



COPYRIGHT BOARD



**ANNUAL REPORT
1992 – 1993**

Copyright Board
Canada



Commission du droit d'auteur
Canada

The Honourable Pierre H. Vincent, 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 fifth Annual Report of the Copyright Board, covering the period from April 1, 1992 to March 31, 1993, for submission to Parliament.

Yours sincerely,

Michel Héту
Vice-Chairman and
Chief Executive Officer

**MESSAGE FROM THE CHAIRMAN AND
THE CHIEF EXECUTIVE OFFICER**

During the past year, the Board established new tariffs for the retransmission of distant television and radio signals which should generate royalty payments of \$42 million annually for three years. For the first time, Francophone markets are entitled to a 50 per cent royalty discount.

The Board also undertook a detailed review of music performance royalties paid by commercial television stations and commercial radio stations. The current royalty payments total close to \$45 million annually.

In the same year, the Board granted six licences authorizing the use of published works whose copyright owners were unlocatable. Decisions are generally issued within 20 days of receipt of the application.

In November 1992, the Government introduced legislation in Parliament to merge the Copyright Board with the Trade Marks Opposition Board, with the new entity to be known as the Intellectual Property Tribunal (Bill C-93). The merger could occur before the end of 1993. The Board will continue to have jurisdiction with respect to any matter referred to it and that, as of the day immediately before the commencement day of the new law, was being heard, considered or decided by the former Board.

The Board will also review its procedure for hearing retransmission tariffs to identify cost-savings and other efficiencies that might be achieved.

Donald Medhurst
Chairman

Michel Héту
Chief Executive Officer

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**BOARD MEMBERS AND STAFF
as of May 1, 1993**

Chairman: Mr. Justice Donald Medhurst

*Vice-Chairman and
Chief Executive Officer:* Michel Héту, Q.C.

Members: Dr. Judith Alexander
Michel Latraverse

General Counsel: Mario Bouchard

Secretary: Claude Majeau

Researcher-Analyst: Pierre Lalonde

Administrative Officer: Ivy Lai

Assistants: Francine Blais
Lise St-Cyr

THE MANDATE OF THE BOARD

Established on February 1, 1989, as the successor of the Copyright Appeal Board, the Board has four distinct areas of jurisdiction under the *Copyright Act* [the *Act*]. Its responsibilities are to:

Finally, any party to an agreement on copyright royalties payable to a licensing body can file the agreement with the Board within 15 days of its conclusion (section 70.5).

- ◆ establish tariffs for the retransmission of distant television and radio signals (sections 70.61 to 70.67);
- ◆ establish tariffs for the public performance of music (sections 67 to 69);
- ◆ adjudicate rate disputes between licensing bodies representing classes of copyright owners and users of their works (sections 70.2 to 70.4);
- ◆ rule on applications for non-exclusive licences to use published works of unlocatable copyright owners (section 70.7).

In addition, the Minister of Consumer and Corporate Affairs can direct the Board to conduct studies with respect to the exercise of its powers (section 66.8).

ORGANIZATION OF THE BOARD

Detailed information on the Board's resources, including financial statements can be found in its Expenditure Plan for 1993-94 (Part III of the Estimates), which was tabled in Parliament on February 25, 1993.

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

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

Chairman

The Honourable Donald Medhurst has been a justice of the Alberta Court of Queen's Bench since 1979. He previously served on that province's District Court. His appointment to the Board is on a part-time basis. Mr. Justice Medhurst was appointed in 1989 and reappointed in 1992 for two years.

Vice-Chairman & Chief Executive Officer

Michel Héту, Q.C. 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. Héту is a full-time member of the Board, appointed in February 1989 for five years.

Members

Judith Alexander 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, first appointed in 1989 and reappointed in 1992 for two years.

Michel Latraverse 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, first appointed in 1989 and reappointed in 1992 for two years.

The Board's staff

The Board has a staff of six employees, three of whom 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.

