decisions and the latest applications received.

The Board also issued a guide explaining its jurisdiction to allow published works to be used if the copyright owner cannot be found. The guide contains information on how to prepare a licence application to the Board and what criteria the Board follows in deciding whether to grant a licence.

Finally, subscribers to *QuickLaw*, a computerized legal information service, will soon have access to the Board's decisions.

APPENDIX A

1992-93-94 STATEMENTS OF PROPOSED ROYALTIES FOR THE RETRANSMISSION OF DISTANT TELEVISION AND RADIO SIGNALS

For Television

Collecting body	Copyright owners represented	Statement proposed for
Border Broadcasters' Collective	U.S. commercial television stations	1992-93-94
Canadian Broadcasters Rights Agency	CTV, Global, TVA and Quatre-Saisons networks and their affiliates, independent television stations and the privately owned affiliates of the CBC and Radio-Canada.	1992-93
Canadian Retransmission Collective	Canadian and foreign (except the U.S.) drama and comedy producers outside the United States, TV Ontario and the Public Broadcasting Service (PBS)	1992-93-94
Canadian Retransmission Right Association	Canadian Broadcasting Corporation/Société Radio-Canada, Radio-Quebec, American Broadcasting Corporation (ABC), Columbia Broadcasting System (CBS) & National Broadcasting Corporation (NBC).	1992-93
Copyright Collective of Canada	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).	1992-93-94
FWS Joint Sports Claimants	Teams of the National Hockey League, National Basketball Association, Canadian Football League and National Football League	1992-93

International Olympic Committee`	Copyright owners of television programming of the Winter and Summer Olympics	1992-93-94
Major League Baseball Collective of Canada	Major League Baseball teams	1992-93-94
Society of Composers, Authors and Music Publishers of Canada	Composers of music and song lyricists	1992-93-94

The IOC withdrew its proposed tariff in March 1992.

For Radio

Collecting body	Copyright owners represented	Statement proposed for
Canadian Broadcasters Rights Agency	Commercial canadian radio stations and the privately owned affiliates of the CBC and Radio-Canada.	1992-93
Canadian Retransmission Right Association	Canadian Broadcasting Corporation/Société Radio-Canada owned and operated radio stations	1992-93
Society of Composers, Authors and Music Publishers of Canada	Composers of music and song lyricists	1992-93-94