RETRANSMISSION TARIFFS

Background

In the 1987 Free Trade Agreement with the U.S., Canada agreed to amend its *Copyright Act* so that, beginning in 1990, copyright owners of works aired on television and radio stations would be compensated when those works are retransmitted outside the area served by the broadcaster. The Copyright Board sets the royalties to be paid each year by cable operators and other retransmitters, and decides how they are to be divided among the *collecting bodies* that represent the copyright owners.

A collecting body must file a statement of proposed royalties with the Board at least six months before the beginning of the year for which the tariff is to apply. This proposed tariff is then published by the Board in the *Canada Gazette*. Any retransmitter or its representative has the right to file an objection with the Board within 28 days of publication. The collecting bodies and the objectors are provided with an opportunity to present evidence and

argument to the Board before the tariff is established. Once the Board has completed its inquiry, the Board establishes the tariff, publishes it in the *Canada Gazette*, and provides written reasons in support of its decision.

The Board issued its first decision, which set tariffs for 1990-91, on October 2, 1990. Interim tariffs were approved for 1992 to enable the Board to complete its inquiry on new tariffs.

The 1992-94 tariffs

On January 14, 1993, the Board announced new tariffs for 1992, 1993 and 1994. These tariffs were published in the *Canada Gazette* on January 16, 1993.

For most retransmitters, the television tariff is essentially the same as that for 1990-91, but several new tariff reductions, including one for Francophone markets, were added. The royalties to be paid range from \$100 annually for retransmitters serving no more than 1,000 premises in a community, up to 70¢ per month, a subscriber for those serving 6,000 or more subscribers. However, in Francophone markets, rates are reduced by

50 per cent for retransmitters serving more than 1,000 subscribers. Furthermore, a 75 per cent discount has been added for premises in schools, colleges and universities.

Royalties for retransmitted radio signals, by agreement between the cable industry and the collecting bodies, were set at \$12.50 annually for retransmitters serving no more than 1,000 subscribers and 4¢ annually, a subscriber, for the others.

For the first time, the Board had Cabinet criteria to consider in setting the tariffs (*Retransmission Royalties Criteria Regulation, SOR/91-690*). The criteria required the Board to take into consideration the American regime for retransmission rights and the impact of the *Broadcasting Act* on retransmitters.

The Board's inquiry included 36 days of public hearings at which it heard from 55 witnesses. It also received more than 400 documents in evidence. Each of the eight collecting bodies and three objectors, namely, the *Canadian Cable Television Association*, *Canadian Satellite Communications*

and *Regional Cablesystems*, participated in the inquiry. Five provincial governments also intervened, namely, those of British Columbia, Newfoundland, Nova Scotia, Ontario and Quebec.

Major League Baseball Collective of Canada, Public Broadcasting Service, and Worldvision Enterprises applied to the Federal Court of Appeal to have certain aspects of the decision reviewed. These applications will probably be heard in 1994.

The Board's conclusions on the main issues raised during the inquiry are summarized below.

The American regime

When proper adjustments are made to reflect the special features of the U.S. retransmission regime, cable operators in the U.S. pay retransmission royalties that, on the whole, are comparable to those paid by the Canadian cable operators.

The impact of the *Broadcasting Act*

Three aspects of the decision reflect the objectives of the *Broadcasting Act*:

◆ The royalties to be paid remain the same regardless of the number of signals retransmitted. This ensures the maximum availability of services to subscribers, no matter where they are located in Canada.

◆ Royalties are reduced by half in Francophone markets, where the viewing of English-language signals is significantly lower than in other parts of the country and where most distant signals are in English.

◆ Each collecting body's share of royalties is based on the number of Canadian and American signals carrying its programs and not merely the viewing of those programs.

U.S. superstations

The Board rejected the collecting bodies' proposal that the retransmission of certain signals, commonly referred to as *superstations*, requires the payment of additional royalties. It concluded that superstations

do not have a higher value than the average distant signal. Furthermore, a superstation surcharge might have stopped cable operators from distributing superstations, inhibiting the further penetration of Canadian pay-TV services to which they, under the CRTC regulations, are linked.

The cable industry's financial position

While the cable industry's profits have not increased in recent years, the Board concluded that payment of retransmission royalties has not harmed the cable industry. In 1990 and 1991, the number of cable subscribers continued to rise steadily and very few cable operators ceased offering distant signals to their subscribers following the imposition of retransmission royalties.

Francophone markets

The Board granted a 50 per cent discount to retransmitters serving Francophone markets because distant signals have less value there than in the rest of Canada. There are far fewer of them in Quebec, almost all of them are in

English, and their share of viewing is substantially lower than in the rest of Canada.

The 1995 tariffs

With the current tariffs set to expire on December 31, 1994, the collecting bodies will soon have to file new tariff proposals. Under the *Act* as it now reads, they have until June 30, 1994 to do so. On May 6, 1993, Bill S-17 received Royal Assent. This act advances the filing date of tariff proposals to March 31, 1994.

**TELEVISION RETRANSMISSION TARIFFS: DISTRIBUTION OF THE
1992-94 ROYALTIES**

Copyright Collective of Canada (CCC) represents U.S. independent motion picture and television production industry for all drama and comedy programming, except that carried on stations of the U.S. Public Broadcasting Service (PBS).

Canadian Retransmission Collective (CRC) represents Canadian and foreign (except the U.S.) drama and comedy producers outside the United States, TVOntario and PBS.

Canadian Retransmission Right Association (CRRA) represents Canadian Broadcasting Corporation/ Société Radio-Canada, Radio-Québec, American Broadcasting Corporation (ABC), Columbia Broadcasting System (CBS) and National Broadcasting Corporation (NBC).

Canadian Broadcasters Rights Agency (CBRA) represents CTV, Global, TVA and Quatre-Saisons networks and their affiliates, independent television stations and the privately

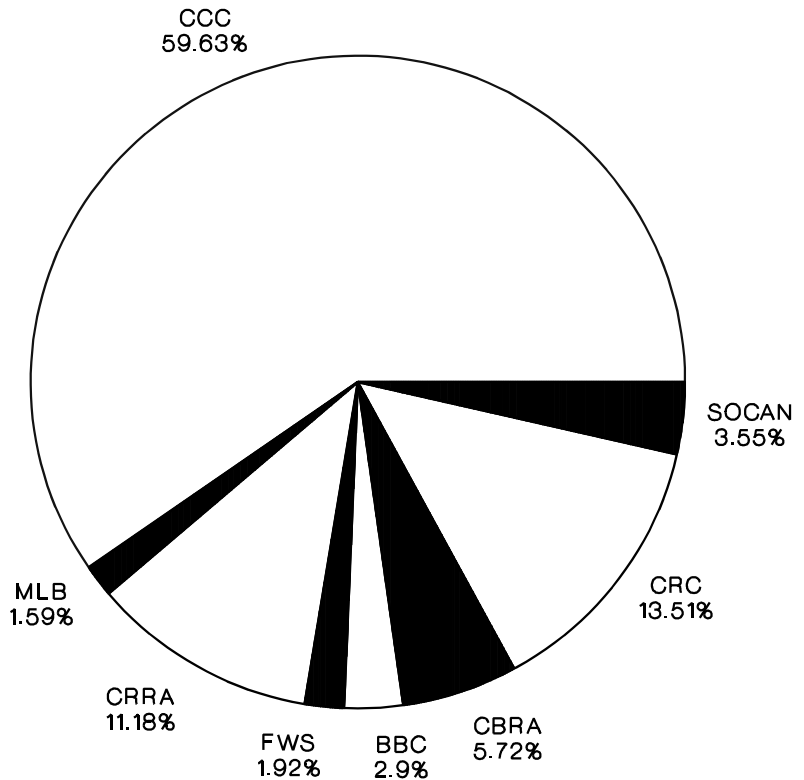
owned affiliates of the CBC and Radio-Canada.

Society of Composers, Authors and Music Publishers of Canada (SOCAN) represents lyricists and composers of music.

Border Broadcasters' Collective (BBC) represents U.S. commercial television stations.

FWS Joint Sports Claimants (FWS) represents teams of the National Hockey League, National Basketball Association, Canadian Football League and National Football League.

Major League Baseball Collective of Canada (MLB) represents Major League Baseball teams.



MUSIC PERFORMANCE TARIFFS

Background

The Board inherited this area of jurisdiction from the former Copyright Appeal Board which for many years had been responsible for setting the annual tariffs of the two licensing bodies for performing rights - the Composers, Authors and Music Publishers Association of Canada (CAPAC) and the Performing Rights Organization of Canada (PROCAN). In 1990, they merged under the name SOCAN - the *Society of Composers, Authors and Music Publishers of Canada*.

SOCAN must file a statement of proposed royalties with the Board at least four months before the beginning of the year in which the tariff is to apply. This proposed tariff is then published by the Board in the *Canada Gazette*. Any music user or its representative has the right to file an objection with the Board within 28 days of publication. SOCAN and the objectors are provided with an opportunity to present evidence and argument to the Board before

the tariff is established. Once the Board has completed its inquiry, the Board establishes the tariff, publishes it in the *Canada Gazette*, and provides written reasons in support of its decision.

The 1992 Tariff

The Board issued two decisions during 1992-93 approving several items of SOCAN's 1992 tariff. The first decision, on July 18, 1992, pertains to tariff items 1.A (*commercial radio*), 1.B (*non-commercial radio*), 1.C (*CBC Radio*), 2.D (*CBC Television*), 5.A (*exhibitions and fairs*) and 13.A (*aircrafts*). The second decision, on February 18, 1993, concerns annual adjustments to tariff items affected by price fluctuations and tariff items 2.B (*TV Ontario*), 2.C (*Radio-Québec*), 3 (*bars and restaurants*), 7 (*skating rinks*), 8 (*receptions and conventions*), 12 (*theme parks*), 14 (*individual works*), 15.A (*background music*), 16 (*music suppliers*), 18 (*dance halls*), 19 (*fitness activities*) and 20 (*karaoke bars*).

Several of these tariff items were the subject of agreements between SOCAN

and the objectors that were then accepted by the Board. They are tariffs 1.B, 1.C, 2.D, 3, 12, 13.A, 18 and 20.

The Board expects to complete its examination of most of the remaining tariff items before the end of 1993. Tariffs 2.A.2 (*commercial television networks*), 6 (*motion picture theatres*) and 17 (*cable services*) are the subject of ongoing litigation before the Courts and cannot be considered by the Board.

Commercial radio

The Board once again set a reduced tariff for commercial radio stations dedicating less than 20 per cent of their broadcast days to music under copyright. The reduced tariff was instituted in 1991. The tariff is set at 1.4 per cent of the stations' advertising revenues, whereas other stations pay 3.2 per cent.

SOCAN initially applied to the Federal Court of Appeal to review the Board's decision instituting the reduced tariff but withdrew its application in March 1993.

Adjustments for fixed rate tariffs

The Board agreed to SOCAN's request to revisit the manner of establishing adjustments to fixed rate tariffs. In 1990, the Board started basing these adjustments on the *Industrial Products Price Index* (IPPI). SOCAN proposed that the *Consumer Price Index* (CPI) be used instead, as had been the case before. A public hearing on this issue was held in February 1992.

On February 18, 1993, the Board issued its decision; it agreed to use the CPI minus 2 per cent. This is the level of the average annual IPPI increase over the past decade. For 1992, this results in a 4.3 per cent tariff increase, which affects tariffs 2.B (*TVOntario*), 2.C (*Radio - Québec*), 15.A (*background music*) and 19 (*fitness activities*).

The Board provided the following justification for using the CPI instead of the IPPI:

Music used in public performances is an input into the production of commodities destined for final consumption or further

processing. The Board remains of the opinion that the public performance tariffs are thus closer to prices included in the IPPI than in the CPI.(...)

The Board accepts the argument that the CPI is more familiar and better understood by copyright owners and music users. (...)

The Board must therefore reconcile two conclusions which, at first glance, appear irreconcilable. On the one hand, the uses of music contemplated in the public performance tariffs are, in most instances, more in the nature of production inputs than of final commodities. On the other, the Board recognizes the practical advantages of using the CPI as a basis for adjusting fixed amounts used in the music tariffs.

Consequently, the Board opts for structuring its own adjustment factor. That factor, which is linked to the CPI, also accounts for the historical correlation between the CPI and the IPPI.

TVOntario

The Board lowered TVOntario's annual licence fee to \$272,800 for 1992, down almost 20 per cent from 1991. This reduction is principally attributable to the decline of TVOntario's share of television viewing since 1987, the year for which viewing had served to calculate previous tariffs. (*The same reasoning had led the Board to lower Radio-Québec's tariff in 1990; see the Board's Annual Report for 1990-91, page 11*).

The 1993 tariff

SOCAN's proposed tariff for 1993 was published by the Board in the *Canada Gazette* on September 28, 1992. Among the tariff items to which objections were filed are those for commercial and non-commercial radio stations (tariffs 1.A and 1.B). The Board should be in a position to issue its decision on these tariff items before the end of 1993.

Court decisions issued during 1992-93

The Federal Court of Appeal delivered decisions on the Board's authority to consider

tariffs sought by SOCAN for commercial television networks (tariff 2.A.2) and cable services (tariff 17). It also upheld the 1991 tariff for CBC Television (tariff 2.D). Meanwhile, the Trial Division of the Federal Court ruled on two aspects of the Board's inquiry powers: the extent to which it can allow third parties to intervene; and whether it can require SOCAN to notify music users of tariff increases that might affect them.

CTV decision (Court file: A-340-90; January 5, 1993)

In 1989, SOCAN's predecessors, CAPAC and PROCAN included in their statement of proposed royalties, a tariff that would require commercial television networks to pay royalties for communicating to their affiliates protected music included in their network programming. The *CTV Television Network (CTV)* soon thereafter applied to the Federal Court to prevent the Board from considering this proposal. CTV was successful before the Trial Division, in April 1990 (*for a summary of that decision, see the Board's 1990-1991 Annual Report, page 12*). The Court of Appeal confirmed that decision. It stated that a

network's communication of its programming to its affiliates is a private communication, not a public performance. It becomes public only when the affiliates air the programming, at which point they themselves, rather than the networks, communicate the work.

In March 1993, SOCAN sought leave from the Supreme Court of Canada to appeal this decision. A decision on the motion for leave is expected by early fall 1993.

Canadian Cable Television Association decision (Court file: A-69-91; January 5, 1993)

CAPAC and PROCAN also sought a tariff for pay and specialty television services transmitted by cable. The *Canadian Cable Television Association (CCTA)* applied to the Federal Court to prevent the Board from considering this tariff. It was unsuccessful before the Trial Division, in January 1991 (*for a summary of that decision, see the Board's 1990-1991 Annual Report, page 12*). The Court of Appeal confirmed that decision on January 5, 1993.

In March 1993, the CCTA sought leave from the Supreme Court of Canada to appeal this decision. A decision on the motion for leave is expected by early fall 1993.

Bill C-88 (*An Act to amend the Copyright Act*), introduced in the House of Commons in June 1992, received Royal Assent on May 6, 1993. The *Act* specifies that the Board can establish tariffs for the *communication by telecommunication* of music.

CBC decision (Court file: A-794-91; March 10, 1993)

The Federal Court of Appeal confirmed the 1991 tariff for CBC television (tariff 2.D). The Board had set that tariff at 26.53 per cent of the commercial television tariff (tariff 2.A.1), thereby reflecting the CBC's comparative audience share.

The Court agreed with the decision to base the CBC tariff on the royalties paid by commercial television stations. The Court stated: "*Payments made by private broadcasters at arms length*

in respect of similar or identical products, while of course not conclusive, are extremely relevant to a determination of the true market value of those products".

SOCAN decision (Court file: T-108-92; February 12, 1993)

A decision from the Federal Court, Trial Division, addresses two key issues of the Board's powers of inquiry: its authority to accept interventions from third parties; and whether it can require SOCAN to notify music users of proposed tariff increases that might affect them. SOCAN was challenging the Board's decision granting intervenor status to a radio station that had filed a late objection to the commercial radio tariff. It also challenged an order from the Board that it notify licensees under the tariff for passenger ships (tariff 13.B) of the increase sought for 1992.

On the issue of notifying licensees, the Court ruled that the Board cannot require SOCAN to send notices although *"the Board is free to seek comments from any source by its own efforts"*.

At the same time, the Court recognized that the Board has wide latitude to accept interventions and comments from third parties. It stated that *"the Board is not precluded from hearing from users other than those who have filed timely objections"* since it is *"entirely consistent with the Board's role to act in the public interest that it receives and considers submissions from any interested party"*.

The decision on both issues is being challenged before the Federal Court of Appeal.

These legal proceedings have delayed the Board's inquiry into the tariff for motion picture theatres for 1992 and 1993 (tariff 6), the *Canadian Motion Picture Distributors Association* having applied to intervene in the Board's inquiry on this tariff. The *Motion Picture Theatre Associations of Canada* has also filed an objection to this proposed tariff.

UNLOCATABLE COPYRIGHT OWNERS

Under section 70.7 of the *Act*, the Board may grant licences authorizing the use of a published work 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.

In 1992-93, the Board granted six licences, two more than in 1991-92, as follows:

- ◆ *The National Film Board of Canada*, to use musical, literary and film works in one of its documentaries, entitled "Forbidden Love";
- ◆ *The Provincial Museum of Alberta*, in Edmonton, to reproduce photographs in a book on the history of the Camsell Foundation;
- ◆ *Andrew Nisker*, of Toronto, to incorporate a musical work in a film shown in public at film festivals.
- ◆ *Musée de la Civilisation*, of Quebec City, to use two short extracts from books in an exhibition on the history of Montreal;
- ◆ *The United Church of Aylmer*, Quebec, to reproduce three photographs in a book on its history;
- ◆ *The School Board of St-Eustache*, Quebec, to make copies of a mathematics exercise book, for teaching an elementary school class;

ARBITRATION PROCEEDINGS

Under section 70.2 of the *Act*, the Board can arbitrate disputes between a "licensing body", that represents copyright owners, and the users of the works of those owners. Its intervention is triggered by application by either the licensing body or the user.

There were no applications in 1992-93.

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. These agreements can be investigated by the Board if it is asked to do so by the Director of Investigation and Research appointed under the *Competition Act*.

During 1992-93, five agreements were filed with the Board.

◆ An agreement between *AVLA Audio-Video Licensing Agency* and the *Canadian Recorded Dance Music Operators (CARDMO)* on a four-year blanket licence which authorizes CARDMO's member disc jockey services to duplicate master records and music tracks in the form of tape programs.

◆ A five-year agreement between the *Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC)* and *Société*

Radio-Canada on reproduction and synchronization rights for television programs taped for later broadcast.

◆ A similar agreement SODRAC entered into with *Télé-Métropole*, another French-language broadcaster.

◆ A seven-year agreement between the *Canadian Recording Industry Association (CRIA)* and the *Canadian Musical Reproduction Rights Agency (CMRRA)* on recording rights for music.

◆ A one-year agreement between the *Canadian Reprography Collective (CANCOPY)* and the *Government of Alberta* allowing schools in that province to reproduce up to 10 per cent of any published work for use by teachers and students.